THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

CONTAINING ALL A.F.R. DECISIONS OF THE
HIGH COURT OF JUDICATURE AT ALLAHABAD

2021 - VOL. I
(JANUARY)

PAGES 1 TO 1287

PUBLISHED UNDER THE AUTHORITY OF THE GOVERNMENT OF UTTAR PRADESH
COMPOSED AT INDIAN LAW REPORTER SECTION, HIGH COURT, ALLAHABAD.

INDIAN LAW REPORTING COUNCIL

ALLAHABAD SERIES

****

PRESIDENT

HON'BLE THE CHIEF JUSTICE GOVIND MATHUR

****

COUNCIL

HON'BLE MRS. JUSTICE SUNITA AGARWAL

HON'BLE MR. JUSTICE SAUMITRA DAYAL SINGH

****

EDITORIAL PANEL

SENIOR LAW REPORTERS

1. MR. VINAY SARAN, SENIOR ADVOCATE
2. MR. SAMIR SHARMA, SENIOR ADVOCATE

JUNIOR LAW REPORTERS

1. MR. ANOOP BARANWAL, ADVOCATE
2. MR. SHESHADRI TRIVEDI, ADVOCATE
3. MS. PRIYA AGRAWAL, ADVOCATE
4. MR. ASHUTOSH MANI TRIPATHI, ADVOCATE
5. MS. NOOR SABA BEGUM, ADVOCATE
6. MR. SAROJ GIRI, ADVOCATE
7. MS. MANISHA CHATURVEDI, ADVOCATE
8. MS. DEEKSHA RASTOGI, ADVOCATE

****

JUDGES PRESENT

Chief Justice:	
Hon'ble Mr. Justice Govind Mathur	
Patna Judges:	
1. Hon'ble Mr. Justice Pankaj Mithal (Sr. Judge Lko.)	33. Hon'ble Mrs. Justice Reksha Dikshit
2. Hon'ble Mr. Justice Sanjay Yadav	34. Hon'ble Mr. Justice Vivek Chaudhary
3. Hon'ble Mr. Justice Manishwar Nath Bhandari	35. Hon'ble Mr. Justice Saumitra Dayal Singh
4. Hon'ble Mr. Justice Prittinker Diwaker	36. Hon'ble Mr. Justice Dinesh Kumar Singh-I
5. Hon'ble Ms. Justice Naheed Ara Moonis	37. Hon'ble Mr. Justice Rajiv Joshi
6. Hon'ble Mr. Justice Ritu Raj Awasthi	38. Hon'ble Mr. Justice Rahul Chaturvedi
7. Hon'ble Mr. Justice Alok Singh	39. Hon'ble Mr. Justice Salil Kumar Rai
8. Hon'ble Mr. Justice Pankaj Naqvi	40. Hon'ble Mr. Justice Jayant Banerji
9. Hon'ble Mr. Justice Manoj Misra	41. Hon'ble Mr. Justice Rajesh Singh Chauhan
10. Hon'ble Mr. Justice Ramesh Sinha	42. Hon'ble Mr. Justice Irshad Ali
11. Hon'ble Mrs. Justice Sunita Agarwal	43. Hon'ble Mr. Justice Saral Srivastava
12. Hon'ble Mr. Justice Devendra Kumar Upadhyaya	44. Hon'ble Mr. Justice Jahangir Jamshed Munir
13. Hon'ble Mr. Justice Bachchoo Lal	45. Hon'ble Mr. Justice Rajiv Gupta
14. Hon'ble Mr. Justice Rakesh Srivastava	46. Hon'ble Mr. Justice Siddharth
15. Hon'ble Mr. Justice Surya Prakash Kesarwani	47. Hon'ble Mr. Justice Ajit Kumar
16. Hon'ble Mr. Justice Manoj Kumar Gupta	48. Hon'ble Mr. Justice Rajnish Kumar
17. Hon'ble Mr. Justice Anjani Kumar Mishra	49. Hon'ble Mr. Justice Abdul Moin
18. Hon'ble Mr. Justice Ved Prakash Vaish	50. Hon'ble Mr. Justice Dinesh Kumar Singh
19. Hon'ble Dr. Justice Kaushal Jayendra Thaker	51. Hon'ble Mr. Justice Rajeev Misra
20. Hon'ble Mr. Justice Mahesh Chandra Tripathi	52. Hon'ble Mr. Justice Vivek Kumar Singh
21. Hon'ble Mr. Justice Suneet Kumar	53. Hon'ble Mr. Justice Chandra Dhari Singh
22. Hon'ble Mr. Justice Vivek Kumar Birla	54. Hon'ble Mr. Justice Ajay Bhanot
23. Hon'ble Mr. Justice Attau Rahman Masoodi	55. Hon'ble Mr. Justice Neeraj Tiwari
24. Hon'ble Mr. Justice Ashwani Kumar Mishra	56. Hon'ble Mr. Justice Prakash Padia
25. Hon'ble Mr. Justice Rajan Roy	57. Hon'ble Mr. Justice Alok Mathur
26. Hon'ble Mr. Justice Arvind Kumar Mishra-I	58. Hon'ble Mr. Justice Pankaj Bhatia
27. Hon'ble Mr. Justice Om Prakash -VII	59. Hon'ble Mr. Justice Saurabh Lavania
28. Hon'ble Mr. Justice Yashwant Varma	60. Hon'ble Mr. Justice Vivek Varma
29. Hon'ble Mr. Justice Vivek Agarwal	61. Hon'ble Mr. Justice Sanjay Kumar Singh
30. Hon'ble Mr. Justice Siddhartha Varma	62. Hon'ble Mr. Justice Piyush Agrawal
31. Hon'ble Mrs. Justice Sangeeta Chandra	63. Hon'ble Mr. Justice Saurabh Shyam Shamshery
32. Hon'ble Mr. Justice Virendra Kumar-III	64. Hon'ble Mr. Justice Jaspreet Singh

65. Hon'ble Mr. Justice Rajeev Singh
66. Hon'ble Mrs. Justice Manju Rani Chauhan
67. Hon'ble Mr. Justice Karunesh Singh Pawar
68. Hon'ble Dr. Justice Yogendra Kumar Srivastava
69. Hon'ble Mr. Justice Manish Mathur
70. Hon'ble Mr. Justice Rohit Ranjan Agarwal
71. Hon'ble Mr. Justice Ram Krishna Gautam
72. Hon'ble Mr. Justice Umesh Kumar
73. Hon'ble Mr. Justice Pradeep Kumar Srivastava
74. Hon'ble Mr. Justice Anil Kumar-IX
75. Hon'ble Mr. Justice Rajendra Kumar-IV
76. Hon'ble Mr. Justice Mohd Faiz Alam Khan
77. Hon'ble Mr. Justice Vikas Kunvar Srivastav
78. Hon'ble Mr. Justice Virendra Kumar Srivastava
79. Hon'ble Mr. Justice Suresh Kumar Gupta
80. Hon'ble Mr. Justice Narendra Kumar Johari
81. Hon'ble Mr. Justice Raj Beer Singh
82. Hon'ble Mr. Justice Jijit Singh
83. Hon'ble Mr. Justice Ali Zamin
84. Hon'ble Mr. Justice Vipin Chandra Dixit
85. Hon'ble Mr. Justice Shekhar Kumar Yadav
86. Hon'ble Mr. Justice Ravi Nath Tilhari
87. Hon'ble Mr. Justice Deepak Verma
88. Hon'ble Mr. Justice Gautam Chowdhary
89. Hon'ble Mr. Justice Shamim Ahmad
90. Hon'ble Mr. Justice Dinesh Pathak
91. Hon'ble Mr. Justice Manish Kumar
92. Hon'ble Mr. Justice Samit Gopal
93. Hon'ble Mr. Justice Sanjay Kumar Pachori
94. Hon'ble Mr. Justice Subhash Chandra Sharma
95. Hon'ble Mr. Justice Subhash Chand
96. Hon'ble Mrs. Justice Saroj Yadav

(2021)01ILR A1
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.01.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Jail Appeal No. 352 of 2018

Ram Das ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Ajay Kumar Singh, Sri Dileep Singh Yadav, Sri Bhishm Pal Singh

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

Evidence Law - Indian Evidence Act,1872 - Sections 3, 154- The first informant Shamshuddin is not an eye witness to the incident. He has categorically stated that the information about the incident has been received by at his house through Naeemuddin PW-1. Naeemuddin PW-1 has not supported the prosecution case and has been declared hostile. The person whose name surfaced later on as an eye witness is Faizuddin PW-4 - In the application of Shamshuddin, there is no reference of Faizuddin being an eye witness to the incident.The sole eye witness Faizuddin PW-4 after the other eye witness Naeemuddin PW-1 has been declared hostile is a chance witness and an interested witness as being the youngest brother of the first informant and the deceased. The evidence of the only eye witness being Faizuddin PW-4 does not inspire confidence. In so far as the fact that the deceased had given an oral dying declaration to Shamshuddin PW-3 whereby he had described the entire incident and detailed about it to him also does not appear to be true and trustworthy as the deceased while in an injured condition was in an unconscious state. There is no evidence or document on record showing his condition contrary to that. Thus, telling Shamshuddin PW-3 of the version of the occurrence as stated by Shahjuddin is a concoction.

It is settled law that although the Court can secure the conviction of the accused on the basis of the evidence of a solitary witness, but where the evidence of such solitary witness is false and concocted on the face of it and fails to inspire the confidence of the Court, then conviction of the accused cannot be secured on the basis of such untrustworthy evidence. (Para 45, 50, 52)

Criminal Appeal Allowed. (E-2)

(Delivered by Hon'ble Samit Gopal, J.)

[Delivered by Samit Gopal, J. for the Bench under Chapter VII Rule 1 (2) of the Allahabad High Court Rules, 1952]

1. The present appeal has been preferred from jail by the appellant Ram Das against the judgment and order dated 29.03.2016 passed by the Additional Sessions Judge, Court No.1, Kannauj, in Sessions Trial No. 428 of 2008 (State of U.P. Vs. Ram Ashrey) which was connected with Sessions Trial No. 445 of 2007 (State of U.P. Vs. Ram Das) whereby the appellant has been convicted and sentenced under Section 304 of the Indian Penal Code, 1860 to Life imprisonment and fine of Rs. 25,000/-. In default of payment of fine, he is directed to undergo two years imprisonment.

2. Initially, in the present matter, a non - cognizable report was lodged by Shamshuddin which was registered as N.C.R No. 122 of 2005 at 22:45 hrs on 07.11.2005 at Police Station Thithiya, District Kannauj. The version as stated in

the said report is that his brother was coming back home on a cycle from cold storage Thithiya and behind him Ram Ashrey son of Bechey Lal was also coming on a cycle and when they reached Bhadausa Road on the drain, Ram Das son of Sundar Lal met him and tried to sit on his cycle, to which, his brother refused and then Ram Das started abusing him. On being tried to stop, he assaulted his brother with kicks and shoes, as a result of which, his brother received injuries on his nose and face and started shouting. Co-villager Naeemuddin saw the incident and saved him. The incident is of 07:00 pm. It is further stated that the treatment of his brother is being done in Qasba Thithiya. He states that a report be registered and action be being taken. The name of his brother is Shahjuddin. The said application is marked as Exb: Ka-2 to the records.

3. Shahjuddin was got medically examined on 08.11.2005 at 10:00 am at PHC, Thithiya by Doctor S.B. Dwivedi (PW-2) wherein he was brought by the informant Shamshuddin. The doctor found one lacerated wound on his person which is as follows:-

"1. Lacerated wound 4.6 cm x 0.5 cm x bone deep on right side nose just away right eye brow. Irregular margin. Blood clot present. Unconscious. Heavy blood loss and swelling on forehead and nose, vomiting, Adv. X-ray and expert opinion."

The injury was kept under observation, X-ray was advised and expert opinion was also advised. The same was opined to have been caused by hard and blunt object and the duration was about half day old, the said medical examination report is marked as Exb: Ka-1 to the records.

4. Subsequently, Shahjuddin died on 09.11.2005 at 09:45 pm while being under treatment in L.L.R Hospital, Kanpur Nagar. The inquest was conducted on his body by Sub-Inspector Shyam Lal Das (PW-10) on 10.11.2005 between 11:40 am and 12:40 pm at L.L.R. Hospital Kanpur Nagar, the same is marked as Exb: Ka-4 to the records.

5. The postmortem examination of Shahjuddin was conducted on 10.11.2005 at 02:20 pm by Doctor Kamal Kumar (PW-9) and the doctor found the following injuries:

"1. Contused swelling 6.0 cm x 5 cm on left temporo-parietal area just above left ear.

2. Abraded contusion 5 cm x 4.0 cm on left side of face.

3. Stitched wound 3 cm long. Four stitches present on right eye lid.

4. Stitched wound 2 cm long. Two stitches present on nose."

The cause of death opined was coma as a result of head injury. The postmortem report is marked as Exb: Ka-6 to the records.

6. The investigation concluded and a charge sheet no. 9 of 2006 dated 10.02.2006 was filed against Ram Ashrey under Section 304 of the Indian Penal Code, 1860, the same is marked as Exb: Ka-4 to the records.

7. A charge sheet no. 9-A of 2006 dated 22.04.2006 was filed against Ram Das under Section 304 of the Indian Penal Code, 1860 as an absconder, the same is marked as Exb: Ka-5 to the records.

8. The trial court framed charge under Section 304 of the Indian Penal Code, 1860

vide order dated 02.01.2009 against Ram Ashrey and under the same section vide order dated 04.02.2009 against Ram Das, to which, both the accused pleaded not guilty and claimed to be tried.

9. By the impugned judgment and order, accused Ram Ashrey has been acquitted of the charges levelled against him but the present appellant Ram Das has been convicted and sentenced as stated above.

10. On receiving the medical examination report of Shahjuddin, the non-cognizable report was converted into a regular case vide GD No. 27 transcribed at 23:05 hrs on 09.11.2005 as Case Crime No. 421 of 2005 under Sections 323, 308, 504 of the Indian Penal Code, 1860 by Head Constable Ram Dutt Rathore PW-7. On 13.11.2005, the first informant Shamshuddin gave an application to the Station House Officer, Police Station Thithiya, District Kannauj that the injured Shahjuddin after receiving injuries on 07.11.2005 was in a critical condition and hence was admitted in Hallet Hospital in the emergency in Kanpur and on 09.11.2005 at 09:45 pm while being under treatment, he died.

11. The accused persons pleaded not guilty and claimed to be tried. They have led no defence.

12. The prosecution in order to prove its case produced Naeemuddin as PW-1 who claimed himself to be an eye witness. Doctor S.B. Dwivedi PW-2 conducted the medical examination of Shahjuddin while he was alive. Shamshuddin PW-3 is the first informant and the elder brother of the deceased. Faizuddin PW-4 is the younger brother of the deceased and the first informant. Smt. Munni PW-5 is the wife of the deceased. Ramnath Dwivedi PW-6 was the second Investigating Officer of the matter from 22.11.2005 upto 09.12.2005. Ram Dutt Rathore the Head Constable converted the present case from N.C.R. to a regular case after receiving information about the death of the injured. Dev Raj Singh PW-8, is the Investigating Officer of the case from 27.12.2005 after the N.C.R. was converted to a regular case. Dr. Kamal Kumar PW-9 conducted the postmortem examination. Ram Lal Das, Sub-Inspector PW-10 conducted the inquest on the body of the deceased and Mohd. Hafeej PW-11 was the first Investigating Officer from 09.11.2005 after the non-cognizable report was registered.

13. The trial court after considering the entire evidence on record came to the conclusion that there is sufficient evidence against the accused appellant Ram Das for committing the offence and as such convicted and sentenced him as stated above. The accused Ram Ashrey who was also tried with the appellant was acquitted of the charges levelled against him of the same judgment and order.

14. We have heard Sri Ajay Kumar Singh, learned counsel for the appellant who has been appointed in the present case by the High Court Legal Committee to represent the appellant in the present jail appeal and Ms. Kumari Meena, learned AGA for the State and perused the record.

15. Learned counsel for the appellant made the following submissions:

i) Naeemuddin PW-1, the eye witness of the incident whose name finds place in the application dated 07.11.2005 given by Shamshuddin which is Exb: Ka-2

to the records did not support the prosecution case and has been declared hostile.

ii) The other eye witness of the incident namely Faizuddin PW-4 is the younger brother of the deceased and the first informant and his name has surfaced all of sudden as an eye witness and he is an interested and related witness.

iii) Shamshuddin, the elder brother of the deceased and the first informant is not an eye witness and he has given the application dated 07.11.2005 on the information received by him from Naeemuddin which was lodged as a NCR. It is thus apparent that the other eye witnesses examined being Faizuddin PW-4 who is the younger brother of the deceased and the first informant is a planted witness and is a related witness whose testimony is totally false just in order to falsely implicate the appellant.

iv) The testimony of the witnesses have major inconsistencies in themselves and as such it cannot be relied upon. Even the version given by Smt. Munni PW-5 is not inconsonance with that given by the other witnesses namely Shamshuddin PW-3 and Faizuddin PW-4 and as such even she cannot be relied upon as a truthful witness.

v) The medical evidence does not corroborate with the prosecution version at all.

16. Per contra, learned Additional Government Advocate for the State argued that the prosecution of the appellant is correct and true. It is argued that Naeemuddin though has been declared hostile but he was named as an eye witness in the application given by Shamshuddin dated 07.11.2005 and further Faizuddin PW-4 is also an eye witness whose presence at the place of occurrence is quite natural. It is further argued that the trial court has considered these aspects and has meticulously dealt with them and has thus convicted the appellant. It is argued that the present appeal lacks merit and be dismissed.

17. PW-1 Naeemuddin was produced as an eye witness to the incident. He states that on 07.11.2005 he was returning on his cycle to his village from Thithiya. He states that he did not see any marpeet. He states that he heard in the village that Shahjuddin is lying at the place of occurrence and when he reached there, he saw Shahjuddin lying unconscious. He states to have reached the place of occurrence at about 08:00 pm when Shahjuddin was lying in an injured condition. He states that he did not see any of the accused persons who are present in court assaulting. He states that he had gone to file an affidavit in the Court which was not read to him. He is illiterate. He was then declared hostile and was permitted cross examination by the ADGC.

18. In the cross examination, he was read over his statement recorded under Section 161 Cr.P.C., to which, he states that he did not give any such statement and as to how the same was recorded he does not know the reason. He was shown an affidavit, to which, he stated that on it, his photograph is affixed. He states that he did not go to the Tehsil for getting the said affidavit prepared. He also states that he does not know as to whether the thumb impression affixed on it is his or not. He states that he knows the deceased Shahjuddin. Accused Ram Ashrey is a resident of his village and he does not know as to where Ram Das lives. Ram Ashrey does the work of getting bidi prepared from Makanpur. He states that he does not know accused Ram Ashrey and

deceased Shahjuddin used to come and go together or not. He did not see the deceased and did not see the injuries and even did not go to the place of occurrence. He had gone to Tehsil Tivo for getting the affidavit prepared. Along with him Shamshuddin and Faizuddin had gone. To a suggestion that he is giving false evidence as he has colluded with the accused, he denies. He states that the affidavit was read by an Advocate but it was not read over to him. He had affixed his thumb impression on it. He was then cross examined by the defence to which he states that he did not go to the place of occurrence and saw when the injured was brought to the village. He states that Shamshuddin and Faizuddin had taken him to Tehsil Terya and had got his thumb impression affixed on the same and prepared it. He does not know about any paper. He was not told where the paper will be used. He was not interrogated by the Investigating Officer. He states that the deceased Shahjuddin was of his family. There was no enmity between the family of the deceased and his family. The accused Ram Ashrey belongs to Kushwaha caste. The distance between the house of Ram Ashrey and his house is about half kilometre. There was no enmity between the family of the deceased and the accused.

19. Dr. S.B. Dwivedi PW-2 had examined Shahjuddin while he was in an injured condition on 08.11.2005 at 10:00 am when he was posted as the Medical Officer, PHC Thithiya. He states that the injured was brought by his elder brother Shamshuddin and states about the medical examination report which he prepared, the injury noted by him the advice mentioned therein. He states that the injured was unconscious. The injuries are not being quoted herein as they have already been quoted above. The injury report was proved by him which was marked as Exb: Ka-1 to the records. He states that it is possible that the injury might have been received on 07.11.2005 at 07:00 pm.

20. In his cross examination, he states that the injuries were about half day old. He states that when the injured came to him, blood was clotted. Police did not bring the injured to him. He states that the majroobi chitthi and the injured was brought to him by his brother. The injured had received injury on his nose and nowhere else. He states that the said injury can be caused from a stone or if any one bangs on a stone. X-ray of the injured was not brought to him. He did not prepare any supplementary report. The injured was unconscious. The injury cannot be caused by fall. The injury can be caused if any one bangs on a stone. If anyone bangs on a hard blunt object, the injury can be caused. He states that he found only one injury on the body of the injured and did not find any other injury. To a suggestion that there were other injuries on the injured except for one injury, he denies the same.

21. Shamshuddin PW-3 is the informant and the elder brother of the deceased. He is not an eye witness of the incident. He states in his examination-in-chief that the deceased Shahjuddin was his younger brother who used to work in bidi factory of Devi Prasad. Ram Ashrey also worked with him. Ram Das did not work with him. Devi Prasad used to get country made pistol made at his house. He states that his brother Shahjuddin had seen the said illegal work being done. Other employees had told Devi Prasad about it, to which, he said that the information may get leaked and then Devi Prasad give Rs. 30,000/- to Ram Ashrey for getting the murder of his brother. He states that the

said information was told by his brother to him when he came from Makanpur, since then Ram Ashrey was trying to get the murder of his brother done. Due to the said reason, Ram Ashrey along with Ram Das committed the murder. The incident is of 07.11.2005 at about 07:00 pm. He states that at that time he was at his house. Naeemuddin co-villager came there and told him that he was returning by foot from Thithiya back to the village and at about 07:00 pm when he reached the drain on Bhadausa Road near the field of Ram Swaroop in Basawan Purva, he saw Ram Das assaulting Shahjuddin with kick, fists and danda by throwing him in the drain on the road. He states at that time Faizuddin PW-4 and Awadhesh reached there and also saw the incident. They exhorted Ram Das, to which, he ran towards Nathuvapur Road. Moonlight was the source of light present. Shahjuddin was lying in an injured condition in the drain of the field. His cycle was lying on the side of the road on the unmetalled part. He states that on the said information, he, Gayasuddin the younger brother, his son Raju and other villagers went to the place of occurrence and saw his brother was lying in an injured condition and the cycle also lying on the unmetalled side of road.

22. He further states that his brother in an injured condition told him that he was returning from cold storage of Thithiya on the cycle and behind him Ram Ashrey was also coming on his cycle. When they reached the place of occurrence, Ram Das met him and stopped him. Ram Ashrey went ahead. Ram Das told him that he may be permitted to sit on the cycle, his brother refused for the same, to which, he was thrown in the drain and assaulted by kick, fists and danda. At that time, Naeemuddin, Faizuddin and Awadhesh reached there and saved him and then Ram Das ran towards Nathuvapur. He then states that he took his injured brother on a cycle to the Police Station Thithiya and got the report lodged. The report was read to him, the same is marked as Exb: Ka-2 to the records.

23. He then states that he took his brother to Thithiya Government Hospital along with letter from the Police Station but did not meet the doctor as it was night and then got his brother treated privately and went home. On the next day, his brother was taken to PHC, Thithiya where he was treated. His condition was precarious and as such he was referred to Hallet Hospital, Kanpur where he was taken on a Marshal Jeep and was being treated. He died on 09.11.2005 in the night and inquest was conducted in the hospital. The postmortem was conducted there only on 10.11.2005 and then the dead body was handed over and the last rites was performed. He states that he had given an application dated 13.11.2005 about the death of his brother at Police Station Thithiya which was proved by him and marked as Exb: Ka-3 to the records. He was interrogated by the Investigating officer.

24. In the cross examination, he states that the day of the incident was Monday. At that time, he was present in the house. The incident is of 07:15 pm. His brother had gone to Thithiya from the house at about 02:00 pm. He does not know where he had gone. He generally used to go and come with Ram Ashrey and Shahjuddin and they were friends. He states that both of them had some differences between them but he does not know what it was. He states that Naeemuddin had informed him about the incident. The name of the father of Naeemuddin is Amjad. Naeemuddin is his nephew. He had informed him about the

incident in the evening. When he reached the place of occurrence, Ram Ashrey and Ram Das were present there. He took the injured along with other persons to the police station. The accused persons did not go to the police station. The accused persons ran away after seeing them towards Nathuvapur which is at a distance of half kilometre from the place of occurrence. Night was moonlit. He states to have told it to the Investigating Officer but if the same has not been written in his statement, he does not know the reason for it. About 20 people went with him to the place of occurrence. The injured also went with him to the police station along with him Faizuddin, Naeemuddin, Pappu, Gayasuddin, Munni and other persons. They remained at the Police Station and the hospital together. After getting the report lodged they went away. He states to have given the statement for the first time in the present matter and prior to this he gave his statement to the police at the Police Station. He states that when he reached the Police Station, his brother was lying in an injured condition. His cycle was lying on the unmetalled side of road which was not broken. He stayed at the place of occurrence for half an hour. The injured was taken to the Police Station on the cycle. He was walking while holding him and reached the Police Station. The Police Inspector talked to him and his brother was sitting outside. Letter for medical examination was given to him and he went to the hospital. He does not know for how much time he remained at the police station. He states that it is false that this brother talked to police at the Police Station. His brother had told him about the incident. To a suggestion that he is giving a false evidence, he denies. He states that it is correct that when he reached the place of occurrence, his brother was unconscious and he regained consciousness after he was given treatment.

25. His brother was brought home after first aid and then he told him about the incident, the same was told to him in isolation. He states that he did not see the incident. He was told about it by Naeemuddin. He got the incident reported on the information given to him by his brother. Except for Naeemuddin no one else came to tell him anything. He discloses the names on the basis of information received from Naeemuddin. He has given the names of Ram Das and Ram Ashrey in his report. He states that when he reached the place of occurrence then except for his brother there was no one else present. He states that on the day of occurrence, the fields were vacant and there was no crop at the place of occurrence. There was a milestone fixed. To a suggestion that his brother in an intoxicated condition hit the milestone and received injuries and died, he denies the same. Further, to the suggestion that he has lodged the report on the basis of what he has heard, he denies the same.

26. Faizuddin PW-4 is the youngest brother amongst the first informant Shamshuddin PW-1 and the deceased Shahjuddin. He states that all the brothers live separately. Shahjuddin makes bidi. He was working in the bidi factory of Devi Prasad. He used to go to the factory daily from the house. Ram Ashrey who is also of the same village was also working in the same factory. He states that in the factory of Devi Prasad illegal country made pistol and guns were also manufactured which was seen by the deceased Shahjuddin. The said fact was told to Devi Prasad by the other workers of the bidi factory and stated that the said fact may be leaked on which he gave Rs. 30,000/- to Ram Das and Ram

Ashrey for murdering Shahjuddin. This fact was told to him and his brother by Shahjuddin. Since then, Ram Das was in the search of committing murder of Shahjuddin. He states that the incident is of 07.11.2005 at about 07:00 pm. He and Naeemuddin were returning to the village from Thithiya on his cycle. He was driving cycle while Naeemuddin was sitting behind. At the place of occurrence, he saw Ram Das and Ram Ashrey assaulting his brother with danda and butt of a country made pistol. Shahjuddin received injuries due to the assault on his face and head. It was bleeding. His cycle was lying on the unmetalled road. They then exhorted, on which, Ram Ashrey ran towards the village and Ram Das ran towards Nathuvapur. He states that Ram Ashrey gave the information about the incident to his house. Apart from the said two persons, Awadhesh of village Bhadausa also came there who saw the incident and had exhorted. Then Shamshuddin, Gayasuddin, Raju and Munni came to the place of occurrence from the house. He, Awadhesh and Shamshuddin told about the incident. His brother was aged about 35 years. Then they took his brother to Police Station Thithiya report was got lodged at the Police Station by Shamshuddin. The Police had seen his injuries and had given majroobi chitthi then he was taken to Thithiya Hospital but doctor was not present and no treatment was given and his medical was not done. Then, he was taken to a private doctor Rajendra Katihar who gave him first aid and did dressing of the injury and the injured was brought to the house. Then, in the morning, he was taken to Thithiya from where he was referred to Hallet Hospital, Kanpur. He was treated for three days in Hallet Hospital and on the third day, he died.

27. The inquest was conducted and the dead body was sealed. He, Shamshuddin and other persons had gone to Kanpur. He, Shamshuddin, Pappu, Kaley Khan and Nanhey Khan were appointed as Panch witnesses to the inquest. He identifies his signature on the inquest which was marked as Exb: Ka-4 to the records. The postmortem examination was then conducted and they brought the dead body thereafter to the village and performed the last rites.

28. In cross examination, he states that he saw the incident and is an eye witness. To a suggestion that the incident was informed to the house and then he went to lodge the report, he states it to be false. He had started from the Thithiya at about 07:00 pm. The distance between Thithiya and the place of occurrence is two kilometres. Naeemuddin was with him. He first saw Ram Ashrey. His brother Shahjuddin and Ram Ashrey were going on different cycles. Ram Ashrey was going in the front. At that time it was dark. Vehicles also ply on the road on which he goes to his house. The accused ran away after the incident. He saw the incident from a distance of 50-60 steps. The accused saw them and ran away. He did not chase the accused but had shouted. He shouted as soon as he identified his brother. He does not know as to for how much time did the assault last. He states that his brother did not use to drink liquor before him.

29. The information of country made pistol being manufactured at the cold store was told to him by his brother 2-3 times. He did not give any application at the Police Station for any action. His brother also did not complain about the manufacture of the country made pistol. He did not see country made pistol being manufactured at the bidi factory. He does not know of any differences between the owner of the bidi factory and his brother

and neither did his brother ever tell him. His brother did not see him coming behind. His brother did not raise a shout and he did not hear it. When he reached the place of occurrence and turned the person lying there then he identified him to be his brother. He states that there is a milestone fixed at the place of occurrence on the side of the road. To a suggestion that the dead body was found at the milestone, he denies the same and states that it was found about 30-40 steps away from it. It was 07:00 pm, he does not know where there was fog or not. He took his brother and came to the Police Station for lodging a report. The body was not sealed there. The body was sealed in Kanpur about after three days of the incident. The report was lodged on the same day. His brother was in an unconscious state. The police went to the place of occurrence later on but did not go before him. He states that the story of giving of Rs. 30,000/- was not witnessed by him. He had not told the said fact to the Investigating officer. To a suggestion that he did not go to the Police Station, he denies it.

30. The report was not signed by him but was got lodged by Shamshuddin. To a suggestion that his brother in an intoxicated condition banged on the milestone due to which he died, he states to be incorrect. He states that Ram Ashrey had gone to the house and had told about the incident to his sister-in-law Munni Devi. He does not know as to whether Ram Ashrey had gone to the house before he had reached or later. To a suggestion that he did not see the incident and came to know of it while he was at the house, he denies. He states that he told the incident at the house after Ram Ashrey had not given information. His family members went to his brother after receiving information from Ram Ashrey. To a suggestion that he is giving false evidence, he denies.

31. Smt. Munni PW-5 is the wife of the deceased Shahjuddin. In her examination-in-chief she states that the incident is of 07:00 pm. She has two sons and two daughters. Gudiya and Anas being the daughters and Gayasuddin and Shamshuddin are her sons. Her husband used to prepare bidi in the factory of Devi Prasad in Makanpur. He used to go to Makanpur from the house daily. On the day of incident, her husband left the house for Makanpur at 10:00 am and came back at 03:00 pm. He told her to prepare food to which she started preparing it. At that time, Ram Ashrey came to her house and told her husband to accompany him to the cold store at Thithiya for taking out potatoes and will sell them and then they will have food at Thithiya. Her husband then went to Thithiya with him without having food. He did not return till 06:00 pm. Then Ram Ashrey came at 07:00 pm and called her son Gayasuddin and told him that Ram Das has taken his father and is assaulting him at the Bhadausa Road in Thithiya. At that time, she states that both the hands of Ram Ashrey were blood stained and his clothes were also having blood. She then raised a hue and cry and along with her sons, nephew and Ram Ashrey went to the place of occurrence where she saw her husband lying in an injured condition. He was seen by her, Kallu and Gayasuddin and other persons. The cycle was also lying there. Then Ram Ashrey disappeared. She states that her husband had received injuries on face and nose which was bleeding. Then they picked him up and her jeth and other persons went to the Police Station. She came back to the house. The report was lodged by her jeth Shamshuddin. Her husband then died on 09.11.2005 at Hallet

Hospital, Kanpur. She states that she, Shamshuddin, Pappu, Nanhey Khan and Kaley Khan were present there. The inquest was conducted and the dead body was taken by the Police. Then the body was brought back home. She states that the death of her husband was due to the assault by Ram Das and Ram Ashrey. She was interrogated by the Investigating Officer.

32. In her cross examination, she states that she is illiterate. She does not know the day of the incident. Ram Ashrey and her husband were friends. They used to be together and often also used to have food together. They used to work together in the factory. They used to go together to the factory. Ram Ashrey for the first time came to her house on the day of the incident at 03:00 pm. He did not sit at the house. Both of them immediately went away. He told her husband to accompany him to Thithiya to which he immediately got ready. The second time Ram Ashrey came to her house was at 07:00 pm. Ram Ashrey did not tell about any fight between her husband and Ram Das. To a suggestion that she is speaking a lie, she denies. To a further suggestion that she had told the Investigating Officer that Ram Ashrey had come to the house and told her that her husband and Ram Das had a fight, she denies. The distance between the place of occurrence and her village is stated to be one kilometre by her. She states that she went on foot to the place of occurrence. She started from her house at 07:00 pm and reached the place of occurrence in half an hour. She was crying and then Ram Ashrey consoled her and made her reach the place of occurrence. She, her nephew and brother then lifted her husband and made him lie down on the road. Ram Ashrey did not hold him. Many persons of the family and about 100-200 peoples of the village were present there who had followed them. The night was moonlit. There was a milestone about 60 steps away from the place where the dead body of her husband was found. She on a suggestion that she did not go to the place of occurrence and is speaking a lie, she denies. She states that the report was got lodged by Shamshuddin after consultation. She did not tell Ram Ashrey to give evidence. The house of Ram Ashrey is about 10 house away from her house. Ram Ashrey did not meet her thereafter. She states her statement to be given for the first time in court and states that she has never given any statement before. She denies the suggestion that she had told Ram Ashrey to give evidence in the matter and as he had refused for it, he has been made an accused. She states that when she reached the place of occurrence, her husband was lying there. Ram Das had run away. She had reached the place of occurrence at about 07:30 pm. She did not see any one assaulting her husband. To a suggestion that she is giving evidence on the same being heard, she denies.

33. Further, to a suggestion that she is giving a false evidence she denies. To a suggestion that her husband was a drunkard and due to the same, he banged somewhere, she denies as result of which he received injuries, she denies.

34. Ram Nath Dwivedi PW-6 is the second Investigating Officer of the matter who took up the investigation on 22.11.2005 which remained with him upto 09.12.2005. He states that the investigation was taken over by him on 22.11.2005 from the previous Investigating Officer Mohd. Hafeez. He perused the case diary and recorded the statements of Faizuddin, Awadhesh, Gayasuddin and Raju on 26.11.2005. Later on, he recorded the

statements of Vijay Dwivedi, Rajendra, Dr. S.B. Dwivedi on 09.12.2005. In his cross examination, he states to have recorded the statements of Faizuddin, Awadhesh, Gayasuddin and Raju and states that the said witnesses did not tell him that Ram Ashrey had a fight with the deceased. Further, he states that the said witnesses did not name Ram Ashrey in their statement.

35. Ram Dutt Rathore PW-7 was posted as the Head Constable at Police Station Thithiya. In his examination-in-chief he states that on 07.11.2005 at 22:45 hrs, a non-cognizable report no. 122 of 2005 was registered, in which, the injury report of Shamshuddin of Dr. Chhotey Khan was given by Vijay Kumar Dwivedi on the basis of which on 09.11.2005 GD No. 27 the N.C.R. was converted at 23:05 hrs in Case Crime No. 421 of 2005 under Sections 323, 308, 504 of the Indian Penal Code, 1860. He proves the same which is marked as Exb: Ka-4 to the records.

36. In his cross-examination, he states that in the N.C.R., Ram Das is only named and Ram Ashrey is not named. He did not tell the name of Ram Ashrey to the Investigating officer. He further states that the said case was converted on the basis of the medical examination report. To a suggestion that he did not see the medical report, he denies the same.

37. Dev Raj Singh PW-8 was the Investigating Officer of Case Crime No. 421 of 2005. In his examination-in-chief, he states that after getting the investigation of the matter he perused the case diary, copy of the inquest and postmortem in it. On 09.11.2006 he received the affidavits of Naeemuddin, Faizuddin and Shamshuddin which he copied the case diary. He recorded the statement of Smt. Munni the wife of the deceased on 10.11.2006 and also recorded the statement of Kallu, in which, the name of Ram Ashrey surfaced as an accused. He then recorded statements of other persons and started raids for arrest of Ram Ashrey. Ram Ashrey then surrendered on 03.02.2006. He concluded the investigation in so far as it related to Ram Ashrey and filed charge sheet no. 9 of 2006 against him which is marked as Exb: Ka-4 to the records. He then conducted raids for the arrest of Ram Das but could not find him and then initiated proceedings under Section 82/83 Cr.P.C. against him and later on filed charge sheet against him on 22.04.2006 being charge sheet no. 9-A of 2006. The same is marked as Exb: Ka-5 to the records. Later on, Ram Das was arrested on 26.10.2006 in Case Crime No. 173 of 2006 under Section 25 of the Arms Act.

38. In his cross examination, he states that he got the investigation of the matter on 27.12.2005 and perused the proceedings of the previous Investigating Officer. He states that the informant did not name Ram Ashrey in his statement given to the previous Investigating Officer. He states that the informant on 13.11.2005 gave statement to the previous Investigating Officer and had stated that witness Naeemuddin had seen Ram Das committing marpeet. In the said statement, he had stated that his brother is an injured condition and was only assaulted by Ram Das. Ram Ashrey had not assaulted him. The statement was recorded by the previous Investigating Officer that witness Naeemuddin and Awadhesh had reached the place of occurrence at the time of the incident. He states that the second Investigating Officer R.N. Dubey had recorded the statement of Faizuddin who stated that Ram Das had assaulted the

deceased Shahjuddin. There is no reference that Ram Ashrey had participated in the incident. To a suggestion that he did not record any statement and has filed a false charge sheet against Ram Ashrey, he denies. He further denies the suggestion that due to party-bandi in the village, Ram Ashrey has been falsely implicated and false charge sheet has been prepared.

39. Dev Raj Singh PW-8 was then again summoned for cross examination. In his cross examination, he stated that he got the investigation of the matter on 27.12.2005. He stated that he did not go to the place of occurrence and had not prepared the site plan and as such he does not know about the place of occurrence. He had seen the site plan prepared by the previous Investigating Officer. Prior to him Mohd. Hafeez and R.N. Dubey were the Investigating Officers. He had again interrogated Smt. Munni Devi, Lallu, Faizuddin, Shamshuddin etc. The said witnesses were previously interrogated by the previous Investigating Officer. He took the statement of the witnesses again. The incident was of 07:00 pm. At the time of incident, there was dark. The witnesses had told him that the day was ending. He could not tell of any source of light. He states that in the month of November at 07:00 pm, visibility is from a close proximity. The witnesses did not tell him any torch etc. He did not recovery the cycle of the deceased. He did not find the previous Investigating Officer taking into possession plain mud and blood stained mud. He did not prepare the recovery memo of the clothes of the deceased. The previous Investigating Officer also did not take into possession the clothes of the deceased. To a suggestion that the deceased fell from his cycle and died and on the pressure of informant, false charge sheet has been filed after investigation, it is a false investigation, he denies.

40. Dr. Kamal Kumar PW-9 had conducted the postmortem examination of the deceased. In his examination-in-chief, he states about the injuries as noted by him which have been extracted above. He states that the cause of death was as a result of coma due to the injuries received by the deceased and the injury no.1 was sufficient to cause death. He further states that the injury of the deceased can be caused by something like lathi or blunt object. In his cross examination, he states that he had written the time since death from the documents which he had received along with police papers. He states that he did not receive the injury report of the deceased with the police papers. He was had found four injuries on different places on the body. He further states that the injury no.1 can be received by the deceased due to fall from cycle on any hard stone etc.

41. Ram Lal Das PW-10 is a Sub-Inspector who conducted the inquest on the body of the deceased in Lala Lajpat Rai Hospital, Kanpur (also known as Hallet Hospital, Kanpur) which was kept in mortuary on 10.11.2005. He had prepared the same which was proved by him and marked as Exb: Ka-4 to the records. He had further prepared the photo and challan lash of the dead body which was sent for postmortem, the same were marked as Exb: Ka-10 to the records. In his cross examination, he states that he has not brought his sample seal to the Court. He states that he does not know where the same is kept. He states that case crime number and sections are not mentioned in the document Exb: Ka-10 to the records. He states that the information of death was received on 09.11.2005 at 22:40 hrs. He

went to the hospital on 10.11.2005 which is at a distance of a half kilometre from the police station. He states that the case crime number and section is not mentioned in any document. The dead body was sealed and then sent. When he reached, he was not able to tell. He states that he has signed on the document. He states that he did not fill the Panchayatnama.

42. Mohd. Hafeez PW-11 is the first Investigating Officer who took up the case on 09.11.2005 for the investigation. He states that the same was registered on the basis of a medical report received at the Police Station. He then recorded the statement of the first informant and inspected the place of occurrence and prepared the site plan which is marked as Exb: Ka-11 to the records. In his cross examination, he states that he had perused the First Information Report and in the same there is no reference of Ram Ashrey committing marpeet. He interrogated the first informant on 13.11.20005 and the first informant told him that he had received information from Naeemuddin that Ram Das has assaulted the deceased with kicks, fists and danda on the road side after throwing him in the drain on the side of the road. He was not told about any assault by Ram Ashrey. The first informant had told him that he had gone to the place of occurrence and had asked Shamshuddin the deceased about the incident to which Shamshuddin told him that in the evening, he was returning from the cold storage Thithiya and behind him Ram Ashrey was coming on his cycle and on that place, Ram Das and Sundar Lal at about 07:00 pm met him and stopped him and Ram Ashrey went ahead. Ram Das then told him to make him sit on his cycle to which he refused on which he started abusing and pushed him, he fell from his cycle and he then started assaulting him with kicks, fists and danda. He states that the first informant had not told him about any assault by Ram Ashrey. He interrogated Naeemuddin and the other eye witness. He states that the assault by Ram Ashrey was not told by him. Naeemuddin had told him that moonlight was there and had told of Ram Das only committing the assault. Ram Ashrey was not seen at the place of occurrence. He had inspected the place of occurrence in the presence of the first informant and the eye witnesses. To a suggestion that no witness had given to any statement and he did not go to the place of occurrence and has done the entire work at the Police Station, he denies.

43. The two accused in their statements under Section 313 Cr.P.C. have stated that the witnesses have given false statement and the case has been instituted against them falsely. They have not led any defence evidence.

44. The initiation of the present case is on the basis of an application dated 07.11.2005 given by Shamshuddin which was initially registered as a non-cognizable report. The first informant Shamshuddin is not an eye witness to the incident. He has categorically stated that the information about the incident has been received by at his house through Naeemuddin PW-1. Naeemuddin PW-1 has not supported the prosecution case and has been declared hostile.

45. After Naeemuddin PW-1 being declared as hostile, the person whose name surfaced later on as an eye witness is Faizuddin PW-4 who is the youngest brother of the first informant Shamshuddin PW-3 and the deceased Shahjuddin. In the application dated 07.11.2005 of Shamshuddin, there is no

reference of Faizuddin being an eye witness to the incident. Faizuddin PW-4 claims that he has witnessed the occurrence from a distance of 50-60 steps. He in very categorical terms states that he did not see that his brother was being assaulted. It was later on when he went to the person who was being assaulted, turned him then he recognized him as that he is his brother Shahjuddin. He states that he was coming with Awadhesh who was also on the same cycle on which he was travelling. Awadhesh has not been produced before the trial court. The said witness has stated that it was dark.

46. Smt. Munni PW-5 has all together come up with a new story of her receiving information about the incident through Ram Ashrey, a co-accused in the present matter. She states that Ram Ashrey had come and had taken away her husband on the day of the incident on the pretext of getting potato from cold storage and then selling it out and after that having dinner and then returning on which her husband went with him. She states that Ram Ashrey had then come to her house and had stated that Ram Das had taken away the deceased and is assaulting him. She states that Ram Ashrey had both of his hands blood stained and even his clothes were having blood stains. She altogether gives a different story as that from the application dated 07.11.2005 and the evidence given by Shamshuddin PW-3 and Faizuddin PW-4.

47. The motive for the present case is stated to be that Devi Prasad, the owner of the bidi factory was involved in some illegal work of manufacture of country made pistol which was seen by the deceased and the said fact was informed to him by other factory workers on which he had given Rs. 30,000/- to Ram Das and Ram Ashrey for the murder of Shahjuddin. The said motive has for the first time come in the present case when the statement of Shamshuddin PW-3, Faizuddin PW-4 was recorded who claim that the deceased had told them about this fact. If the deceased had a threat to life from Ram Ashrey then would not have gone with Ram Ashrey, cannot be overlooked.

48. The argument of the learned counsel for the appellant that the sole eye witness Faizuddin PW-4 after the other eye witness Naeemuddin PW-1 has been declared hostile is a chance witness and an interested witness as being the youngest brother of the first informant and the deceased has substance. The incident has taken place at the time when it was dark. The same has taken place on a road.

49. The doctor conducting the postmortem examination has not ruled out the possibility of the deceased receiving the injury by hitting his head on a stone. The statement of Smt. Munni PW-5 that Ram Ashrey had gone to her house with blood stained hands and blood stains on his clothes, is an impossibility. Ram Ashrey though has been acquitted of the charges by the trial court but was not named in the First Information Report and his name had surfaced for the first time when the matter was taken up in investigation by Dev Raj Singh PW-8 from 27.12.2005.

50. The evidence of the only eye witness being Faizuddin PW-4 does not inspire confidence. In so far as the fact that the deceased had given an oral dying declaration to Shamshuddin PW-3 whereby he had described the entire incident and detailed about it to him also does not appear to be true and trustworthy.

51. Dr. S.B. Dwivedi PW-2 who had medically examined Shahjuddin while he was in an injured condition has specifically stated in the medical examination report and even in his examination-in-chief and in his cross examination that Shahjuddin was in an unconscious state. The doctor before whom the first aid was given for the first time to Shahjuddin in an injured condition being Dr.

Rajendra Katihar as stated by Faizjuddin PW-4 has not been produced and examined before the trial court.

52. The conclusion thus comes to be drawn that the deceased while in an injured condition was in an unconscious state. There is no evidence or document on record showing his condition contrary to that. Thus telling Shamshuddin PW-3 of the version of the occurrence as stated by Shahjuddin is a concoction.

53. In our opinion, the present case is such in which the benefit of doubt needs to be extended to the appellant Ram Das. We extend the benefit of doubt to him and acquit him of the charges levelled against him.

54. Thus the conviction of the appellant by the trial court is not sustainable in the eyes of law. The trial court committed an error in recording the conviction and sentence of the appellant. Hence the impugned judgment and order dated 29.03.2016 passed by the trial court is liable to be set aside, which is accordingly set aside.

55. The present appeal is **allowed.**

56. The appellant Ram Das is in jail. He is directed to be released forthwith unless wanted in any other case.

57. Keeping in view the provision of Section 437-A of The Code of Criminal Procedure, 1973 the accused-appellant Ram Das is directed to furnish a personal bond in terms of Form No. 45 prescribed in The Code of Criminal Procedure, 1973 of a sum of Rs. 25,000/- with two reliable sureties in the like amount before the court concerned 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 the instant judgment or for grant of leave, the aforesaid appellant on receipt of notice thereof shall appear before the Apex Court.

58. The lower court record along with a copy of this judgment be sent back immediately to the trial court concerned for compliance and necessary action.

59. The party shall file computer generated copy of such judgment downloaded from the official website of High Court Allahabad before the concerned Court/Authority/Official.

60. The computer generated copy of such judgment shall be self-attested by the counsel of the party concerned.

61.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)01ILR A15
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.01.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 234 of 2017

Dharmendra Rajbhar
...Accused Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Shamsher Singh, Sri Ravi Ratan Kumar Sinha, Swati Agrawal Srivastava, Sri Virendra Singh

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

Criminal Law - Indian Penal Code,1860- Section 304 –B , 302- Charges under Sections 304-B, 498-A IPC and Section 4 Dowry Prohibition Act- Death by smothering- Elements of demand of dowry and harassment soon before death lacking - The presumption under Section 113-B of Evidence Act cannot attract and conviction under Section 304-B IPC cannot be held- Acquittal of the accused/in-laws of the charges under Sections 304-B, 498-A IPC and Section 4 Dowry Prohibition Act- Conviction of husband of deceased under section 302 of the IPC with recourse of Section 106 of the Evidence Act- held- unsustainable.

Evidence Law - Indian Evidence Act, 1872 - Section 101, Section 106- Prosecution has to establish guilt of the accused filtered of all reasonable prognosis favourable to accused to secure conviction and it is never relieved of its initial duty. It is only when the initial burden has been discharged by the prosecution that the defence of the accused has to be looked into. Section 106 of the Indian Evidence Act cannot be applied to fasten guilt on the accused, even if the prosecution has failed in its initial burden. 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. 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".

The prosecution is never relieved of its initial burden to prove its case beyond all reasonable doubt and the prosecution cannot shift the burden on the accused, u/s 106 of the Evidence Act, without discharging its initial burden. However, where the facts are within the special knowledge of the accused and cannot be possibly explained by the prosecution, then the burden shifts on the accused to explain the said facts.

Evidence Law - Indian Evidence Act, 1872- Section 106- The evidence of doctor who conducted autopsy of deceased, is mere opinion which is in relation to cause of death of deceased but it is not indicative of guilt of appellant. The presence of appellant at his home at the time of incident is not established, therefore, his liability for death cannot be fixed. There is no any evidence or link to connect the appellant to the incident i.e. murder of deceased. Thus, in lack of any such link which can connect the appellant to the commission of crime, he cannot be held guilty of committing the crime only on the ground that he is husband of deceased. Death of deceased is not proved to be caused by hanging and the story as shown by father-in-law of deceased seems to be false and his presence on the spot stands proved. He was in exclusive possession of the house at the time of commission of incident. The actual fact was in his knowledge and he would have disclosed it. If he did not disclose or keep mum or disclosed the fact but false, he would become liable for the commission of crime with the help of section 106 of Evidence Act but this factual situation was not taken in view by the learned trial judge while concluding the judgment and acquitting the informant (father-in-law of deceased) of the charges.

Where the evidence establishes that the husband of the deceased was not present at the time and place of the occurrence and there is absence of any other evidence linking him with the commission of the offence, then his conviction caanot be secured with the aid of Section 106 of the Evidence Act. Rather, the burden under Section 106 of the Evidence Act will be upon the father-in-law whose presence in the house with the deceased stood

established. (Para 25, 39, 40, 41, 42, 43, 45, 47)

Criminal Appeal allowed. (E-2)

Judgements/ Case law relied upon:-

1. Attygalle Vs Emperor, (1936) 38 Bombay LR 700.

2. Stephen Seneviratne Vs King, (1937) 39 Bombay LR 1

3. Shambhu Nath Mehra Vs St. of Ajmer, AIR 1956 SC 404

4. Ch. Razik Ram Vs Ch. J.S. Chouhan , AIR 1975 SC 667

5. St. of W.B Vs Mir Mohammad Umar, 2000 SCC(Cr) 1516

6. St. of Raj. Vs Kashi Ram, JT 2006 (12) SCC 254

7. Trimukh Maroti Kirkan Vs St. of Maha. (2007) 10 SCC 445

8. P. Mani Vs State of T.N. (2006) 3 SCC 161

9. Vikramjit Singh Vs St. of Punj. (2006) 12 SCC 306

10. St. of Raj. Vs Thakur Singh (2014) 12 SCC 211

11. Pawan Kumar Vs St. of U.P. 2016 SCC OnLine All 949

(Delivered by Hon'ble Subhash Chandra Sharma)

1. This criminal appeal emanates from the judgment and order dated 15.12.2016 passed by learned Additional Sessions Judge, Jaunpur in Session Trial No. 274 of 2015 (State Vs. Heera Lal and two others) arising out of Crime No. 271 of 2015, under Sections 498-A, 304-B, 302/34 of Indian Penal Code & Section ¾ Dowry Prohibition Act, Police Station Sureri, District Jaunpur by which appellant Dharmendra Rajbhar has been convicted and sentenced under Section 302 IPC with life imprisonment and fine of Rs.10,000/-, in default of payment of fine to undergo additional imprisonment for a period of one year.

2. The prosecution case in brief is that Shakuntala Devi, the daughter of informant Pardeshi Rajbhar, was wedded to appellant-Dharmendra Rajbhar on 08.07.2008. Sufficient dowry was given in the marriage but her father-in-law, mother-in-law, sister-in-law and husband were not satisfied with the dowry. They were making demand for a golden ring and motorcycle but informant could not fulfill the demand owing to his meagre financial conditions. Consequently, the in-laws were harassing his daughter. She always told about this to the informant and members of his family. On 11.06.2015 at about 8.30 P.M. informant was communicated by the villagers that her daughter had been killed at about 8.30 P.M. by her husband, father-in-law, mother-in-law and sister-in-law. When he arrived at the spot, dead body of his daughter was lying at the door but her inmates were absent. All of them fled away leaving their home. He lodged an F.I.R. on 13.06.2015 at Police Station Sureri.

3. On 12.6.2015 at about 0.10 a.m. Hiralal Rajbhar (father-in-law of deceased) informed the police at police station Sureri that his daughter-in-law w/o Dharmendra Rajbhar aged about 27 years wedded in the year 2008 was aggrieved with matter related to tonsure (mundan) of her child. She hanged in the room while locking the door from inside. When door was not opened for long, she was called out but no response came from inside. They broke open the door and found her hanging with

ceiling fan at about 8.30 p.m. He got down her dead body & lay it on the cot. This information was entered into G.D. Report no. 2 the same day.

4. Inquest of deceased Shakuntala was conducted by Nayab-Tehshidar Pradeep Tripathi on 12.6.2015 at about 8 O'clock in presence of witnesses. Dead body was sealed and handed over to constable Tribuwan Singh and constable Jaiprakesh Narayan for post-mortem. On 12.6.2015 at about 2 p.m. Post-mortem of dead body of deceased Shakuntala was conducted by Dr. Om Prakash Singh.

5. The details of post-mortem report are as below:

Deceased Shakuntala Devi was aged about 27 years. Average built body. Rigor mortis passed in upper limb present in lower limb. Rigor mortis in upper extremitis. Cyonosis present on face & upper extremities. Bleeding from nostrils.

Ante-mortem injuries:- No any external injury present.

Head: Scalp & skull found congested. Brain-congested. Neck: mouth, tongue, pharynx-congested. Larynx, vocal dords-congested. Trachea Hyoid bone was found intact.

Chest: Ribs and chest wall were found NAD. Oesophagus found congested. Trachea and Bronchial Tree were found congested. Pleura found congested. Lungs found congested. Pericardium Pericardial Sac found congested. Right heart filled and left empty. Large blood vessels-NAD.

Abdomen: Condition of Abdominal wall was pale. Perinoteum and Peritonial Cavity pale. Stomach wall condition contents and smell-pale. Small intestine including appendix-gases present. Fecal matter and gases were present in large intestine. Spleen-pale. Pancreas-pale. Condition & weight of kidney-NAD. Pelvic cavity Tissues-pale. Genital organs-non gravid uterus. Spinal column and spinal cord-not opened.

Death approximately about one day.

Cause of death was Asphyxia as a result of smothering.

6. Investigation of the case was handed-over to Circle Officer Virendra Kumar Srivastava who started the investigation and recorded the statement of informant, inspected the place of occurrence and prepared the site plan. The statements of other witnesses were also recorded and charge sheet was submitted against accused Heera Lal, Girja Devi and Dharmendra Rajbhar under Sections 498-A, 304-B IPC and Section 3/4 Dowry Prohibition Act before the court concerned.

7. Learned Chief Judicial Magistrate took the cognizance of the offences and provided copies of prosecution papers in compliance of Section 207 IPC to accused persons and committed the case to the court of session for trial.

8. The trial court after taking into consideration the material on record, framed the charges against accused persons under Sections 498-A, 304-B IPC and Section 4 Dowry Prohibition Act and alternative charge under Section 302 IPC read with Section 34 IPC was also framed.

9. Charges were read-over and explained to the accused persons, they did not plead guilty but denied the charges and claimed for trial.

Consequently, the case was fixed for prosecution evidence.

10. In support of its case prosecution examined P.W.1 Pardeshi Rajbhar who is informant and father of deceased, P.W.2 Chandrama Devi who is mother of deceased, P.W.3 Santosh Rajbhar who is brother of deceased, P.W.4 Ranjeet Chauhan who is gram-pradhan of village Kathwatiya, as witnesses of fact. P.W.5 Dr. Om Prakash Singh who conducted the autopsy of the deceased Shakuntala Devi & P.W.6 S.I. Ajay Kumar Rai who prepared essential papers at the time of inquest were also examined as formal witnesses. Genuineness of first information report, charge sheet was admitted by the learned counsel for accused persons, therefore, no formal witnesses in this regard were summoned and examined. On conclusion of prosecution evidence, statements of accused persons were recorded under Section 313 Cr.P.C. in which they told the prosecution version false except date of marriage. They also stated that there was no evidence against them, thereafter, an opportunity for defence evidence was given to them but no evidence was adduced on their part.

11. After hearing the arguments for accused as well as the State, learned Additional Session Judge, Court No. 4, Jaunpur acquitted the accused persons (Heerala, Girja Devi & Dharmendra Rajbhar) under Section 498-A, 304-B IPC & Section 4 Dowry Prohibition Act but convicted and sentenced the accused/present appellant Dharmendra Rajbhar under Section 302 IPC for a term of life imprisonment and with fine amounting to Rs. 10,000/- in default of payment of fine, to undergo one month additional imprisonment. Against this order of conviction and sentence this appeal has been preferred by the accused-appellant Dharmendra Rajbhar.

12. Heard Smt. Swati Agrawal, learned counsel for appellant as well as Shri Rajesh Mishra, learned A.G.A. for State and perused the record.

13. Learned counsel for the appellant submits that the impugned judgment and order of conviction is bad in law and against the evidence available on record. Learned trial court has erred in convicting the appellant without considering and appreciating the evidence. Prosecution could not prove its case with cogent and reliable evidence and learned trial court has decided this case wrongfully. Appellant is innocent. He has not committed any offence as alleged against him. Offences under Sections 498-A, 304-B IPC & Section ¾ Dowry Prohibition Act were not made out against the appellant, resultantly, he was acquitted by the trial court but convicted wrongfully under Section 302 IPC. All the witnesses of fact turned hostile as they had not supported the prosecution case. At the time of alleged incident, appellant was not present in the house because he was doing a job at Bombay. This fact was disclosed by all prosecution witnesses but trial court had not considered this aspect. One girl aged about 4 years and boy aged about 2 years were born from the wedlock of appellant and deceased. The responsibility of upbringing of these two issues is on the shoulder of appellant. There is no evidence constituting the offence under Section 302 IPC and charge sheet had also not been submitted under Section 302 IPC but only alternative charge under Section 302 IPC was framed by the trial court and without having any evidence on record, convicted the appellant

mechanically by taking aid of Section 106 of Evidence Act while appellant was not present in the village at the time of incident. The cause of death was opined to be smothering by the Doctor. On this sole ground conviction has been recorded, whereas no other evidence in corroboration is available on record. In this way, the impugned judgment and order dated 15.12.2016 passed by learned Additional Sessions Judge being erroneous in fact and law is likely to be set-aside and appellant is entitled for acquittal.

14. Learned A.G.A. opposed the contentions raised by learned counsel for the appellant and submitted that in this case all the witnesses of fact turned hostile. Deceased Shakuntla Devi died in the house of her husband. This was custodial death. In post-mortem, the cause of death was found to be asphyxia as a result of smothering. It was not a case of suicide but homicide. At the time of incident, husband of the deceased and members of his family were present in the house. How did she die in their house was specially in the knowledge of those persons. This fact could only be disclosed by them. Prosecution could not be expected to bring the evidence in this regard which was beyond its approach. The explanation given by the accused-appellant is not sufficient about the cause of death. It was stated by the father of appellant in his information tendered to the police station on the day of incident which was entered into the G.D. that deceased committed suicide by hanging from a bamboo used for suspending a ceiling fan in her room after bolting it from inside but during the course of autopsy no ligature mark was found on her neck, no external injury was found on her body except cyonosis on face and upper extremities with bleeding from nostrils. In the opinion of doctor, her death was caused due to asphyxia as a result of smothering. Doctor has also stated before the trial court that her death was not caused by hanging and it was not result of suicide. In this way appellant and members of his family including his father who informed the police about this incident had concealed the real cause of death of deceased. Whereas the persons living in the same house at that time could know as to how the death of deceased occurred. Since, it was custodial death and accused-appellant with other members of family was in his house and he was husband of deceased, so he was liable for her death. In this way, learned trial court has recorded conviction of the appellant with the recourse of Section 106 of Evidence Act which is just and lawful. There is no error in the impugned judgment and order.

15. From the submissions made by learned counsel for the appellant as well as learned A.G.A. for State and from the perusal of record, it transpires that as to whether conviction recorded against the accused-appellant under Section 302 IPC is based on the evidence on record or it is hypothetical and for reaching to the right conclusion, first it is necessary to re-appreciate the evidence available on record and secondly to consider the invocation of Section 106 of Evidence Act.

16. As per F.I.R. version, deceased Shakuntala was wedded to accused-appellant Dharmendra Rajbhar and she was married to him on 8.7.2008. From the date of marriage in-laws of the deceased were not satisfied. They made demand of golden ring and a motorcycle which could not be fulfilled by the parents of the deceased, as a result she was subjected to harassment by her in-laws. On11.6.2015 at about 8.30

o'clock, father of the deceased/ informant got information about the death of his daughter in her *Sasural*. In this regard, he lodged an F.I.R. at the police station on 13.6.2015.

17. Information regarding death of deceased was given to the police on 12.6.2015 at about 0.10 a.m. by the father of accused-appellant which was entered into G.D. No. 2. in which he stated that deceased was aggrieved in relation to tonsure (mundan) of her children. She closed herself into her room from inside and hanged in the bamboo fitted for suspending ceiling fan with her *saree* and committed suicide, when door was not opened for a long, no response came on call, he broke open the door and found his daughter-in-law hanging at about 8.30 p.m. He got down her dead body & lay it on the cot. On this information Nayab Tehshildar and one sub-inspector Ajay Kumar went to spot where inquest was conduced by Nayab-Tehshildar and dead body was sent for post-mortem. In the post-mortem, the cause of death was found asphyxia as a result of smothering.

18. P.W.1 Pardeshi Rajbhar (father of deceased) informant deposed before the trial court that he wedded his daughter Shakuntala on 8.7.2008 with Dharmendra Rajbhar. When her daughter went to her *sasural* and came back from there, she told that her husband, father-in-law, mother-in-law and sister-in-law demanded a golden ring and motorcycle. They beat her and subjected to torture. There was panchayat between both the parties but they insisted on demand. On 11.6.2015 at about 8.30 p.m., he was informed by the sister-in-law of deceased about her hanging. Then, he went to *sasural* of his daughter and found her lying dead on a bed in the room. In cross-examination, he turned hostile and stated that Shakuntala used to talk to him, his wife Chandrama Devi, his son Santosh, Chandan and daughter Pooja, Shankuntala never told them about demand of golden ring and motorcycle made by Hiralal, Dharmendra and Girja Devi. They never subjected her to torture. A boy Ajit and a girl Shreya were born-out of the wedlock of his daughter & appellant. His daughter was happy in her *sasural*. Dharmendra was earning his livelihood in Bombay. Prior to this incident, Shankuntala was insisting to go with Dharmendra to Bombay but he went to Bombay alone assuring her that he would take her later after making arrangements. She became depressed and committed suicide.

19. P.W.2 Chandrama Devi (mother of deceased) has also stated that Shakuntla was wedded Dharmendra Rajbhar on 8.7.2008. When she came back from her *sasural*, she always told her about her happiness. She never made complaint of any kind of harassment or torture. She did not tell her about the demand of golden ring and motorcycle. Information about the death of her daughter was given by her husband Dharmendra Rajbhar who was living at Bombay. She also stated that she along with other members of her family went to *sasural* of deceased Shakuntala where members of her daughter's *Sasural* were present. Neighbours told that Shakuntala was short tempered and she used to become angry as a result she committed suicide. Her daughter died accidentally. During cross-examination made by learned A.D.G.C. She again stated that her daughter Shakuntala was happy in her *Sasural* and at the time of incident her son-in-law Dharmendra Rajbhar was living at Bombay. Her daughter Shakuntala never told her that Dharmendra made demand of

golden chain or motorcycle. She was never subjected to harassment or beating by inmates of her husband.

20. P.W.3 Santosh Rajbhar (brother of deceased) has also stated that she was wedded to Dharmendra Rajbhar on 8.7.2008. She nenver told about harassment or torture from her husband or inmates. She was happy in her *sasural*. Information about the death of Sakuntala was given to him by her husband Dharmendra Rajbhar who was living at Bombay. He was at Bombay at the time of incident. Her sister was never incited for suicide by her in-laws. During cross-examination by learned A.D.G.C. the witness clearly refused the fact of complaint made by her sister relating to harassment and torture. He has also denied with his statement recorded under Section 161 Cr.P.C. by the Investigating Officer.

21. P.W.4 Ranjeet Chauhan who was gram-pradhan village Kathwatiya has stated that on 12.6.2015 the daughter-in-law of Heeralal hanged. He also went there where police and magistrate were present. Inquest of deceased Shakuntala was done in his presence. On the date of incident Heera Lal and his wife went to their relative and Dharmendra was living in Bombay. Shankuntala was under depression from long period.

22. P.W.5 Dr. Om Prakash Singh (Medical Officer) has proved the post-mortem report Exhibit- Ka-3 in his handwriting and told that the cause of death was asphyxia as a result of smothering. There was no any external injury found on the body. Only cyonosis was present on face & upper extremities. During cross-examination, he has stated that there was not external injury on the dead body. Hyoid bone was found intact. There was no ligature mark on her neck. Deceased was died of asphyxia. There was bleeding from nostrils and her tongue, eyes were not coming out. He denied the suggestion made by learned counsel for defence that she committed suicide or used *saree* for committing suicide by hanging. On query made by court, he further stated that the case could not be suicidal in any way. No suicide can be committed by stopping breath herself.

23. P.W.6 S.I. Ajay Kumar has stated that on the information given by Heera Lal as entered into the G.D., he went to the place of incident and Nayab Tehshildar Pradeep Tripathi also came there who got prepared the inquest report and dead body was sealed there. It was sent for post-mortem. He has proved the inquest report Exhibit Ka-2 and also paper nos. 7-ka, 8-ka, 13-ka/1 and 13-ka/2 and Exhibit-Ka-4 to Ka-8.

24. From the statements made by the prosecution witnesses. It is evident that they denied the fact of demand of dowry and harassment with the deceased on behalf of her in-laws including her husband-appellant. They turned hostile and even during their cross-examination by learned A.D.G.C. nothing appeared to support the prosecution version relating to demand of dowry and harassment soon before death.

25. In the situation where the elements of demand of dowry and harassment soon before death are lacking, the presumption under Section 113-B of Evidence Act cannot attract and conviction under Section 304-B IPC cannot be held.

26. Keeping, this kind of unsupportive evidence in view, learned

Additional Sessions Judge has rightly acquitted the accused/in-laws of the charges under Sections 304-B, 498-A IPC and Section 4 Dowry Prohibition Act but with the recourse of Section 106 of Evidence Act, convicted and sentenced the appellant under Section 302 IPC as being husband of deceased.

27. At this juncture, it is expedient to consider the legal position regarding invocation of Section 106 of Evidence Act in the case of custodial death in bridal home.

28. One of the earliest cases in which Section 106 of Evidence Act was examined and explained are **Attygalle versus Emperior reported in (1936) 38 Bombay LR 700. Stephen Seneviratne versus King reported in (1937) 39 Bombay LR 1.**

"In the aforesaid decisions, Their Lordships of the Privy Counsel dealt with Section 106 of Ordinance No. 14 of 1895 (corresponding to Section 106 of the Indian Evidence Act). It was held that Section 106 of the Evidence Act does not affect the onus of proof and throw upon the accused the burden of establishing innocence."

29. Scope of section 106 of the Indian Evidence Act was examined inconsiderable detail by the Apex Court in the case of **Shambhu Nath Mehra versus State of Ajmer reported in AIR 1956 SC 404,** wherein learned Judges spelt out the legal principle in paragraph 11 which read as under :

11."This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that it means facts that are preeminently or exceptionally within his knowledge."

30. In **Ch. Razik Ram versus Ch. J.S. Chouhan reported in AIR 1975 SC 667** it has been held as under:-

"116. In the first place, it may be remembered that the principle underlying Section 106 Evidence Act which is an exception to the general rule governing burden of proof - applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant-respondent. It cannot apply when the fact is such as to be capable of being known also by persons other than the respondent."

31. In **State of West Bengal versus Mir Mohammad Umar reported in 2000 SCC(Cr) 1516** it has been reiterated as under:-

"36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows : "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has

succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference.

38. Vivian Bose, J. had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

32. The applicability of Section 106 of the Indian Evidence Act, 1872 has been lucidly explained by the Apex Court in paragraph 23 of its judgement rendered in the case of **State of Rajasthan versus Kashi Ram reported in JT 2006 (12) SCC 254** which runs as here under:-

"23. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution."

33. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer an explanation.

34. The Apex Court in **Trimukh Maroti Kirkan versus State of Maharashtra reported in (2007) 10 SCC 445** reiterated as here under :-

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of

any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

"(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

35. **P. Mani Vs. State of T.N. 2006 (3) SCC 161** the Apex Court held as here under :

10. We do not agree with the High Court. In a criminal case, it was for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, husband and wife, were last seen together inside a room. The incident might have taken place in a room but the prosecution itself has brought out evidences to the effect that the children who had been witnessing television were asked to go out by the deceased and then she bolted the room from inside. As they saw smoke coming out from the room, they rushed towards the same and broke open the door. Section 106 of the Evidence Act, to which reference was made by the High Court in the aforementioned situation, cannot be said to have any application whatsoever.

36. The Apex court in the case of **Vikramjit Singh Vs. State of Punjab 2006 (12) SCC 306** observed as here under :

14. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.

15. It may be that in a situation of this nature where the court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt.

37. The Apex Court in the case of **State of Rajasthan v. Thakur Singh reported in (2014) 12 SCC 211,** while allowing the appeal preferred before it by the State of Rajasthan against the judgment and order of the Rajasthan High Court, by which the High Court had set aside the conviction of accused Thakur Singh

recorded by the trial court under Section 302 I.P.C. on the ground that there was no evidence to link the respondent with the death of the deceased which had taken place inside the room in the respondent's house, in which he had taken the deceased (his wife) and their daughter and bolted it from within and kept the room locked throughout and later in the evening when the door of the room was broken open the deceased was found lying dead in the room occupied by her and the respondent-accused, held:

The High Court did not consider the provisions of Section 106, Evidence Act at all. The law is quite well settled, 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, 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. In the instant case, since the deceased died an unnatural death in the room occupied by her and the respondent, cause of unnatural death was known to the respondent. There is no evidence that anybody else had entered their room or could have entered their room. The respondent did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred, nor he did set up any case that some other person entered room and cause to the unnatural death of his wife. The facts relevant to the cause of the death of the deceased being known only to the respondent, yet he chose not to disclose them or to explain them. The principle laid down in Section 106, Evidence Act, is clearly applicable to the facts of the case and there is, therefore, a very strong presumption that the deceased was murdered by the respondent. It is not that the respondent was obliged to prove his innocence or prove that he had not committed any offence. All that was required of the respondent was to explain the unusal situation, namely, of the unnatural death of his wife in their room, but he made no attempt to do this. The High Court has very cursorily dealt with the evidence on record and has upset a finding of guilt by the trial court in a situation where the respondent failed to give any explanation whatsoever for the death of his wife by asphyxia in his room. In facts of the case, approach taken by the trial court was the correct approach under the law and the High Court was completely in error in relying primarily on the fact that since most of the material prosecution witnesses (all of whom were relatives of the respondent) had turned hostile, the prosecution was unable to prove its case. The position in law, particularly Section 106, Evidence Act, was completely overlooked by the High Court, making it a rife at a perverse conclusion in law.

38. A Division Bench of this Court, in the case of **Pawan Kumar versus State of U.P. and reported in 2016 SCC OnLine All 949** held as under:-

"Section 106 of the Evidence Act can not be utilised to make up for the prosecution's in ability to establish it's case by leading cogent and reliable evidence, especially when prosecution could have known the crime by due diligence and care. Aid of section 106 Evidence Act can be had only in cases where prosecution could not produce evidence regarding commission of crime but brings all other incriminating circumstances and sufficient material on record to prima facie probablise

it's case against the accused and no plausible explanation is forthcoming from the accused regarding fact within his special knowledge about the incident. That section lays down only this much that if a fact is in the "special knowledge of a person" and other side could not have due knowledge of it in spite of due diligence and care then burden of proving that fact lies on that person in whose special knowledge it is. Section 106 Evidence Act has no application if the fact is in the knowledge of the prosecution or it could have gained it's knowledge with due care and diligence."

39. Thus, what follows from the reading of the law reports referred to herein above, is that prosecution has to establish guilt of the accused filtered of all reasonable prognosis favourable to accused to secure conviction and it is never relieved of its initial duty. It is only when the initial burden has been discharged by the prosecution that the defence of the accused has to be looked into. Section 106 of the Indian Evidence Act can not be applied to fasten guilt on the accused, even if the prosecution has failed in its initial burden.

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.

41. However once the prosecution establishes entire chain of circumstances together in a conglomerated whole unerringly pointing out that it was accused alone who was the perpetrator of the crime and the manner of happening of the incident could be known to him alone and within his special knowledge, recourse can be taken to section 106 of the Evidence Act. Aid of Section 106 of the Evidence Act can be invoked only in cases where prosecution could produce evidence regarding commission of crime to bring all other incriminating circumstances and sufficient material on record to prima-facie probablise its case against the accused and no plausible explanation is forthcoming from the accused regarding fact within his special knowledge about the incident.

42. Section 106 of the Evidence Act lays down only this much that if a fact is in the "special knowledge of a person" and other side could not have due knowledge of it in spite of due diligence and care then burden of proving that fact lies on such person in whose special knowledge it is.

43. Thus before Section 106 of the Evidence Act could be applied in the instant case it was incumbent upon the prosecution to establish by cogent and reliable evidence inter alia that the appellant was in occupation of house at the time incident took place.

44. Considering the testimony as deposed by prosecution witnesses who are near relatives of deceased, it transpires that appellant Dharmendra Rajbhar was not present at his home when incident took place. He was at Bombay. P.W.2 has categorically stated that Dharmendra Rajbhar informed about the incident to her husband on phone from Bombay. P.W.3 brother of deceased has also made similar statements. P.W.4 who was pradhan of village has also supported the version of P.Ws.-1, 2 & 3 to the extent Dharmendra Rajbhar lived in Bombay at the time of incident. Though, the appellant has not made such statement recorded under Section 313 Cr.P.C. before the court, but it does not infer that he was present at his home at the time of incident. In such a situation, how can he be made liable for incident occurring in his house, when he was not present there. The inmates of the deceased have also stated that deceased was in depression she was never harassed or subjected to torture by the appellant or the members of his family.

45. The evidence of doctor who conducted autopsy of deceased, is mere opinion which is in relation to cause of death of deceased but it is not indicative of guilt of appellant. He can only be made liable for it when his presence in the home is proved and he does not tell the reason but keeps quiet in this regard. Here in this case the presence of appellant at his home at the time of incident is not established, therefore, his liability for death cannot be fixed. In the case of ***Maruti Kirkan*** inmates of deceased were held liable because they were proved to be present at home when the incident took place but in the present case position is different, therefore, the case of *Maruti Kirkan* is of no help to the prosecution. Except this, there is no any evidence or link to connect the appellant to the incident i.e. murder of deceased. Thus, in lack of any such link which can connect the appellant to the commission of crime, he cannot be held guilty of committing the crime only on the ground that he is husband of deceased.

46. As per version of prosecution witnesses, appellant Dharmendra Rajbhar was not in occupation of his house with the deceased at the time of incident, but he was at Bombay. So it cannot be said that the fact of cause of death of deceased was in his special knowledge and only he could disclose the real fact as to how she died in his house.

47. Exhibit Ka-10 G.D. Report No. 2 indicates that Hiralal father-in-law of deceased was at home when incident took place. He informed the police station that his daughter-in-law hanged by a bamboo used for fixing ceiling fan with the help of her *saree* but this fact of hanging was found incorrect after post-morterm of deceased. Doctor conducting post-mortem had opined that death was caused by asphyxia as a result of smothering. During

his cross-examination and query by court, he had clearly stated that the death was not caused by hanging, it was not suicide in any case. He had denied the suggestion of causing death by using *saree*. In this way, death of deceased is not proved to be caused by hanging and the story as shown by father-in-law of deceased seems to be false and his presence on the spot stands proved. He was in exclusive possession of the house at the time of commission of incident. The actual fact was in his knowledge and he would have disclosed it. If he did not disclose or keep mum or disclosed the fact but false, he would become liable for the commission of crime with the help of section 106 of Evidence Act but this factual situation was not taken in view by the learned trial judge while concluding the judgment and acquitting the informant (father-in-law of deceased) of the charges.

48. Learned Trial Court has not taken this part of evidence in consideration while concluding the judgment that is why he has convicted the appellant on the basis of principle laid down in the case of *Maruti Kirkan* which cannot be said to be correct in the eye of law. In the well considered opinion of this Court, as per record, appellant cannot be held guilty for committing murder of his wife but he is liable to be acquitted to the charge under Section 302 IPC.

49. Therefore, this appeal succeeds and conviction and sentence against the appellant is set-aside. He is in jail, he be released forthwith, if not wanted in any other case.

50 Appeal is **allowed.**

51. 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)01ILR A29
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 583 of 2013

Ashish Kumar ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri S.K. Sharma, Sri Mohd. Samiuzzaman Khan, Sri Ramesh Chandra Agrahari, Sri Ambrish Kumar

Counsel for the Opposite Party:
Govt. Advocate

Evidence Law - Indian Evidence Act, 1872- This Section is based on doctrine of confirmation by subsequent facts. That doctrine is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered, it is a guarantee that the confession made was true. But only that portion of the information can be proved which relates distinctly or strictly to the facts discovered. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. It cannot be lost sight of that Section 27 of the Evidence Act has frequently been misused by the police against an accused. Court should, therefore, be cautious and vigilant about the application of the above provision. The

protection afforded by the provisions under Sections 25 and 26 of the Evidence Act is sought to be overcome by the police by taking resort to the provisions of Section 27 of the Evidence Act. Mere recovery in pursuance of Section 27 of the Evidence Act is not a clinching proof for holding an accused guilty.

It is settled law that Section 27 of the Evidence Act is an exception to sections 25 and 26 of the Act and therefore, only that part of the confession is admissible in evidence u/s 27 which distinctly relates to the fact discovered in pursuance of the disclosure. However, since frequently misused by the prosecution, the Court should be cautious in matters pertaining to recovery made in pursuance of a confession.

Criminal Law- Code of Criminal Procedure, 1973- Section 313- The questions put to the appellant were not complete or in accordance with law. The questions should have been more clear giving the correct fact that during the investigation the accused had promised to the Investigating Officer to get the dead body recovered on his pointing out. It is duty of the Court to find out whether the circumstances put to the accused under Section 313 Cr. P. C. were intelligible to him and whether he could answer the same after understanding the same and whether the question has caused any prejudice to the accused. Both the said circumstances are quite different in themselves and do cause prejudice to the accused as at one point the place of recovery of dead body is different from the other. The question should only give the circumstances and not the details, which may otherwise amount to cross examination of the accused.

Questions put to the accused u/s 3131 of the Cr.Pc. should be clear, giving out only the circumstances and not the details, and must not be contradictory as the same would seriously prejudice the accused.

Evidence Law - Indian Evidence Act, 1872- Section 3- Circumstantial Evidence- In a case based on circumstantial evidence the Courts ought to have a conscientious approach and conviction ought to be recorded only in case in which all the links of the chain are complete and pointing to the guilt of the accused. Each link unless connected together form a chain may suggest suspicion but the same in itself cannot take place of proof and will not be sufficient to convict the accused.

It is settled law that in a case resting on circumstantial evidence; it is the duty of the prosecution to link all the circumstances so that the same point unerringly to the culpability of the accused and failure to link all such circumstances in a complete chain cannot bring home the charge against the accused. (Para 37, 41, 44, 46, 49, 50, 52, 57, 59)

Criminal Appeal allowed. (E-2)

Case Law/ Judgements relied upon:-

1. Queen-Empress Vs Hosh Nak : 1941 All LJ 416

2. Hanumant, son of Govind Nargundkar Vs St. of M.P.: AIR 1952 SC 343

3. Khasbaba Maruti Sholke Vs The St. of Maha. : (1973) 2 SCC 449

4. Sharad Birdhichand Sarda Vs St. of Maha. : (1984) 4 SCC 116

5. Ram Kishan Mithan Lal Sharma Vs St. of Bom. : AIR 1955 SC 104

6. Pulukari Kottaiah Vs King Emperor: AIR 1947 PC 67

7. Delhi Admin. Vs Balkrishan : AIR 1972 SC 3

8. Jai Dev and Hari Singh Vs St. of Punj. : AIR 1963 SC 612

9. A.P. Vs Cheemalapati Ganeswara Rao : AIR 1963 SC 1850

10. Geejaganda Somaiah Vs St. of Kar. : (2007) 9 SCC 315

(Delivered by Hon'ble Samit Gopal, J.)

1. The present appeal arises out of the judgment and order dated 10.01.2013 passed by the Additional District Judge, Court No.4 Kanpur Nagar in Sessions Trial No. 823 of 2005 (State of U.P. Vs. Ashish Kumar) whereby the appellant Ashish Kumar has been convicted and sentenced under Section 302 IPC to life imprisonment, a fine of Rs. 10,000/- and in default of payment of fine to two months rigorous imprisonment, under Section 364-A IPC to life imprisonment, a fine of Rs. 10,000/- and in default of payment of fine to two months rigorous imprisonment and under Section 201 IPC to seven years rigorous imprisonment, a fine of Rs. 3,000/- and in default of payment of fine to one month rigorous imprisonment. The sentences have been ordered to run concurrently.

2. The trial court while passing the judgment impugned herein has directed that the period of incarceration of the accused will be set off against the sentence of imprisonment.

3. At the first instance, an application dated 17.03.2005 was moved by Hari Ram son of Narottam Ram before the Station House Officer, Police Station Chakeri, District Kanpur Nagar to the effect that his son Alok Kumar aged about 21 years went to give his exam at D.V.S. College on a cycle on 15.03.2005 at 05:30 a.m. but has not returned. His physical appearance was given in the said application and it was requested that appropriate action be taken. The said application about the disappearance of Alok Kumar was recorded in GD No. 54 dated 17.03.2005 transcribed at 19:30 hrs at the said Police Station. The same is marked as Exb: Ka- 1 to the records.

4. Thereafter, an application was given by Hari Ram at the Police Station Chakeri on 30.05.2005 informing that he has received calls on his mobile three times, on which, threat has been extended to him and on inquiry it transpires that one of the numbers from which call was received is of a P.C.O. and he stated that he has a suspicion that his son Alok Kumar may be murdered by the kidnappers and appropriate action be taken as soon as possible. The same was recorded in GD No. 41 dated 30.05.2005 transcribed at 17:10 hrs which is marked as Exb: Ka-8 to the records.

5. Subsequently, on an oral information given by Hari Ram, a First Information Report was lodged which was registered as Case Crime No. 413 of 2005 under Sections 364, 504 IPC, Police Station Chakeri, District Kanpur Nagar on 30.05.2005. The case was subsequently converted from Section 364 IPC to Section 364-A IPC, and later on, after the recovery of the remains of a human body, the same was converted into a case under Section 364-A, 302, 201 IPC.

6. The first informant handed over a packet to the Investigating Officer on 31.05.2005 while stating that the said gift packet contains the t-shirt of his son Alok Kumar which he was wearing when he left the house. The same was taken by the Investigating Officer and a recovery memo dated 31.05.2005 was prepared which is marked as Exb: Ka-3 to the records.

7. At the same time on 31.05.2005, the first informant Hari Ram gave a letter to the Investigating Officer by which a ransom of Rs. 3 lakh was alleged to be demanded for releasing his son. The said letter was dated 18.05.2005 and was received in the office of Hari Ram which was sent by post. A recovery memo of the same was prepared on 31.05.2005 which is marked as Exb: Ka-4 to the records.

8. Further, on the same day, the first informant Hari Ram also gave a *chit* to the Investigating Officer which was pasted on the gift packet, in which, t-shirt was wrapped. The said *chit* was taken into custody by the Investigating Officer and a recovery memo to the same was prepared which is marked as Exb: Ka-5 to the records.

9. Subsequently, a skeleton was recovered on 01.06.2005 on the pointing out of the appellant. A recovery memo of the same was prepared on 01.06.2005 which is marked as Exb: Ka-6 to the records.

10. A tape recorder was also recovered which was manufactured by Panasonic and was in a running condition which had a cassette in it, in which, it is said that there was some recording in the voice of the deceased Alok Kumar. The said tape recorder is also said to be recovered on the pointing out of the appellant. The recovery memo to the same is Exb: Ka-16 to the records.

11. Further, a cycle is said to have been recovered by the Investigating Officer from the cycle stand of Station Govindpuri, Kanpur Nagar. The recovery memo of the same was prepared on 01.06.2005 which is marked as Exb: Ka-17 to the records.

12. The skeleton was subjected to the postmortem examination. The doctor conducted the postmortem examination. While stating about the condition of the same as stated has follows:-

5'5" long skeleton. H.C. 21". Skull hair - 3". Mostache, sole and genitalia absent. Whole of skin except scalp, muscle & brain absent. All bones and vertebrae are seperated from each other. All viscera absent. 16 teeth present in upper jaw. Lower jaw absent. Ribs, metacarpals, carpals and all bones are loose and covered with decomposed flesh and mud. PMS - can't be found out.

Further, the doctor observed in the skeleton while observing the head and the neck region as follows:-

All cervical vert. seperated. Skull base is cut with sharp object above level of Ist cervical vertebra. Scalp covered with skin with hair 3" long.

The cause of death could not be ascertained and except for the bones of both hands were preserved for examination.

The time since death has been opined by the doctor as about 2½ months.

The postmortem report is marked as Exb: Ka-18 to the records.

13. The bones as recovered were sent for X-ray examination. The X-ray examination was done on 10.01.2006. The doctor conducting the X-ray examination was of the opinion that the bones appear to

be human skeleton. He further opined that no further opinion can be given. The said X-ray report is marked as Exb: Ka-21 to the records.

The genuineness of the said document was admitted by the learned counsel for the defence and as such the formal proof of the same was dispensed with.

14. An admitted handwriting of the appellant along with the recovered letters were sent to the Forensic Science Laboratory, Uttar Pradesh, Lucknow for comparison and examination by the Investigating Officer. The examiner vide his letter dated 16.06.2005 opined that the handwriting of the person who had written the Specimen-1 to 18 does not tally with the disputed document marked as Q1 to Q4.

15. The investigation concluded and a Charge Sheet No. 341 of 2005 dated 19.07.2005 was submitted against the appellant under Sections 364-A, 302, 201 IPC. The same is marked as Exb: Ka-20 to the records.

16. The trial court vide its order dated 01.09.2006 framed charges against the appellant accused Ashish Kumar Savita under Sections 364A, 302, 201 of the Indian Penal Code, 1860.

17. The accused appellant pleaded not guilty and claimed to be tried. He has not led any defence evidence.

18. The prosecution in order to prove its case produced Hari Ram PW-1 who is the informant and father of Alok Kumar, the missing boy. Smt. Dharma Devi PW-2 is the wife of the first informant Hari Ram and the mother of Alok Kumar. Shahanshah Hussain PW-3 is the Constable Clerk who transcribed the general diary of the *gumshudgi* report on 17.03.2005. Rakesh Kumar Shukla PW-4 is the Head Constable who was given information about the kidnapping of Alok Kumar who had transcribed GD on 30.05.2005. Anjani Kumar Pandey PW-5 is the first Investigating Officer of the case who took up the investigation on 30.05.2005 which remained with him upto 01.06.2005. Doctor Ashok Kumar PW-6 is the doctor who conducted the postmortem examination of the skeleton. Shyam Singh Yadav PW-7 is the second Investigating Officer who took up the investigation from 02.06.2005, concluded it and filed charge sheet, and subsequently, again took up the same after receiving the report of the Forensic Lab regarding comparison and analysis of the handwriting in the documents and also after receiving the X-ray examination report of the bones and prepared supplementary case diary of the matter.

19. The trial court after considering the entire evidence on record came to the conclusion that there is sufficient evidence against the accused for kidnapping Alok Kumar and demanding ransom, murdering him and causing disappearance of the dead body and convicted the appellant and sentenced him as stated above.

20. We have heard Sri Mohd. Samiuzzaman Khan, learned counsel for the appellant-Ashish Kumar and Sri Gaurav Pratap Singh, learned brief holder for the State of U.P. and perused the records.

21. Learned counsel for the appellant made the following submissions:-

i) The present case is a case of circumstantial evidence. The chain of circumstances are not completed at all which have missing links in between.

ii) The evidence relied by the trial court of ransom being demanded by the appellant is totally fallacious. The handwriting of the appellant was sent for comparison and while being compared with the handwriting on the letter demanding ransom, the same was not found matching with the admitted handwriting of the appellant.

iii) The recovery of the dead body allegedly shown on the pointing out of the appellant, is false. The first informant Hari Ram PW-1 has stated that the appellant was arrested much prior than as shown by the police and further the dead body was recovered thereafter.

iv) The witnesses of recovery of the dead body have not been produced before the trial court. This fact also creates a doubt in the manner of the alleged recovery.

v) In the case, there was a letter received by the first informant which stated that Alok Kumar has run away with a girl named Fatima as he had a love affair with her and she has taken Rs. 3 lakhs and jewellery from her house with her but the Investigating Officer in spite of the same, did not investigate the said aspect at all.

vi) The appellant has no motive to commit the aforesaid offence.

22. Per contra, learned brief holder for the State opposed the submissions of learned counsel for the appellant and argued that there has been a recovery of the dead body on the pointing out of the appellant after being dug from a room which was rented to him and as such the accused was under a burden to disclose as to how the dead body was buried in the room occupied by him which he has not. It is further argued that the recovery of the dead body is a clinching evidence against the appellant, for which, he has tendered no explanation. It is further argued that the appeal lacks merit and is liable to be dismissed.

23. Hari Ram PW-1 is the first information and the father of Alok Kumar, the missing boy. He in his examination-in-chief has stated that his son Alok Kumar aged about 21 years left on a cycle for D.V.S. College to give his examination on 15.03.2005 at 05:30 a.m. He did not return home after giving the examination. He transcribed a missing report and gave it to the S.H.O., Police Station Chakeri on 17.03.2005, in which, he mentioned the physical appearance of his son by stating that he was about 5'4" in height having fair complexion and was wearing an almond coloured t-shirt and a grey coloured pant. He was having a small mark of injury on his forehead. He identifies the said application and proves it which was marked as Exb: Ka-1 to the records. He states that later on, a letter dated 18.03.2005 was received at his work place, in which, ransom of Rs. 3 lakhs was demanded. He gave the said letter to the Investigating Officer which was proved by him and was marked as Exb: Ka-2 to the records. He states that, subsequently, on 21.03.2005 at about 10:34 hrs, a call of some unknown person came on mobile no. 9336235161 on which a ransom of Rs. 5 lakhs was demanded. He states that the said mobile on which the call was received was of his master Sri L.C. Sharma which was attended by his wife. He identifies the accused appellant who was present in court

and states that he knows him and recognises him and he only called from the phone and demanded ransom and also sent letter for the same. He states that the kidnapper of his son Alok Kumar and due to non fulfilment of demanded of ransom, he has been murdered and his dead body was got disappeared. He states that on 17/18.03.2005, he then got pamphlets printed and pasted on 22.03.2005 and on 23.03.2005 news in the newspapers was also got published. On 12.05.2005, on mobile no. 9336814524 belonging to one Hemant a call from phone no. 05222457449 was received from Charbagh, Lucknow about which he immediately informed Police Station Chakeri. On 13.05.2005, on the phone of Rajesh, a call from mobile no. 9336235161 was received, on which, it was stated that money be arranged. The said call was received by him which was done from phone no. 05122509258 of Devki Palace Vandana P.C.O. He then went to the P.C.O. and inquired about it and was told that a boy aged about 20-21 years had called up who was wearing a cream coloured t-shirt, was of grey complexion and had covered his face. He states that on 25.05.2005, the accused Ashish Kumar sent the clothes of his son and demanded ransom through rickshaw puller. The said rickshaw puller was apprehended by him and handed over to Police Station Chakeri. He states that later on the dead body of his son Alok Kumar was recovered from near a canal in Govindpuri Nagar. The police informed him about the said recovery on which he reached there and identified the dead body as that of his son. The said identification was done on the basis of the clothes on the body. Later on, he states to have signed the recovery memo relating to the t-shirt sent in the gift packet and the *chit* pasted on the gift pack through which Rs. 3 lakhs was demanded as ransom. The said three have been marked as Exb: Ka-3, 4 and 5 to the records. He states that his son Alok Kumar was studying with the accused appellant Ashish Kumar and as such he knew the accused very well and identifies him. He states that the said accused has kidnapped his son for ransom and due to the non fulfilment of the amount of ransom murdered him and got the dead body disappeared.

In cross examination, he states that at the time of the incident, he was working in Seal Foods and Fertilizer, Dulichand Oil Mill Company, Mill Area Fazalganj, Kanpur Nagar which is a private company. He is the D.O. Incharge. No other person except for him was working on the said post. Others were field employees. At that time, he was getting a salary of Rs. 3,200/-. He has four persons in the family who are living with him which included his wife, two daughters and a son Alok Kumar who is the deceased. The house, in which, they were living was a rented house which was taken on a rent of Rs. 1,100/- per month. The elder daughter had passed B.A. Amongst the children, the eldest was a daughter, then son and then another daughter. The younger daughter was studying in B.Sc. 1st year and was about two years younger to Alok Kumar. His son was studying in B.A. 1st Year and was given examination of the same. He was studying with Hindi, Economics and one other subject which he does not remember. His son Alok Kumar and the accused appellant Ashish Kumar were studying together in the same class and in the same section. He states that he does not know about the subject which Ashish Kumar was studying. Alok Kumar and Ashish Kumar were friends and as such he knew him quite well. Ashish Kumar never came to his

house. He may have come in his absence, for which, he does not know. Ashish Kumar is a resident of village Nonpur Police Station Bhogsipur, and at the time of the incident, he was living with his maternal uncle in Bheemsen and used to go to D.V.S. College for his studies from there. The distance between Bheemsen and D.V.S. College Govindpuri Nagar, Kanpur is about 10-12 kilometres. The said two places are connected by a train also. Govindpuri Station is at a distance of half kilometre from DVS College. At the time of occurrence, he used to live in Koyla Nagar which is situated at a distance of about 15 kilometres from D.V.S. College. He states that his son used to go by cycle daily. He states that he does not know as to how many friends Alok Kumar had because they never used to come to the house. Purushottam is a friend of Alok Kumar whose father is a police personnel. Purushottam did not tell the name of other friends of Alok Kumar. He states to have identified the dead body of his son from the clothes. His clothes were of grey colour. Clothes of grey colour are available in the market and many people wear it. His son was from the science side in High School. He does not know as to when his son did his High School. He did his Inter from the science side but he does not know as to when his son did Inter. He states with his son had passed Inter in 2nd Division. He did not take admission in B.Sc. as he was not interested in sending him for studies. Then later on, after two years, he took admission in B.A. To a suggestion that his son was not serious about studies, he denies. To a further suggestion that his son was naughty boy, he denies. He states that his son had a technical mind and used to concentrate in studies. Further, to a suggestion that his son had a love affair with a girl named Fatima, he denies. Further, to a suggestion that due to the love affair with Fatima, his son used to roam about, he denies. He states that his son had gone to the college for giving examination on cycle at 05:30 a.m. He states that he cannot tell as to whether Fatima had taken Rs. 3 lakhs and jewellery from her house and had met his son at a fixed place and went with him. He further states that he cannot tell as to how the cycle of his son was found at Govindpuri Station. To a suggestion that his son has eloped with Fatima and is still alive. To a further suggestion that his son Alok Kumar and Fatima had a love affair and have eloped along with jewellery, he denies.

He was further cross examined wherein he states that his son was aged about 21 years at the time of incident. He states that he had received a letter, in which, it was written that his son Alok Kumar has eloped with Fatima, the sister of the said person and she has taken Rs. 3 lakhs and jewellery with her. He states that the said fact was written in the said letter. He states that Purushottam may not be involved in the elopement of the girl because the same is not written in the said letter. He proves the said letter which is marked as Exb: Ka-2 to the records. He states that he does not know that Purushottam to save himself has disclosed the acquaintance of Ashish with Alok Kumar. The father of Purushottam is a police inspector. To a suggestion that as the father of Purushottam is in the police, Ashish Kumar is being implicated in the matter just to save Purushottam, he denies. Further, to a suggestion that his son Alok Kumar is alive and is with Fatima, he denies. He further denies the suggestion that his son is intentionally not giving his correct address. He states that in Exb: Ka-1, the name of Ashish Kumar is not mentioned which is correct and true. He

further states that it is true that the letter which was received by him is in the records, but the envelope of the same is not on record. He states that he had given them to the Investigating Officer. He states that except for the recovery memo Exb: Ka-4 relating to the demand of Rs. 3 lakhs as ransom there is no other letter has referred to in Exb: Ka-2 to the records. He states that there was no separate letter demanding ransom. To a suggestion that Exb: Ka-1 has been prepared in a forged manner and has been filed directly in Court and was not given at the Police Station, he denies the same. He states that it is correct that there is no signature of name of Ashish Kumar written at the bottom in the said letter. It is not even in the letter. He states that he had informed the Police Station Chakeri about the phone call from an unknown person received by him but had not given any written report. He states that the unknown persons phone call was received by his landlord which was for him. The information about the phone call was informed to him by his landlord. The landlord had given the phone to his wife, on which, his wife had interacted with the said person. The said person did not tell his name while talking. He further states that it is true that he had given his statement in Court that he knew accused Ashish Kumar and identifies him and he had called on phone for ransom and had sent the letter. He states that he had not given any written complaint at the Police Station. He states that he does not know the date, on which, he had received the said letter. He had given the pamphlets which he had got printed for searching his son to the Investigating Officer, the same is not on record. Further, to a suggestion that he has cooked up a false story due to a love affair of his son and under pressure of police, to which, he denies. To a further suggestion that all the letters have been prepared in a forged manner, he denies. He states that his son was studying in D.V.S. College. He states that after the disappearance of his son, the police had arrested the accused Ashish Kumar and had taken him with them. It was about two months after the disappearance of his son and about 15 days prior to the recovery, he states that the police had interrogated him and then had released him. About 3-4 times call was received on the mobile. The first call was about 5-7 days and second was after about a month and the third was after 2-3 days of the second call. He states that all the phone calls were done by accused Ashish Kumar. He states that accused Ashish Kumar did not tell his name on the phone and as such he was not named in the report. To a suggestion that he is stating the story about the phone calls on being tutored, he denies. He states that after the recovery of the dead body which he states to be of his son, he had gone to the Police Station and the paper work was done in the Police Station. To a suggestion that under the pressure of the police and out of love affection of his son, he has given a false evidence, he denies. He further denies the suggestion that his son is alive and has gone with a girl named Fatima. Further, he denies the suggestion that his son has misappropriated the jewellery of Fatima and to save himself, he is not coming forward, he denies.

24. Smt. Dharma Devi PW-2 is the wife of Hari Ram PW-1 and the mother of Alok Kumar. In her examination-in-chief she states that she has three children, in which, two are daughters and one son. Her son was studying in B.A. 1st Year in D.V.S. College, Govindpuri Kanpur. The examination of her son started in the 2nd week of March. For giving his 4th paper, he went on his cycle on 15.03.2005 at 05:30

a.m. He was wearing a grey coloured pant and almond coloured t-shirt. The exam was scheduled from 07:00 a.m. to 10 a.m. He did not return till evening. Then, her husband went to the college and inquired about him and came back and told her that Alok Kumar did not attend the exam. Later on, her husband started searching for him but his whereabouts were not known. Her jeth lives in Ghaziabad. On information, he also came. He also searched for Alok Kumar at various places but whereabouts of Alok Kumar could not be known. Information in newspaper and pamphlets were also printed. In the pamphlets, the mobile number of V.D. Kureel, her neighbour was mentioned. Her husband had informed him that if he receives any phone call then he may be informed about it. On 21.03.2005 i.e. after about a week of the disappearance of her son, her landlord received a phone call. The landlord informed them about the same. The call was received at about 10:30 a.m. Her husband was not at home at that time but was on duty. The call was received in his absence which was answered by her. The person calling immediately told her that if she wants her son then she should make arrangement Rs. 5 lakhs. She started crying, on hearing the same, to which, the phone was disconnected. She gave information to her husband. Her husband gets Rs. 3,200/- as salary from the work. The family affairs are met with difficulty in that money. After about 1¾ month, no phone call or any news was received. They used to search Alok Kumar through their contacts. If persons used to be arrested then they used to go to the police for inquiry. The information about the first phone call which was received, was not given to anyone. Later on, various phone calls were received wherein Rs. 3 lakhs was demanded for releasing Alok Kumar. A letter was also received and at the office of her husband, t-shirt of Alok Kumar which he was wearing on 15.03.2005 while going out from the house, was sent and received in a gift pack. The said facts were told to her by her husband. The fact regarding demand of Rs. 5 lakhs was also told by her husband to her. She did not believe that her son was kidnapped. She could understand that her son was in the clutches for about two and half months. There was a situation about her son not being recovered. She states that whenever the kidnapper used to call, she used to say that the family is very much under grief and trouble and help may be extended. She later on, came to know that accused Ashish Kumar who is the friend of Alok had kidnapped him for ransom, and due to non fulfilment of the same, has murdered him. She states that the Investigating Officer had interrogated her and had recorded her statement.

In her cross examination, she states that her daughter Yogita is the eldest amongst the children. She states to have come to the court with her husband who is standing behind her. She states that she has come to the court many times. Her husband always comes with her. Her second child was her son. Her son had stopped his studies on his own. He had stopped it for one year only. He had started learning work of electronics. Her son had started his studies from science side, and later on, restarted from the arts side. The phone call for ransom was received after about a week of his disappearance. The person who had called did not tell his name. The second call was received after about two and a half months. The person again did not disclose his name. Ashish Kumar Savita had called for ransom and the said fact came to be known to her after about two and a half months which was told by her husband to

her. She does not know that Purushottam is the friend of her son. Ashish Kumar Savita did not ever come to her house with her son. For the first time, he was brought by the police. Police had told her that the said person is Ashish Kumar Savita and since then she knows him. The name of Ashish Kumar Savita is written in the diary of Alok Kumar but she does not remember as to which all other names are written in it. The diary was given to the Investigating Officer. She does not know as to whether the diary is part of the record or not. To a suggestion that since the name of Ashish Kumar Savita was written in the diary and her husband has tutored her to take the names she is disclosing the said name, she denies. She states that the name and roll numbers of other friends were also written but she does not remember. She states that when police had brought Ashish Kumar Savita to her house then she had told the police that he is not the accused in the case of her son. She then says that he is the accused. She states that as it was not known hence his name was not mentioned in the report. She states that she does not know that her son was having a love affair with a girl named Fatima. To a suggestion that her son was known to Fatima and has eloped with her along with jewellery and money, she denies. To a further suggestion that her son is living with a girl named Fatima and is still alive, she denies. She states that it is incorrect to say that her son has eloped with a girl named Fatima along with jewellery and just in order to save him, she and her husband are not disclosing his correct location. She states that whenever she comes to court, the Government Advocate used to meet her.

25. Shahanshah Hussain PW-3 was posted as Constable moharrir at Police Station Chakeri, Kanpur Nagar on 17.03.2005. He states in his examination-in-chief that Hari Ram came to the Police Station and gave an application regarding disappearance of his son Alok Kumar aged about 21 years, on the basis of which, a report of disappearance was transcribed in GD No. 54 at 19:30 hrs on 17.03.2005 by him. He proves the same which is marked as Exb: Ka-7 to the records.

26. Rakesh Kumar Shukla PW-4 was posted as Constable moharrir at Police Station Chakeri, District Kanpur Nagar on 30.05.2005. He states that previously, an information was given by Hari Ram on 17.03.2005 regarding the disappearance of his son Alok Kumar which was registered at the Police Station and a pamphlet was got printed and distributed by him, in which, he had given his and his neighbour's telephone numbers. He states that Hari Ram used to give information about the various phone calls received by them at the Police Station and he had then stated that looking to the said situation, he suspects that his son Alok Kumar may be murdered by the kidnapper and as such appropriate action be taken as early as possible. He states that the said information was transcribed in the general diary of the Police Station in GD No. 41 at 17:10 hrs on 30.05.2005 by him. The same was marked as Exb: Ka-8 to the records.

27. Anjani Kumar Pandey PW-5 is the 1st Investigating Officer of the matter. He took up the investigation on 30.05.2005 which remained with him till 01.06.2005. He states that after recovery of the dead body the inquest was conducted. The same is Exb: Ka-9 to the records. The dead body was sent for post-mortem and the required documents were prepared. The same were marked as Exb: Ka-10 to Ka-14 to the records which was prepared by him. He

states that on 30.05.2005 he transcribed GD No. 41, GD No. 54 and recorded the statement of Constable Shahanshah Hussain and of Constable Rakesh Shukla. On 31.05.2005, he recorded the statement of Hari Ram and inquest. The letter for demand of ransom and also the *chit* which was pasted on the gift packet was sent to him. He prepared the recovery memos of the said papers, the gift pack and the t-shirt. He then inspected the place of occurrence and prepared the site plan which was marked as Exb: Ka-15 to the records. On 01.06.2005, he states to have arrested accused Ashish Kumar Savita and on his pointing out recovered a human skeleton and recorded the statement of the accused and also recovered a tape recorder and prepared its recovery memo. He prepared the recovery memo of the dead body and of the cycle of the deceased. The same are marked as Exb: Ka-16 and 17 to the records. The investigation was then handed over to Ram Singh Yadav S.H.O.

In his cross examination, he states that he had mentioned the condition of the dead body as recovered. The dead body was in a decomposed state and as such the physical appearance could not be known. The whole body consisted of bones only, and it was only on the bones of the head that hairs were present. To a suggestion that the said recovery memos have been falsely prepared just in order to falsely proceed with the matter, he denies. He states that the clothes of the deceased as recovered are not present in court. To a suggestion that he has taken the clothes from informant and has falsely shown the recovery, he denies. He states that Pusushottam was a friend of Ashish Kumar. The father of Purushottam is the Sub-Inspector of Police. He states that it is correct that Purushottam had disclosed that a student named Ashish Kumar is a friend of Alok Kumar. Ashish Kumar was a student of DVS College. He had got the list of students named Ashish Kumar during investigation. He states that accused Ashish Kumar had disclosed that he was a friend of deceased Alok Kumar. He states that he did not take Ashish Kumar to the house of the informant Hari Ram for being identified by them. He states that Hari Ram had given a letter to him, in which, it was written that Hari Ram your son Alok Kumar has enticed away my sister Fatima. Fatima has taken Rs. 3 lakhs and jewellery along with her. He states that he did not do any investigation regarding the relationship and love affair of Alok Kumar with Fatima. Alok Kumar and Purushottam were friends. He states that he does not know that Purushottam had some relationship with a girl named Fatima. He states that he did not do any investigation regarding Fatima. To a suggestion that the father of Purushottam is a Police Inspector and to save him Ashish Kumar who was a friend of Alok Kumar and was known to him was falsely introduced and implicated in the matter, he denies the same. To a further suggestion that Alok Kumar is still alive and is hiding himself with Fatima, he denies. He states that he did not take any action against Purushottam. To a suggestion that in a hurried manner to show that the case has been worked out he been has falsely implicated Ashish Kumar, he denies. To a further suggestion that in order to save Purushottam falsely implicated Ashish Kumar, he recorded the false statement of witnesses, he denies.

28. Dr. Ashok PW-6 conducting the post-mortem examination of the recovered skeleton. The findings of the said doctor have already been stated above.

In his cross examination, he states that the time since death of the deceased, can be sometimes between 2-3 months. He

states that from the skeleton, the dead body cannot be identified. He states that he cannot tell as to how the lower jaw of the skeleton is missing. He further states that it is true that along with skeleton, nine police papers were sent, on which, the name of the deceased was written as Alok Kumar and he read the same and as such he had mentioned the name of the deceased in the post-mortem report as Alok Kumar.

29. Shyam Singh Yadav PW-7 is the second Investigating Officer of the matter who took up the investigation from 02.06.2005, concluded it filed the charge sheet and then again took up the investigation and appended certain documents in it through a supplementary case diary. He states that on 02.06.2005, he perused the investigation as done by the previous officers and recorded the statement of Jakir. On 03.06.2005, he copied and annexed the post-mortem report and recorded the statement of the first informant and his brother Himmat Ram. He then inspected the place from where the dead body was recovered and prepared the site plan of the same which was marked as Exb: Ka-19 to the records. He then recorded the statement of witness Ramesh and Chaudhary Badri Prasad. On 04.06.2005, he recorded the statement of two witnesses of recovery. On 05.06.2005, he further recorded the statement of witnesses of recovery. On 06.06.2005, he recorded the statement of witnesses of inquest. On 07.06.2005, he states to have recorded the statement of two witnesses of the recovery of cycle. On 08.06.2005, he recorded the statement of witness of recovery of dead body and cycle. On 10.06.2005, he annexed the inquest with the case diary. On 11.06.2005, he recorded the statement of two witnesses. On 12.06.2005, he recorded the statement of three witnesses. On 13.06.2005 he sent a report to the court concerned regarding the gift packet, t-shirt and *chit* for being sent for examination. On 16.06.2005, the packet for the comparison of handwriting was prepared. On 19.06.2005, he disclosed about the preparation of the docket for sending material for handwriting comparison. On 21.06.2005, the statement of three witnesses were recorded. On 25.06.2005, he made an attempt to send the bones for examination. On 28.06.2005 and 06.07.2005, the bones were being sent for X-ray. On 12.07.2005, he made an attempt to obtain the handwriting of accused Ashish Kumar for comparison and also to send the bones for analysis. On 13.07.2005, the bones were sent for analysis. On 19.07.2005, he filed a charge sheet against the appellant which was marked as Exb: Ka-20 to the records. Subsequently, from 04.08.2005 to 18.11.2005, the inquest on the examination of the bones, x-ray and report of the handwriting expert was appended with the case diary. The case was then transferred to the Station House Officer.

In his cross examination, he states that on 03.06.2005, he recorded the statement of the first informant. He states that the first informant did not disclose the name and states that he knew and identifies accused Ashish Kumar and the said Ashish Kumar had called up for ransom and had sent letter but in the investigation it has come out that Ashish Kumar had called on phone and had also sent letter for an attempt to obtain ransom. He further states that the informant did not give him the statement that this accused had kidnapped his son Alok Kumar for ransom and due to non fulfilment of the same, has murdered him and has got the dead body disappeared but had stated to him that Ashish Kumar

who is the murderer of his son Alok Kumar, be given strict punishment which would pacify him. He states that the informant did not give him the statement that on 25.05.2005 through rickshaw puller accused Ashish Kumar had sent clothes of his son and had demanded ransom but states that he had given the statement that a gift packet was sent through a rickshaw puller. He states that the first informant Hari Ram did not give him any letter. It was given to the previous Investigating Officer before him. To a suggestion that he has not prepared the site plan of the recovery of the dead body on the pointing out of the first informant, he denies. He further denies the suggestion that the site plan of the recovery of the dead body has been prepared in a false manner. He further states that he did not fill the inquest. He did not recover the cycle on the pointing out of the accused. He states that papers were sent to the Forensic Science Lab for handwriting comparison. He states that in the report of the Forensic Lab Science Laboratory, it is mentioned that the person who has written document marked S1 to S18 has not written the disputed document marked as Q1 to Q4. He states that he did not conduct investigation regarding the elopement of a girl named Fatima. To a suggestion he further states that it is incorrect to state that he has not conducted the correct investigation and has not unearthed the case properly and Ashish Kumar who is a poor person, has been falsely implicated and nominated in the matter and a false charge sheet has been filed.

30. The accused in his statement under Section 313 Cr.P.C. has stated that he has not committed the murder of Alok Kumar. Alok Kumar has run away with a girl named Fatima along with jewellery and as such he is hiding himself. He stated that Alok Kumar is still alive.

31. The trial court after considering the entire evidence on record and has convicted and sentenced the accused by the judgment impugned herein as stated above.

32. The present case is a case of circumstantial evidence. The rules to be followed in a case of circumstantial evidence are trite.

33. There is no eye witness of the incident and the entire case of the prosecution rests on circumstantial evidence.

34. The case of **Queen-Empress Vs. Hosh Nak : 1941 All LJ 416** is worth referring at this juncture which is a locus classicus on the issue of circumstantial evidence. This is a very old decision which was printed in the Allahabad Law Journal after sixty years of its decision on the recommendation of Rt. Hon'ble Sir Tej Bahadur Sapru. In the case of **Hosh Nak (supra),** it has been held that to prove an offence by the circumstantial evidence four things are essential. They are:

(1) : That the circumstance from which the conclusion is drawn be fully established.

(2) : That all the facts should be consistent with the hypothesis.

(3) : That the circumstances should be of a conclusive nature and tendency.

(4) : That the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.

35. Then in the case of **Hanumant, son of Govind Nargundkar Vs. State of Madhya Pradesh : AIR 1952 SC 343** it has been held in para 10 by the Apex Court as under:

"10. .....It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused....."

36. Thereafter, in the case of **Khasbaba Maruti Sholke Vs. The State of Maharashtra : (1973) 2 SCC 449** it was held by the Apex Court as under:

"18. In order to base the conviction of an accused on circumstantial evidence the court must be certain that the circumstantial evidence is of such a character as is consistent only with the guilt of the accused. If, however, the circumstantial evidence admits of any other rational explanation, in such an event an element of doubt would creep in and the accused must necessarily have the benefit thereof. The circumstances relied upon should be of a conclusive character and should exclude every hypothesis other than that of the guilt of the accused. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances must show that within all reasonable probability the impugned act must have been done by the accused. If two inferences are possible from the circumstantial evidence, one pointing to the guilt of the accused, and the other, also plausible, that the commission of the crime was the act of some one else, the circumstantial evidence would not warrant the conviction of the accused....."

37. The circumstantial evidence must be so complete as to exclude every hypothesis other than that of guilt of the accused.

38. In the celebrated case of **Sharad Birdhichand Sarda Vs. State of Maharashtra : (1984) 4 SCC 116** the Apex Court has described five principles of circumstantial evidence as the pillars on circumstantial evidence. The five principles have been narrated in para 153 which is extracted herein :

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should' and not "may be' established. There is not only a grammatical but a legal distinction between "may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of

Maharashtra : [(1973) 2 SCC 793; para 19, p. 807] where the following observations were made : "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable and any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as to leave by reasonable grounds for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Further in paragraph 154 of the said judgment it was held as under:

"154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence".

39. The cardinal principle of criminal jurisprudence is that the prosecution has to stand on its own legs and it should prove its case beyond reasonable doubt. Doubt must be of a reasonable man and reasonableness of doubt must be commensurate with the nature of the offence to be investigated.

40. Before appreciating the evidence on record it is necessary to point out Section 27 of the Indian Evidence Act, 1872 which reads as under:

"27: How much of information received from accused may be proved:

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

41. It is clear from the reading of Section 27 of the Evidence Act that this Section is based on doctrine of confirmation by subsequent facts. That doctrine is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered, it is a guarantee that the confession made was true. But only that portion of the information can be proved which relates distinctly or strictly to the facts discovered.

42. In the case of **Ram Kishan Mithan Lal Sharma Vs. State of Bombay : AIR 1955 SC 104,** it is held by the Apex Court that Section 27 of the Evidence Act is an exception to the rules enacted in Sections 25 and 26 of the Act which provide that no confession made to a police officer shall be proved against a person accused of an offence and that no confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Where, however, any fact is discovered in consequence of information received from a person accused of any offence in the custody of a police officer,

that part of the information as relates distinctly to the fact thereby discovered can be proved whether it amounts to a confession or not.

43. In the case of **Pulukari Kottaiah Vs. King Emperor : AIR 1947 PC 67** it has been held as follows : "the condition necessary to bring S. 27 into operation is that the discovery of a fact must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved".

44. The Section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence, but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.

45. In the case of **Delhi Administration Vs. Balkrishan : AIR 1972 SC 3** the Apex Court has held that Section 27 of the Evidence Act is by way of a proviso to Sections 25 and 26 and a statement by way of confession made in police custody which distinctly relates to the fact discovered is admissible is evidence against the accused.

46. It cannot be lost sight of that Section 27 of the Evidence Act has frequently been misused by the police against an accused. Court should, therefore, be cautious and vigilant about the application of the above provision. The protection afforded by the provisions under Sections 25 and 26 of the Evidence Act is sought to be overcome by the police by taking resort to the provisions of Section 27 of the Evidence Act. The validity of Section 27 of the Evidence Act has been upheld by the Apex Court.

47. Section 313 of the Code of Criminal Procedure, 1973 is for the purpose of enabling the accused personally to explain any circumstance appearing in the evidence against him.

The nature of questions put to the appellant, under Section 313 of the Cr. P. C. also needs to be seen and referred. The questions put to the appellant were not complete or in accordance with law. The questions should have been more clear giving the correct fact that during the investigation the accused had promised to the Investigating Officer to get the dead body recovered on his pointing out.

48. Section 313 of the Code of Criminal Procedure, 1973 reads as follows:

"313: Power to examine accused :

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court--

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may

also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."

49. From the reading of the Section it is clear that it is duty of the Court to find out whether the circumstances put to the accused under Section 313 Cr. P. C. were intelligible to him and whether he could answer the same after understanding the same and whether the question has caused any prejudice to the accused.

50. It is a matter of law that the circumstances appearing in evidence against the accused have to be put to the accused for the purposes of enabling the accused to explain such circumstances. This is a mandatory duty of the Court. In the present case, the prosecution in the question No. 1 has put to the accused that the dead body was concealed by him to case disappearance of it in the kacchi kothari in Kacchi Basti near a nahar in mohalla Sanjay Nagar, Police Station Govind Nagar and later on in question No. 3 he has been asked that P.W. - 1 has stated that the dead body of his son was recovered near nahar in Govind Nagar which both were denied by the accused. Both the said circumstances are quite different in themselves and do cause prejudice to the accused as at one point the place of recovery of dead body is different from the other. We have examined the entire statement recorded under Section 313 Cr. P. C.

51. In the case of **Jai Dev and Hari Singh v. State of Punjab : AIR 1963 SC 612** it has been held by the Apex Court that the examination of the accused person under Section 342 Cr. P. C. (old) is intended to give him an opportunity to explain any circumstances appearing in the evidence against him. In exercising its powers under Section 342, the Court must take care to put all relevant circumstances appearing in the evidence to the accused person. It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get opportunity of explaining all the relevant circumstances. On the other hand, it would not be fair or right that the court should put to the accused person detailed questions which may amount to his cross examination. The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity. It is obvious that no general rule can be laid down in regard to the manner in which the

accused person should be examined under Section 342 Cr.P.C. The true position appears to be that passion for brevity which may be content with asking a few omnibus general questions is as much inconsistent with the requirements of Section 342 as anxiety for thoroughness which may dictate an unduly detailed and large number of questions which may amount to the cross examination of the accused persons.

52. From the above decision it is clear that the question should only give the circumstances and not the details, which may otherwise amount to cross examination of the accused.

53. In the case of State of **Andhra Pradesh Vs. Cheemalapati Ganeswara Rao : AIR 1963 SC 1850** the Apex Court has held that the accused should not be put involved questions embracing a number of matters.

54. The recovery of the dead body on the pointing out of the appellant has been relied upon by the prosecution as one of the evidences against him. Te other being the letter demanding ransom and the various telephone calls.

55. No doubt, mere recovery in pursuance of Section 27 of the Evidence Act is not a clinching proof for holding an accused guilty. However, there is no doubt that it is good piece of evidence which may be relied upon as a link in the chain of circumstances in the present case for holding the guilt.

56. It is a well settled principle of law that a conviction cannot be founded on circumstantial evidence alone unless it cannot be explained on any hypothesis other than that of the guilt of the accused.

57. It is well settled that in a case which rests on circumstantial evidence, law postulates two fold requirements:-

(i) Every link in the chain of the circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt.

(ii) All the circumstances must be consistent pointing only towards the guilt of the accused.

58. In the case of **Sharad Birdhichand Sarda (supra)** has enunciated the aforesaid principle as under:-

"The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the Accused and inconsistent with his innocence".

59. It is well settled that in a case based on circumstantial evidence the Courts ought to have a conscientious approach and conviction ought to be recorded only in case in which all the links of the chain are complete and pointing to the guilt of the accused. Each link unless connected together form a chain may suggest suspicion but the same in itself cannot take place of proof and will not be sufficient to convict the accused.

60. In cases where the evidence is purely circumstantial in nature, the circumstances from which the conclusion of guilt is sought to be drawn must be fully established beyond any reasonable doubt and such circumstances must be consistent and must form a complete chain unerringly point to the guilt of the accused and the chain of circumstances must be established by the prosecution. Referring to several earlier decisions the Apex Court in the case of **Geejaganda Somaiah v. State of Karnataka : (2007) 9 SCC 315** in para 15 held as follows:-

"15. Sir Alfred Wills in his admirable book *Wills' Circumstantial Evidence* (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."

The same principle has been reiterated in a catena of later judgments.

61. In the present matter, the appellant is not named as an accused in the first information report. The name of the appellant appears on the basis of some information given by one Purushottam who has not been produced and examined as a witness. The recovery of the alleged skeleton is being strongly disputed by the defence as that of being of Alok Kumar the son of Hari Ram PW-1. Further, the prosecution relies heavily on the recovery of the alleged skeleton on the pointing out of the applicant which is stated to be buried in a room which is said to have been taken on rent by the appellant. There is no evidence whatsoever coming forth to substantiate that the recovery as alleged from the room was taken on rent by the accused appellant Ashish Kumar and was in his possession at the time of the incident as a tenant. No evidence to the said fact has been brought on record. Except for the said fact being mentioned in the recovery memo Exb: Ka-6 to the records which is dated 01.06.2005, there is no other evidence to show that the said room was rented to the accused appellant and was in his possession at the time of occurrence. Further, PW-1 Hari Ram in his examination-in-chief has very categorically stated that he discovered the dead body of his son Alok Kumar near a canal in Govindpuri and then informed the police about the same and had reached there and identified the said body on the basis of clothes worn by it. The said fact clearly runs contrary to the case of the prosecution that the dead body has been recovered on the pointing out of the appellant from a room where it was buried which was rented to him. A letter which was given by Hari Ram PW-1 to the police which shows to have been addressed to him and written by the brother of a girl named Fatima states that his son has eloped with Fatima who has taken Rs. 3 lakhs and jewellery from the house and has left the place. The said letter was handed over by Hari Ram PW-1 to the police but the police failed to investigate the said aspect of the

matter. Specific questions were put to Anjani Kumar Pandey PW-5 and Shyam Singh Yadav PW-7 regarding the fact of any investigation being conducted in the matter of elopement of Fatima with Alok Kumar the son of Hari Ram PW-1 but they have categorically stated that they did not conduct any investigation as such. The letters and *chit* sent to Hari Ram PW-1 demanding ransom alleged to have been sent by the appellant, were sent along with the admitted handwriting of the appellant to the Forensic Lab for comparison of the handwriting. The opinion of the handwriting expert is very specific in terms of the fact that both of the same are not written by the same person. Even, the telephone calls which are said to be various in numbers and received by various persons are said to be only confined to the fact of disclosure of the amount of the alleged ransom but it has nowhere come as to who the person was who had called various times. Even, the said link fails to have any corroboration for implicating the appellant. PW-1 Hari Ram has in his cross examination stated that the appellant was previously arrested by the police after about two months of the disappearance of his son and then again after about 15 days prior to the recovery of the dead body. The said statement is also very categorical in its terms whereas the Investigating Officer states to have arrested the appellant on a different date.

62. The prosecution in the present case has failed to discharge its duty by fixing each and every link in the chain which would reach to an irresistible conclusion that the appellant is the accused in the matter.

63. Thus the conviction of the appellant by the trial court is not sustainable in the eyes of law. The trial court committed an error in recording the conviction and sentence of the appellant. Hence the impugned judgment and order dated 10.01.2013 passed by the trial court is liable to be set aside, which is accordingly set aside.

64. The present appeal is **allowed.**

65. The appellant Ashish Kumar Savita is in jail. He is directed to be released forthwith unless wanted in any other case.

66. Keeping in view the provision of Section 437-A of The Code of Criminal Procedure, 1973 the accused-appellant Ashish Kumar Savita is directed to furnish a personal bond in terms of Form No. 45 prescribed in The Code of Criminal Procedure, 1973 of a sum of Rs. 25,000/- with two reliable sureties in the like amount before the court concerned 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 the instant judgment or for grant of leave, the aforesaid appellant on receipt of notice thereof shall appear before the Apex Court.

67. The lower court record along with a copy of this judgment be sent back immediately to the trial court concerned for compliance and necessary action.

68. The party shall file computer generated copy of such judgment downloaded from the official website of High Court Allahabad before the concerned Court/Authority/Official.

69. The computer generated copy of such judgment shall be self-attested by the counsel of the party concerned.

70. 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)01ILR A50
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2020

BEFORE

THE HON'BLE DINESH PATHAK, J.

Criminal Appeal No. 1132 of 1982

Udai Narain @ Udai & Ors.
...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri U.K. Misra, Sri Anurag Pathak

Counsel for the Opposite Party:
A.G.A., Sri V.V. Mishra

Criminal Law - Code of Criminal Procedure, 1973- Sections 385, 386- Criminal Appeal- Records of court below weeded out- Reconstruction of record not possible- nor retrial possible as most of the accused persons had died.

Criminal Law - Code of Criminal Procedure, 1973- Sections 385, 386- Criminal Appeal - After being convicted it is right of an accused to assail the impugned judgment and order in appeal and point out the ambiguity, perversity, illegality, irregularity and infirmity in the order and proceeding of the trial Court to prove his innocence, which is not possible in absence of original record of the Sessions Trial.

The purpose of the statutory right of appeal provided to the accused under Section386 of the Cr.Pc. to challenge the judgement of the trial court, stands defeated in the absence of the record of the court below since the infirmities, illegalities and perversities in the judgement of the trial court cannot be demonstrated before the Appellate Court.

Criminal Law - Code of Criminal Procedure, 1973 -Section 386- Criminal Appeal-In defining power of the Appellate Court, Section 386 Cr.P.C. enumerates that Appellate Court is empowered to reverse the finding of the Court below or uphold the sentence or acquit the accused and, in exercising its power, Appellate Court has to go through the record of Court below and submissions made by the appellant and Public Prosecutor. In this view of the matter, Appellate Court cannot properly exercise its jurisdiction of acquittal, reversal or upholding the sentence without perusing the record of Sessions Trial. Therefore, in the present scenario, taking into account the death of the parties and non availability of the documents, retrial in the present case is almost impossible.

The Appellate Court, while considering an Appeal against a judgement of conviction recorded by the trial court, cannot exercise the jurisdiction conferred upon it by Section 386 of the Cr.Pc. in the absence of the record of the trial court and a retrial would be an exercise in futility as most of the accused and the witnesses have died during the passage of time.

Criminal Appeal Allowed. (E-2)

Case law/ Judgements relied upon:-

1. St. of U.P. Vs Abhai Raj Singh & anr, AIR 2004 SC 3235.

2. Sita Ram & ors. Vs State, 1981 Cri.L.J. 65

3. Crl. Appeal No. 522 of 1980 (Bachchi Lal & ors. Vs St. of U.P.)

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the appellants and learned A.G.A. for State-respondent.

2. Instant criminal appeal has been preferred challenging the judgment and order dated 26.03.1982 passed by 3rd Additional Sessions Judge, Ballia in Sessions Trial No.245 of 1980 convicting the appellants under Section 395 IPC and sentencing them to undergo five years rigorous imprisonment.

3. Vide impugned judgment and order dated 26.03.1982, eight accused persons had been convicted, out of them six had filed instant appeal.

4. As per FIR version, in the intervening night of 14/15 March, 1980 while first informant Ram Nagina Mishra (PW-2) was sleeping in his room situated towards north of the outer verandah of his house, a gang of 14-15 dacoits raided at his house and barged into the house after breaking the outer door. On strong resistance by the villagers, many of the dacoits managed to escape from the place of occurrence, but out of them five dacoits namely Udai Narayan, Ram Vachan, Jagdish, Mani Ram and Babban were caught by the villagers. Apart from that, two others namely Ghura and Dukhu were recognized by the villagers. During course of investigation police suspected one more accused namely Moti. In this view of the matter, total eight persons were blamed to be involved in commission of crime (i.e. dacoity). Informant Ram Nagina Mishra (PW-2) has moved written report dated 15.03.1980 (Exhibit Ka-1) with respect to incident in question on the basis of which Chik FIR (Exhibit Ka-5) has been registered under Section 395/397 IPC and same was scribed in the General Diary. Copy of which was exhibited as Exhibit Ka-6. After due investigation, the Investigating Officer has submitted charge sheet under Sections 395/397 IPC and case was registered in the Court of Judicial Magistrate-I, Ballia. Thereafter, case was committed to the Court of Sessions for trial.

5. In order to substantiate the charges levelled against the accused, prosecution has produced as many as ten witnesses. On the other side, defence has examined four witnesses. After considering the facts and circumstances and documents available on record, trial Court has passed the impugned judgment and order convicting the accused persons as mentioned above.

6. Against aforesaid judgment and order dated 26.03.1982, two criminal appeals were preferred which are registered as (i) Criminal Appeal No.1131 of 1982 (Ram Vachan and another vs. State of U.P.) and (ii) Criminal Appeal No.1132 of 1982 (Udai Narayan and five others vs. State of U.P.).

(i) So far as Criminal Appeal No.1131 of 1982 is concerned, it was preferred by two accused namely Ram Vachan (appellant no.1) and Mani Ram (appellant no.2). Aforesaid appeal was ordered to be dismissed as infructuous vide order dated 06.05.2013 passed by this Court on the ground that appellant no.1 Ram Vachan had already served out the sentence and has already been released from the jail. So far as appellant no.2 Mani Ram is concerned, he expired and appeal was already abated against him.

(ii) In the present criminal appeal i.e. Criminal Appeal no.1132 of 1982, which has been filed on behalf of six

appellants/accused, out of them four had already died and vide order dated 12.03.2013, present appeal was ordered to be dismissed as abated against appellant nos.1, 2, 4 and 5. Now it survives only against appellant no.3 Babban Nonia and appellant no.6 Moti Ram.

7. Vide order dated 04.05.1982, instant appeal was admitted and notice was ordered to be issued to the State and appellants were enlarged on bail during pendency of appeal. With respect to the record of Court below, District Judge, Ballia had submitted report dated 18.02.2003 informing that record of Criminal Appeal No.1131 of 1982 relating to Sessions Trial No.245 of 1980 had already been weeded out by the concerned Record Keeper on 03.06.1992. After considering aforesaid report, this Court had passed order dated 29.01.2004 directing District Judge, Ballia for reconstruction of the record. Thereafter, sufficient number of communications have been made between Registry of High Court and concerned Court below. Ultimately, District Judge, Ballia had sent a detailed report dated 27.07.2016, through Special Messenger, along with a detailed enquiry report dated 06.07.2016 submitted by Additional District and Sessions Judge, Court no.3, Ballia. Record further reveals that District Judge, Ballia had sent another report to the same effect vide communication letter dated 08.07.2016 along with the detailed enquiry report dated 06.07.2016 submitted by Additional District and Sessions Judge, Court No.3, Ballia. In the aforesaid report, District Judge, Ballia has specifically mentioned that despite best efforts, reconstruction of record of Sessions Trial no.245 of 1980 is not possible.

8. In support of his observation, showing his inability to reconstruct the record, District Judge, Ballia had appended enquiry report dated 06.07.2016 as mentioned above, which reveals that learned Additional District and Sessions Judge, Ballia had made mammoth effort for reconstruction of the record relating to Sessions Trial No.245 of 1980 from all possible corners i.e. Office of District Government Advocate (Criminal), Office of Senior Superintendent of Police, Ballia, Office of concerned police station, and Record Room but all his efforts proved to be futile. He had also summoned accused persons namely Babban Nonia (appellant no.3) and Moti Ram (appellant no.6), who had stated that their counsel, in trial Court, had already died and all record relating to their case was with them and they did not possess any document relating to the case. After enquiry, it was found that first informant Ram Nagina Mishra (PW-2) had also died.

9. In the light of enquiry at the ground level, Additional District and Sessions Judge, Ballia had submitted a detailed report dated 06.07.2016 that no record/document could be found relating to Sessions Trial No.245 of 1980, therefore, reconstruction of record is not possible. In the light of aforesaid enquiry report dated 06.07.2016, District Judge, Ballia had also made his observation to the same effect.

10. Learned counsel for the appellants has submitted that since the record of Court below is missing and neither the reconstruction of record is possible nor retrial relating to present matter is possible, in the light of the fact that most of the accused persons had died, hence, instant appeal may be allowed and accused-appellants, who are alive, may kindly be acquitted. In support of his contention, learned counsel for the appellants has relied on Hon'ble Supreme Court's case passed in

State of U.P. vs. Abhai Raj Singh and another, AIR 2004 SC 3235.

11. Learned A.G.A. has nodded the proposition of law, as submitted by learned counsel for the appellants, relating to the matter where record of trial Court is missing, and proper adjudication of the accusation against accused persons is not possible as required under Sections 385 and 386 of Cr.P.C.

12. In this view of the matter, the vexed question arose for consideration in this appeal is as to whether appeal can be allowed and accused-appellants can be acquitted for want of original record of Sessions Trial.

13. I have carefully considered the submissions advanced on behalf of both the parties and also gone through the relevant provisions of law.

14. After being convicted it is right of an accused to assail the impugned judgment and order in appeal and point out the ambiguity, perversity, illegality, irregularity and infirmity in the order and proceeding of the trial Court to prove his innocence, which is not possible in absence of original record of the Sessions Trial. As such, original record of Sessions Trial is most essential before the Appellate Court to examine the legality of conviction of accused-appellant

15. The procedure qua legitimate right of an accused to challenge the impugned judgment and order of conviction and prove his innocence is provided under Sections 385 and 386 Cr.P.C. Aforesaid sections fall under Chapter XXIX of Cr.P.C. which is captioned as "Appeals". Sections 385 and 386 Cr.P.C. deals with "Procedure for hearing appeals not dismissed summarily" and "Powers of the Appellate Court", respectively, which read as follows :

"385. Procedure for hearing appeals not dismissed summarily.-(1) *If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given-*

(i) to the appellant or his pleader;

(ii) to such officer as the State Government may appoint in this behalf;

(iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;

(iv) if the appeal is under Section 377 or Section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not ready available in that Court, and hear the parties:

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground.

386. Powers of the Appellate Court.*-After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-*

(a) ***

(b) ***
(c) ***
(d) ***
(e) ***"

16. As per procedure embodied under Section 385 Cr.P.C., Appellate Court, in case not dismissing the appeal summarily, is entrusted with the duty to issue notice to persons as mentioned in several categories of Section 385 (1) Cr.P.C. Appellate Court has also been entrusted to call for the record of Court below with one exception, where the appeal is only to the extent or the legality of sentence, it may dispose of an appeal without summoning the record. Further, in defining power of the Appellate Court, Section 386 Cr.P.C. enumerates that Appellate Court is empowered to reverse the finding of the Court below or uphold the sentence or acquit the accused and, in exercising its power, Appellate Court has to go through the record of Court below and submissions made by the appellant and Public Prosecutor. In this view of the matter, Appellate Court cannot properly exercise its jurisdiction of acquittal, reversal or upholding the sentence without perusing the record of Sessions Trial.

17. Dealing with the matter wherein record of Court below is missing and reconstruction is not possible, even retrial of the case has also become difficult owing to so many reasons, Hon'ble Supreme Court has enumerated the law relating to these matter and expounded that in such eventuality, matter should be closed. In **State of U.P. Vs Abhai Raj Singh (supra)**, Hon'ble Supreme Court has observed as under :

"The powers of the appellate court when dealing with an appeal from a conviction are delineated in sub-clauses (I), (ii) and (iii) of clause (b) of section 386 of the code. The appellate court is empowered by section 386 to reverse the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence. The appellate court of competent jurisdiction subordinate to the appellate court or committed for trial . For exercise of the powers in cases of first two categories, obviously a finding on merits after consideration of the materials on record is imperative. Where that is not possible because of circumstances like the case at hand i.e. destruction of the records , the proper course for the appellate court would be to direct retrial after reconstruction of the records the same was impossible. If on the other hand, from the copies available with the prosecuting agency or the defence and/or their respective counsel, reconstruction is possible to be made, the said course indicated in sub-clause (i) and (ii). After perusal of the records and hearing the appellant's pleader and Public Prosecutor under section 377 or 378, the exercise of power as indicated above can be resorted to. As was observed in Bani Singh v. State of U.P. (1996) 4 SCC 720 . The plain language of section 385 makes it clear that if the appellate court does not consider the appeal fit for summary dismissal, it must call for the records and section 386 mandates that after record is received, the appellate court may dispose of the appeal after hearing as indicated.

A question would further arise as to what happens when reconstruction is not possible. Section 386 empowers the appellate court to order that the case be committed for trial and this power is not circumscribed to cases exclusively triable

by the Court of Session.(See State of U.P. v. Shankar AIR 1962 SC1154).

It has been the consistent view taken by several High court that when records are destroyed by fire or on account of natural or unnatural calamities reconstruction should be ordered. In Queen Empress v. Khimat Singh 1889 AWN 55 the view taken was that the provisions of section 423(1) of the criminal procedure code,1898(in short " the old code") made it obligatory for the court to obtain and examine the record at the time of hearing. When it was not possible to do so, the only available course was a direction for reconstruction. The said view was reiterated more than six decades back in Sevuaperumal, Re AIR 1943 Mad 391(2). The view has been reiterated by several high Courts as well,even thereafter.

The High court did not keep the relevant aspects and consideration in view and came to the abrupt conclusion that reconstruction was not possible merely because there was no response from the Session Judge. The order for reconstruction was 1-11-1993 and the judgement of the high court is in Criminal Appeal No. 1970 of 1979 dated 25-2-1994. the order was followed in Criminal Appeal No. 1962 of 1979 disposed of on 16-9-1995. it is not clear as to why the high court did not require the session court to furnish the information about reconstruction of records; and/or itself take initiative by issuing positive directions as to the manner, method and nature of attempts,efforts and exercise to be undertaken to effectively achieve the purpose in the best interests of justice and to avoid ultimately any miscarriage of justice resulting from any lapse,inaction or inappropriate or perfunctory action,in this regard; particularly when no action was taken by the high court to pass necessary orders for about a decade when it received information about destruction of record. The course adopted by the high court, if approved, would encourage dubious persons and detractors of justice by allowing undeserved premium to violators of law by acting hand in glove with those anti-social elements coming to hold sway,behind the screen, in the ordinary and normal course of justice.

10. We , therefore, set aside the order of the high court and remit the matter back for fresh consideration. It is to be noted at this juncture that one of the respondents i.e. Om pal has died during the pendency of the appeal before this court .The High court shall direct reconstruction of the records within a period of six months from the date of receipt of our judgment from all available or possible sources with the assistance of the prosecuting agency as well as the defending parties and their respective counsel. If it is possible to have the records reonstructed to enable the high court itself to hear and dispose of the appeals in the manner envisaged under section 386 of the code,rehear the appeals and dispose of the same, on their own merits and in ordering retrial interest of justice could be better served-adopt that course. If only reconstruction is not possible to facilitate the high court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by the sessions court is also rendered impossible due to loss of vitally important basic records- in that case and situation only, the direction given in the impugned judgement shall operate and the matter shall stand closed. The appeals are accordingly disposed of."

18. In **Sita Ram and others vs. State, 1981 Cri.L.J. 65,** it is held that appellant has a right to show in the appeal

that the decision arrived at by the Court below, was not supported by the evidence on record and in absence of original record, it is not possible to examine the legality of the judgment in question that as to whether same is supported by the evidence available on record and order of conviction passed and sentence imposed is legally justified and proper. Relevant paragraphs 5, 6, 7, 8, 9, 10, 11 of aforesaid judgment are reproduced herein below :

"5. Since it is incumbent on the appellate court to send for the record and peruse it and hear the counsel for the parties before it can exercise its power under Section 386, the present appeal cannot possibly be heard and decided on merit.

6. The appellants have a right to show to this Court that the decision arrived at by the court below was not supported by the evidence on record. They can legitimately contend that material evidence and circumstances have either been ignored or incorrectly appraised. This right cannot be denied to the appellants. In the absence of the original record it is not possible for us to arrive at a decision that the impugned judgment is supported by the evidence on record and the order of conviction passed and the sentence imposed on the appellants is legally justified and proper.

7. In such a situation two courses are open to the Court; (1) to order retrial after setting aside the impugned judgment; or (2) to acquit the appellants. A situation like the present one arose before Courts earlier also. In re Sevugaperumal AIR 1943 Mad 391 (2) : 44 Cri LJ 611 the accused were convicted under Sections 457, 395 and 397 Penal Code, and sentenced to various terms of imprisonment. Following the decision of this Court in Queen-Empress v. Khimat Singh 1889 All WN 55 (supra) the Madras High Court ordered retrial after setting aside the convictions. From the reports of these decisions it is not clear how much time had elapsed between the incident and the date when retrial was directed. In the Madras case the impugned order of the trial court was dated 22-6-1942. The appeal was filed on 6-8-1942 and the original record was destroyed by fire on 17-8-1942. The appeal came up for hearing on 5-11-1942. It may be that the time lapse between the date of the incident and the date of decision by the appellate court was not long. Moreover the Public Prosecutor conceded in those cases that no other course was possible under the circumstances.

8. In Madhusudhan v. State 1963 (2) Cri LJ 103 (Orissa) the appellant was convicted under Section 302, I.P.C. and sentenced to imprisonment for life by an order of the Sessions Judge dated 17-4-1962. The incident had taken place on 29-3-1962. The appeal came up for hearing on 12-12-1962. The appellate court directed retrial of the case. It may be noted that the order for retrial was passed well within two years of the incident.

9. A similar situation arose before this Court in Zillar v. State 1956 All WR (HC) 613. In this case the appellants were convicted by the Sessions Judge on 21-1-1951 under Sections 304 and 148, I.P.C. in respect of the offence committed on 2-4-1950. The appeal was filed in this Court on 24-1-1951 which came up for hearing in April 1956 when it was brought to the notice of the Court that the entire record of the case had been lost. Attempt was made to reconstruct the record but it proved futile. This Court refused to direct retrial of the case on the reasoning that the case related to an offence which was committed more than six years ago and five years had

elapsed since the judgment of the Sessions Judge convicting the appellants was passed. The court took into account the further fact that even the copies of the F.I.R. and the statements of witnesses taken under Section 161 Cr. P.C. were not available as they had been weeded out in the ordinary course.

10. A Division Bench of this Court in Criminal Appeal No. 3235 of 1971 (Jit Narain v. State) decided on 15-3-1978 in similar circumstances allowed the appeal and acquitted the appellants instead of directing their retrial.

11. On a careful consideration of the relevant statutory provisions and the principle 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 appellant 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 lag between the date of the incident and the date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the case since witnesses normally would be available and it would not cause undue strain on the memory of witnesses. Copies of F.I.R., statements of witnesses under Section 161, Cr. P.C. reports of medical examination 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 F.I.R. and statements of 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 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 hardship to the accused and waste of time, money and energy of the State.

In the present case the incident took place on 23-8-1971. The appellants were convicted by the Sessions Court by an order dated 18-11-1974. The appeal has been pending in this Court for about six years. We are informed that copies of the First Information Report and statements of witnesses recorded under Section 161, Cr. P.C. have been weeded out and are not available. All attempts to reconstruct the record have proved futile. In such a situation it is not permissible for us to affirm the order of conviction of the appellants, since in the absence of the record we cannot possibly feel satisfied that the appellants have been rightly convicted. Due to lapse of time and non-availability of papers like First Information Report, statements under Section 161, Criminal Procedure Code etc, we do not consider it either just or expedient to order retrial of the case."

19. Similar view was expressed by a Division Bench of this Court in **Criminal**

Appeal No.522 of 1980 (Bachchi Lal and others vs. State of U.P.) decided on 11.02.2020.

20. I have examined the matter in the light of the expressed view expounded by Hon'ble Supreme Court as well as Division Bench of this Court as mentioned above. It is apparent that in deciding appeal at the time of examining legality of judgment and order passed by Court below, Appellate Court is required to peruse the record of Sessions Trial to ascertain as to whether evidence which have been relied on by the trial Court in convicting or acquitting the accused, has properly been appreciated or not.

21. In the present matter, as discussed above, sincere effort had been made by the concerned authorities of Subordinate Court qua reconstruction of original record and after proper and elaborate enquiry made by the concerned Additional District and Sessions Judge, a report had been submitted by him that reconstruction of original record of Sessions Trial is not possible, inasmuch as, any paper or document relating to Sessions Trial No.245 of 1980, despite sincere efforts, could not be collected or procured from any possible corner, from where documents were expected to be available. So far as retrial of the case is concerned, after examining the matter in the light of report submitted by Subordinate Court and perusal of record, I am of the opinion that in the present scenario retrial of the instant matter is not possible. Out of eight accused, who had been convicted by impugned judgment and order dated 26.03.1982, five had already died and one accused namely Ram Vachan had already completed his sentence and released from jail. Here, it is made clear, as discussed above, that two accused namely Ram Vachan and Mani Ram had filed Criminal Appeal No.1131 of 1982, which was dismissed as infructuous vide order dated 06.05.2013 and remaining six accused persons have filed the instant criminal appeal. As per enquiry report of Additional District and Sessions Judge, Ballia, first informant Ram Nagina Mishra (PW-2) had also died years back.

22. In the light of aforesaid fact, that many of the persons relating to case including the accused and first informant had died, it is quite possible that many of the witnesses must have also died. Therefore, in the present scenario, taking into account the death of the parties and non availability of the documents, retrial in the present case is almost impossible. Time passed in the matter is also relevant to be considered. Initially incident took place long back in March, 1980 and impugned judgment and order was passed in March, 1982. Thereafter, appeal was filed and the same was admitted vide order dated 04.05.1982. Since, the date of occurrence up to till date, about 40 years had passed and at this stage issuing direction for retrial would be an exercise in futility, therefore, in the eventuality that record of Sessions Trial is missing, no fruitful purpose would be served in protracting the appeal.

23. In the light of law laid down by Hon'ble Supreme Court and provisions of law wherein record of Sessions Trial is essentially required to be perused before deciding an appeal, but same is neither traceable nor reconstruction of aforesaid record is possible nor even retrial of the case is

possible, I am of the considered view that present appeal should be allowed and impugned judgment and order dated 26.03.1982 passed by Sessions Court should be quashed and surviving appellants should be acquitted.

24. Resultantly, present appeal is allowed. Impugned judgment and order dated 26.03.1982 passed in Sessions Trial No.245 of 1980 is hereby quashed so far it relates to conviction and sentence to appellant no.3, Babban Nonia and appellant no.6, Moti Ram.

25. A copy of this order along with lower Court record be sent to concerned Court forthwith for information and immediate compliance.

(2021)01ILR A59
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.01.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1536 of 2003

Smt. Chameli & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Subodh K. Shukla

Counsel for the Opposite Party:
Govt. Advocate

Criminal Law - Code of Criminal Procedure, 1973- Section 154- First Information Report- Delay in lodging- It is settled principle of law that only on the ground that F.I.R. was lodged by delay, the prosecution case cannot be thrown out because no time limit has been prescribed for lodging the F.I.R. either in Evidence Act or in the Code. The delay, caused in lodging the F.I.R., depends upon facts and circumstances of the each case and if such delay is natural and reasonable, it cannot be treated fatal to the prosecution story. (P.W.-1) has specifically stated that he had requested the concerned police at the time of inquest proceeding to take action against the appellants and after post-mortem examination, also had gone to concerned police station to lodge the F.I.R. but he was expelled from the concerned police station and no F.I.R. was lodged. Thereafter he had sent the written information (Ext.-Ka-1) dated 27.04.1998 to Hon'ble Chief Minsiter, U.P.

There is no uniform proposition of law that delay in lodging FIR will be invariably fatal for the case of the prosecution.The effect of delay depends on the facts and circumstances of each case- Delay is not fatal where the same is reasonable and sufficiently explained.

Criminal Law - Indian Penal Code, 1860- Section 498-A - 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. Although, P.W.-1 and P.W.-2 failed to lodge report at any police station but it cannot be said that they failed to protest the torture and harassment committed by the appellants.

Merely because the parents of the deceased failed to make any complaint before the authorities cannot lead to the inference that the deceased was not subjected to cruelty.

Criminal Law - Indian Penal Code, 1860- Section 306- The offence of Section 306 I.P.C. is lesser and different from the offence of dowry death. For this offence only abetment which leads to commitment of suicide of a person is required to be proved and if such suicide is done by women within seven years of her

marriage, due to cruelty caused by her husband or any relation of her husband, the Court may presume the offence of abetment of suicide, in view of statutory presumption as provided under Section 113-A of Evidence Act- The appellants have failed to lead any satisfactory evidence to rebut the statutory presumption of Section 113-A of Evidence Act.

The presumption under Section 113-A of the Evidence Act may be available to the Court where the wife commits suicide within seven years of her marriage as a result of cruelty and the said act of cruelty will constitute abetment as defined under Section 107 of the IPC. However, the presumption under Section 113-A of the Evidence Act is rebuttable and failure to controvert the same will lead to the Court taking an adverse inference against the accused.

Criminal Law - Indian Penal Code, 1860- Section 306- Section 498-A- The appellants-Durg Vijay and Chameli had categorically stated that they were leaving separately from their son - The prosecution has not made any specific allegation and made only general allegation, for either demand of dowry or harassment to deceased, against the appellant-Durg Vijay and Chameli. In view of above, if the said occurrence was taken place inside the house of appellant-Dinesh Kumar where his presence was most probable, looking into the whole facts and circumstances of this case, the prosecution evidence is not reliable and trustworthy so far it relates to the appellants-Durg Vijay and Chameli and consequently the prosecution has failed to prove its case beyond reasonable doubt against the appellants-Durg Vijay and Chameli and they are liable to be acquitted, whereas it has successfully proved its case beyond reasonable doubt against the appellant-Dinesh Kumar (husband of the deceased).

Where only general allegations of demand of dowry have been made against the in-laws of the deceased by the prosecution witnesses and they have adopted a specific plea of living separately from her, then they will be entitled to be acquitted.(Para 27, 29, 30, 32, 34, 35, 36, 39, 42)

Appeal partly allowed. (E-2)

Judgements/ Case law cited-

1. Kishori Lal Vs St. of M.P., 2007 (58) ACC 1069,

2. Mangat Ram Vs St. Of Har. AIR 2014 SC 1782 and

3. Heera Lal & anr. Vs St. of Raj., 2017 (101) ACC 265

Judgements / Case law relied upon:-

1. Trimukh Maroti Kirkan Vs St. of Maha. (2006) 10 SCC 681

2. Tara Singh & ors. Vs St. of Punj., AIR 1991 SC 63

3. Preet Pal Singh Vs St. of U.P., AIR 2020 SC 3995

4. St. of Punj. Vs Iqbal Singh & ors., 1991 SCC (Crl.) 513

5. Kans Raj Vs St. of Punj., (2000) 5 SCC 207

6. Naresh Kumar Vs St. of Har. (2015) 1 SCC 797

7. St. of M.P. Vs Saleem @ Chamaru, AIR 2005 SC 3996

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

1. This appeal has been preferred under Section 374 (2) Code of Criminal Procedure, 1973 (hereinafter referred to as Code) by the appellants-Smt. Chameli, Durg Vijay and Dinesh Kumar (hereinafter referred to as appellants) against the

judgment and order dated 19.09.2003, passed by Additional Sessions Judge, Fast Track Court-I, Hardoi in Sessions Trial No.1099/98, arising out of Case Crime No.74/98, Police Station-Tadiyawan, District-Hardoi, whereby the appellants have been convicted and sentenced for seven years rigorous imprisonment with fine of Rs.2,000/- for offence under Section 306 I.P.C. and for one year rigorous imprisonment with fine of Rs.1,000/- for the offence under Section 498A I.P.C.. It has further been directed that the appellants will have to undergo six months simple imprisonment in default of payment of fine for offence under Section 306 I.P.C. and three months simple imprisonment in default of payment of fine for the offence under Section 498-A I.P.C.. All the sentences shall run concurrently.

2. The prosecution case, in brief, is that the deceased-Guddi Devi (hereinafter referred to as deceased) was married with the appellant-Dinesh Kumar in the year 1994. The appellants-Durg Vijay and Smt. Chameli are the parents of the appellant-Dinesh Kumar. On 25.04.1998, the deceased-Guddi Devi died due to hanging. The appellant-Durg Vijay, who was Chaukidar of his village-Mugalipur, informed the said incident to concerned police of Police Station-Tadiyawan, District-Hardoi. Sri Krishna Bajpayee-Nayab Tehsildar (Executive Magistrate), on the direction of concerned Sub Divisional Magistrate, rushed to the place of occurrence on 26.04.1998, inspected the dead body of the deceased, conducted inquest proceeding, prepared inquest report (Ext.-Ka-6) and other document required for post-mortem examination, sealed the dead body and sent it for post-mortem examination to District Hospital, Hardoi.

3. Nanke (P.W.-1), brother of the deceased, made a written complaint dated 27.04.1998 to District Magistrate, Hardoi, endorsing its copy (Ext.-Ka-1) to Superintendent of Police and another copy (Ext.-Ka-3) to Chief Minister, U.P., alleging therein that his sister was married four years ago with the appellant-Dinesh Kumar and in her marriage, sufficient dowry was given but the appellants were demanding a she-buffalo and transistor in dowry which could not be given by them due to poverty. It was further alleged in the said report that due to non-fulfillment of said dowry, the appellants used to torture his sister, who (deceased) used to complain him. It is further alleged that on 29.04.1998, there was Mundon Ceremony of his son-Pinku and in order to get back (Bidai) of his sister, he (P.W.-1) had gone to his sister's matrimonial house (Sasural) on 26.04.1998 and when he reached there, he found the dead body of his sister, kept in room. It was further alleged that he narrated the whole story to the police Inspector, present on the spot, who assured him that necessary steps were being taken and also took his signature on a paper. It was further alleged in the said information that after post-mortem of his sister, he again tried to lodge an F.I.R. but failed to lodge it as the appellant-Durg Vijay, who was a Chaukidar, was having better relationship with the concerned local police. It was further alleged that his sister was hanged by the appellants, so necessary action be taken against them.

4. A criminal case, bearing Case Crime No.74/98, under Sections-498-A, 304-B I.P.C. and ¾ D.P. Act, was registered against the appellants and chik report (Ext.-Ka-12) and G.D. report (Ext.-Ka-13) was prepared by Constable-Mohd. Rashid Khan (P.W.-7). Investigation of the case was handed over to Dy. S. P. A. K. Vaidya (P.W.-9), who reached at the place of occurrence and after its inspection, prepared site plan (Ext.-Ka-14), arrested the appellants and recorded their statement

as well as of other witnesses. After the transfer of P.W.-9, the investigation was handed over to Dy. S.P. Pradeep Gupta (P.W.-5), who concluded the investigation and filed a charge sheet (Ext.-Ka-5) against the appellants under Sections-498-A, 304-B I.P.C. & ¾ of D.P. Act before the concerned Magistrate, who took the cognizance and since the offence was exclusively triable by the Court of Sessions, after providing the copy of relevant police papers as required under Section 207 of the Code, committed the case to the Court of Sessions, Hardoi, for trial.

5. The learned trial Court, after hearing the counsel for both the parties, framed charges for the offence under Sections 498-A, 304-B & ¾ D.P. Act against the appellants from which they denied and claimed for trial.

6. The prosecution, in order to prove its case, examined Nanhake (P.W.-1), Smt. Shanti Devi (P.W.-2), Prithvipal (P.W.-3), Dr. B. B. Tripathi (P.W.-4), Dy. S. P. Pradeep Gupta (P.W.-5), Executive Magistrate, Sri Krishna Bajpayee (P.W.-6), Constable Mohd. Rashid Khan (P.W.-7), S. I. Nishanath Pandey (P.W.-8) and Dy. S. P. A. K. Vaidya (P.W.-9) wherein Nanhake (P.W.-1), Smt. Shanti Devi (P.W.-2) and Prithvi Lal (P.W.-3) are witnesses of fact whereas rest are formal witnesses.

7. After conclusion of the prosecution evidence, the statements of the appellants were recorded under Section 313 of Code wherein they denied the prosecution allegations and stated that they were innocent and had been falsely implicated. The appellant-Dinesh Kumar stated that he was married with the deceased-Guddi Devi eight years ago and neither any dowry was demanded nor any harassment was given to the deceased. He further stated that the deceased was happily residing with him, a girl was born to deceased who had died 15-20 days prior to occurrence and due to which, she was shocked. He further stated that the deceased was suffering abdominal pain and her treatment was going on but she could not recover from that pain. He further stated that due to shock of death of her daughter as well as of her ailment, the deceased had committed suicide on 25.04.1998 at about 2:00 p.m. and information whereof had been given by his father, appellant-Durg Vijay, at 6:30 a.m. on 26.04.1998 at Police Station-Tadiyawan. He further stated that on the instigation of some person, who were inimical to the appellant, the informant (P.W.-1), lodged a false report against the appellants whereas his father-Durg Vijay and his mother-Smt. Chameli were residing separately from him.

8. The appellants in their defence examined Bharat (D.W.-1) to rebut the prosecution story.

9. After conclusion of trial, learned trial Court convicted and sentenced the appellants as above by the impugned judgment. Aggrieved by the above said judgment, the appellants have preferred this appeal.

10. Heard Sri Ashok Kumar Verma, learned Advocate holding brief of Sri Subodh K. Shukla, learned counsel for the appellants and Sri G. D. Bhatt, learned A.G.A. for the State.

11. Learned counsel for the appellants has submitted that the appellants are innocent and have been falsely implicated in this case. Learned counsel further submitted that the allegations for demand

of dowry and dowry death have been found false by the trial Court. Learned counsel further submitted that no complaint was made against the appellants, earlier to this occurrence and deceased had committed suicide in frustration as she was ailing abdominal disease. Learned counsel further submitted that the death information of the deceased was sent to the informant and his family members and informant was also present at the time of inquest proceeding ; he did not make any complaint to the Officer (P.W.-6). Learned counsel further submitted that after the cremation of the deceased in order to harass and extort money, informant, brother of the deceased, sent a written report by delay of three days which was lodged after seven days of the occurrence. Learned counsel further submitted that prosecution has failed to produce any explanation for causing such delay in lodging the F.I.R. Learned counsel further submitted that the appellants-Smt. Chameli and Durg Vijay are parents-in-law of the deceased, who are more than sixty years and they were living separately from the appellant-Dinesh Kumar, husband of the deceased, but the trial Court did not consider and discuss the evidence available on record and without application of proper mind, passed the impugned judgment and order, which is liable to be set aside.

12. Learned counsel for the appellants has placed reliance on the judgment delivered by Hon'ble the Supreme Court in the case of ***Kishori Lal vs. State of Madhya Pradesh, 2007 (58) ACC 1069, K. S. Radhakrishnan and Vikramjit Sen, AIR 2014 SC 1782*** and ***Heera Lal and another vs. State of Rajasthan, 2017 (101) ACC 265.***

13. Per contra, learned A.G.A. vehemently opposed and has submitted that the deceased had died by hanging inside the house of the appellants within seven years of her marriage and the appellants have failed to produce any proper explanation as to why the deceased had committed suicide as alleged by the appellants. Learned A.G.A. further submitted that there is no delay in lodging the F.I.R. because the local police failed to lodge the F.I.R. on the request of P.W.-1 as the appellant-Durg Vijay was Chaukidar of his village. Learned A.G.A. submitted that merely on the ground that informant was present at the time of inquest proceeding and did not make any complaint at that time, it cannot be said that the death of the deceased was natural. Learned A.G.A. further submitted that there is no illegality in the impugned judgment and order and the appeal is liable to be dismissed.

14. I have considered the rival submissions made by learned counsel for the appellants and perused the record.

15. In ***Kishori Lal vs. State of Madhya Prasad, 2007 (58) ACC 1069***, Hon'ble Supreme Court held that where the deceased had committed suicide on 31.08.1982 and the prosecution had failed to adduce any evidence that the appellant, who was husband of the deceased, had induced or abetted her wife to commit suicide and also held that the mere fact that the husband treated the deceased-wife with cruelty is not enough to commit her suicide.

16. In ***Mangat Ram vs. State of Haryana, AIR 2014 SC 1782,*** where after few months of the marriage of the deceased, on 15.09.1993, according to prosecution, the appellant sprinkled kerosene oil on the body of the deceased and set her on fire, having failed to meet

the dowry demand. On hearing the hue and cry, neighbours assembled and took her to Civil Hospital where she died on 17.09.1993, Hon'ble Supreme Court found that failure of the husband to take the deceased to his place of posting is not amount to wilful conduct which is of such a nature as is likely to drive the woman to commit suicide. Hon'ble the Supreme Court also held as under :

"23. Explanation to Section 498-A gives the meaning of "cruelty', which consists of two clauses. To attract Section 498-A, the prosecution has to establish the wilful conduct on the part of the accused and that conduct is of such a nature as is likely to drive the wife to commit suicide. We fail to see how the failure to take one's wife to his place of posting, would amount to a wilful conduct of such a nature which is likely to drive a woman to commit suicide. We fail to see how a married woman left at the parental home by the husband would by itself amount to a wilful conduct to fall within the expression of "cruelty', especially when the husband is having such a job for which he has to be away at the place of his posting. We also fail to see how a wife left in a village life "in the company of rustic persons", borrowing language used by the trial Court, would amount to wilful conduct of such a nature to fall within the expression of "cruelty'. In our view, both the trial Court as well as the High Court have completely misunderstood the scope of Section 498-A IPC read with its explanation and we are clearly of the view that no offence under Section 498-A has been made out against the accused appellant."

17. In ***Heera Lal and another vs. State of Rajasthan, 2017 (101) ACC 265,*** where the prosecution had failed to prove the charge of Section 498-A I.P.C. and the appellants were acquitted for the said charge, Hon'ble Supreme Court has held that the appellant could not be convicted for the offence under Section 306 I.P.C.

18. Coming to the facts of the present case, the deceased had died on 25.04.1998 within seven years of her marriage for demand of dowry and cruelty, inside the house of the appellants and the appellants have been convicted for offence under Sections 498-A and 306 I.P.C. The offence of present case was committed after insertion of Section 113-A and 113-B of Indian Evidence Act, 1872 (in short Evidence Act). The facts and circumstances of the case in ***Kishori Lal (supra), Mangat Ram (supra)*** and ***Heera Lal (supra)*** relied by the appellant are different to the facts of this case, hence, no benefit can be given to the appellants.

19. The deceased had died within seven years of her marriage, inside the house of the appellants where her death was unnatural and the appellants have been convicted under Sections-498-A I.P.C. and 306 I.P.C., the provisions of 498-A, 306 I.P.C. and 113-A of the Indian Evidence Act are relevant, which are as under :

***"Section-498-A I.P.C.**. 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 purposes 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 is on account of failure by her or any person related to her to meet such demand."

*"**Section-306 I.P.C.** If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

*"**Section-113A Evidence Act.** Presumption as to abetment of suicide by a married woman.- when the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband and subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband."*

20. It is also relevant to note that in most of the cases the death of married woman, for want of dowry, 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. So the prosecution cannot be blamed to produce such evidence which is not in the possession and knowledge of prosecution witnesses.

21. 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)

22. Coming to the facts of this case, Nanhake (P.W.-1), brother of the deceased, has stated that his sister-Guddi Devi was married to appellant-Dinesh Kumar on 06.05.1993 ; the appellant-Durg Vijay and the appellant-Chameli were parents-in-law (saas and sasur) of the deceased. He further stated that at the time of marriage, he had given articles of worth Rs.25,000/- and some money in the dowry but the appellant-Dinesh Kumar had demanded she-buffalo and transistor as additional dowry to which he (P.W.-1) assured that he would manage the said dowry in future. He further stated that due to poverty, he could not manage the said dowry, due to which, the appellants used to beat and torture his sister. He further stated that whenever his sister (deceased) came his house, she used to complain and had said that if she-buffalo and transistor were not given to them, they (appellants) would kill her. He further stated that on 29.04.1998, there was Mundon Ceremony of his son and in order to get back (Bidai) his sister, he had gone to the house of the appellants and reached there at 7:00 a.m. on 26.04.1998. He further stated as he entered inside the house of the appellants, he saw that the dead body was lying in room and police were also present there. Stating that after seeing the dead body of his sister, he began to cry bitterly and asked the said police personnel, present there, to lodge a report, who assured him not to worry as legal action was being taken. He further stated that "darogaji" got his signature made on paper forcibly, hurled abuses and said that how he (P.W.-1) dare to implicate his chaukidar *("police walo se kaha ki meri report chal kar likh lijiye to unhone kaha ki wahi sab kaam kar raha hoon tum pareshan na ho | Kagaj number 10 a/4 gawah ne dekhkar kaha ki is par mere daskhkat darog ji ne jabardasti banbaye the aur gali dekar kaha ki mere chaukidar ko phasaonge").*

23. Stating that the appellant-Durg Vijay was Chaukidar of his village, he

further stated that the dead body was sealed and it was sent for post-mortem. Stating further that he had gone to the hospital, he further stated that after post-mortem, the dead body of the deceased was handed over to the appellant-Dinesh Kumar. Stating that again he had gone to lodge the first information report at Police Station-Tandiyawan but *"daroga ji"* chased him therefore he fled away. Stating further that on 27.04.1998, he had made complaint to District Magistrate, Hardoi, Superintendent of Police, Hardoi and Hon'ble Chief Minister, U. P., he further stated that he had also sent a copy (Ext.-Ka-4) of the said complaint by Fax to Hon'ble Chief Minister, U.P. whereupon a direction was made to lodge the F.I.R.

24. Shanti Devi (P.W.-2), mother of the deceased has also stated that her daughter (Guddi Devi) was married to the appellant-Dinesh Kumar, four years prior to her death and the appellants-Durg Vijay and Chameli were parents-in-law (Sas and Sasur). Stating that the deceased was not literate, she further stated that at the time of her marriage, she had given sufficient dowry according to her capacity but in Kalewa (afternoon high tea in marriage ceremony) there was demand of she-buffalo and transistor to which she had assured to be given in future. She further stated that when the deceased returned back to her matrimonial house, she was very upset and upon query, she told that her in-laws were demanding she-buffalo and transistor as a dowry. She further stated that within two years of marriage, the deceased had gone so many times to her matrimonial house but she continuously complained regarding the torture and harassment, caused by the appellants, due to demand of dowry. She further stated that for 1-1/2 years, she did not send her daughter to her matrimonial home and just before her death, the appellant-Dinesh Kumar took away her to his house. She further stated that a girl also took birth to deceased, who died within one month. She further stated that her son (P.W.-1) had gone to invite the deceased to attend the Mundon Ceremony of his son but saw that the deceased had died. She also stated that after getting information, she had also gone to the matrimonial home of the deceased and saw her dead body.

25. Prithvi Pal (P.W.-3), co-villager of P.W.-1, stating that inquest proceeding was conducted in his presence and in presence of P.W.-1, has further stated that deceased Guddi Devi used to complain the demand of she-buffalo and transistor by appellant and harassment and torture caused to her by appellant.

26. So far as the submission made by learned counsel for the appellants that after the death of deceased, the information was sent to the family members of the informant and in presence of the informant, the inquest proceeding of the deceased was conducted but he did not make any complaint either to the police who prepared the inquest report or lodged the F.I.R. at that day and in order to extort money, he filed false report after three days of the occurrence which was lodged after seven days and no explanation for such huge delay was given, is concerned, admittedly, the deceased had died inside the house of the appellants. In inquest report (Ext.-Ka-6) it has been specifically mentioned that the information of the death of the deceased was given to the concerned police station on 26.04.1998 at 6:30 a.m. by the appellant-Durg Vijay and her death was caused by hanging. It is further mentioned in the said inquest report that inquest

proceeding was concluded at about 15:30 p.m. on 26.04.1998 and thereafter dead body of the deceased was sent for post-mortem. According to Dr. B. B. Tripathi (P.W.-4) the post-mortem of the deceased was conducted by him at about 5:00 p.m. on 26.04.1998. It means that after post-mortem examination the dead body would have been handed over to the appellants and thereafter her cremation was taken place either in the night of 26.04.1998 or on 27.04.1998. The appellants, in their statements recorded under Section 313 of the Code, have not stated as to when dead body was received by them after the post-mortem examination or deceased was cremated by them. From perusal of the F.I.R. (Ext.-Ka-1), it transpires that it was prepared on 27.04.1998 and was sent to District Magistrate, Hardoi, Superintendent of Police, Hardoi and also to Chief Minister, U.P. wherein it was specifically mentioned that informant was given assurance by the concerned police at the time of inquest proceeding i.e. after occurrence the legal action would be taken against the appellants and when no legal action was taken, he (P.W.-1) went to concerned police station and requested to lodge the F.I.R. but he was expelled from there as the appellant-Durg Vijay was the Chaukidar of his village and was having good relations with concerned police.

27. It is settled principle of law that only on the ground that F.I.R. was lodged by delay, the prosecution case cannot be thrown out because no time limit has been prescribed for lodging the F.I.R. either in Evidence Act or in the Code. The delay, caused in lodging the F.I.R., depends upon facts and circumstances of the each case and if such delay is natural and reasonable, it cannot be treated fatal to the prosecution story.

28. Hon'ble Supreme Court, on delay caused in lodging the F.I.R., in ***Tara Singh and others vs. State of Punjab, AIR 1991 SC 63*** has held as under :-

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the" report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case."

29. Coming to the facts of this case again, Nanhake (P.W.-1) has specifically

stated that he had requested the concerned police at the time of inquest proceeding to take action against the appellants and after post-mortem examination, also had gone to concerned police station to lodge the F.I.R. but he was expelled from the concerned police station and no F.I.R. was lodged. Thereafter he had sent the written information (Ext.-Ka-1) dated 27.04.1998 to Hon'ble Chief Minsiter, U.P.. This witness was cross-examined by the defence counsel on the point of delay but nothing had come out in his cross-examination to create any doubt in his statement whereby it can be shown that such delay was caused deliberately to falsely implicate the appellants in this case. In my view there is no delay in lodging the F.I.R. and if any delay is caused, the same is well explained and is not fatal to the prosecution case. Hence, there is no force in the submission of learned counsel for the appellants in this regard.

30. So far as the submission of learned counsel for the appellants that no complaint of demand of dowry or any cruelty was made by informant earlier to the occurrence, hence, the prosecution story, that the deceased was being harassed and tortured for demand of dowry since four years is not trustworthy, is concerned, admittedly, the appellants as well as informant belong to rural areas. They are not literate and aware to their legal right. The deceased was also illiterate. It is often seen that in rural areas generally the bride groom's family is well known to the family of the bride earlier to their marriage settlement, the bride and her parents do not agitate some problem and issues occurred between them with family of bride groom after her marriage 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 inlaws of the deceased does not mean that neither dowry was demanded nor harassment or cruelty was committed to the deceased soon before her death.

31. 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 23 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)

32. Coming to the facts of this case again, P.W.-1 in cross-examination, stating that he had not lodged any report regarding torture or harassment with the deceased prior to her death, has stated that he had made a complaint at police station Pishawa regarding torture and demand of dowry. P.W.-2 has also stated that she had not made any complaint to any one regarding demand of dowry or torture committed by appellants. Both these witnesses had stated that they did not send the deceased to her matrimonial home for one and half year, due to demand of dowry and torture committed by the appellants. Thus, although, P.W.-1 and P.W.-2 failed to lodge report at any police station but it can not be said that they failed to protest the torture and harassment committed by the appellants. Thus in view of law laid down by Supreme Court in ***Preet Pal Singh (supra)***, the submission of learned counsel for the appellants has no force.

33. Appellants have been convicted for offence under Section 498-A and 306 I.P.C. For offence under Section 498-A I.P.C. not only physical but mental cruelty is also sufficient to constitute the offence of cruelty as required for this section. For offence under Section 306 I.P.C., the person, who abets the commission of suicide, is liable under this section. Offence of abetment has been defined under Section 107 and 108 I.P.C. Abetment includes, according to Section 107 I.P.C., instigating any person to do that thing. Instigation, for the offence of abetment, is not required pre-planned or intentional. Supreme Court, while convicting only the husband, acquitting other accused, discussing the legislative intent behind the Criminal Law Amendment Act, 1983 and Dowry Prohibition Amendment Act, 1986 and the provisions of Sections 107, 108, 498-A and 304-B I.P.C. and Section 113-A and 113-B of Evidence Act in ***State of Punjab vs. Iqbal Singh and others, 1991 SCC (Crl.) 513,*** has held as under :

"5. The charge against the accused was under Section 306 I.P.C. That section must be read in the backdrop of the above facts. Under that section if any person commits suicide the person who abets commission of suicide shall be liable to be punished with imprisonment of either description for a term which may extend to ten years and fine. The question is whether on the facts proved it can be said that either Iqbal Singh or his sister were guilty of abetment. Chapter V of the Penal Code is entitled 'Of Abetment' and comprises Sections 107 to 120 of which we may notice Sections 107 and 108 only. 'Abetment' as defined by Section 107 comprises (i) instigation to do that thing which is an offence (ii) engaging in any conspiracy for the doing of that thing and (iii) intentionally aiding by any act or illegal omission the doing of that thing. Section 108 defines an abettor as a person who abets an offence or who abets either the commission of an offence or the commission of an act which would be an offence. ***The word 'instigate' in the literal sense means to incite, set or urge on, stir up, goad, foment, stimulate, provoke, etc.*** *Since there is no question of parties being engaged in any sort of conspiracy we have to consider whether there was any intentional aiding for committing suicide. The dictionary meaning of the word aid is to give assistance, help, etc.*

xxxxxx xxxxxx xxxxx

8. ***The legislative intent is clear to curb the menace of dowry deaths, etc., with a firm hand. We must keep in mind this legislative intent. It must be remembered that since crimes are***

generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. That is why the legislature has by introducing Sections-113-A and 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life. *If a married woman is subjected to cruelty or harassment by her husband or his family members Section 498-A I.P.C. would be attracted. If such cruelty or harassment was inflicted by the husband or his relative for, or in connection with, any demand for dowry immediately preceding death by burns and bodily injury or in abnormal circumstances within seven years of marriage, such husband or relative is deemed to have caused her death and is liable to be punished under Section 304-B I.P.C. When the question at issue is whether a person is guilty of dowry death of a woman and the evidence discloses that immediately before her death she was subjected by such person to cruelty and/or harassment for, or in connection with, any demand for dowry, Section 113-B, Evidence Act provides that the court shall presume that such person had caused the dowry death. Of course if there is proof of the person having intentionally caused her death that would attract Section 302 I.P.C.* ***Then we have a situation where the husband or his relative by his wilful conduct creates a situation which he knows will drive the woman to commit suicide and she actually does so, the case would squarely fall within the ambit of Section 306 I.P.C. In such a case the conduct of the person would tantamount to inciting or provoking or virtually pushing the woman into a desperate situation of no return which would compel her to put an end to her miseries by committing suicide."(Emphasis supplied)***

34. It is also pertinent to point out at this juncture that for offence of dowry death as provided under Section 304-B I.P.C., prosecution has to prove unnatural death of a woman within seven years of her marriage. In addition to that, she was subjected to cruelty by her husband or his relatives in relation to demand of dowry soon before her death. If anyone of the above ingredients is not proved by prosecution, accused can not be convicted for offence of dowry death. The offence of Section 306 I.P.C. is lesser and different from the offence of dowry death. For this offence only abetment which leads to commitment of suicide of a person is required to be proved and if such suicide is done by women within seven years of her marriage, due to cruelty caused by her husband or any relation of her husband, the Court may presume the offence of abetment of suicide, in view of statutory presumption as provided under Section 113-A of Evidence Act. Further accused charged for offence of Section 302 or 304 I.P.C. may be convicted for offence under Section 306 I.P.C. without framing separate charge for offence under Section 306 I.P.C Three judges Bench of Supreme Court, relying on Constitutional Bench Judgment in ***Willie Slaaney vs. State of M.P. AIR 1956 SC 116 and three Judges Bench Judgement in Gurubachan Singh vs. State of Punjab, AIR 1957 SC 623, in Dalbir Singh vs. State of U.P., 2004 SCC (Crl.) 1592***, where question arose, whether the appellant convicted for offence under Section 302 and 498 I.P.C. but acquitted for offence

under Section 304-B I.P.C. by trial Court, can be convicted for offence under Section 306 I.P.C., convicting the appellant for offence under Section 306 I.P.C., has held as under :

"There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 CrPC, it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangaraboina Sreenu [(1997) 5 SCC 348 : 1997 SCC (Cri) 690] was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC."

35. Coming again to the facts and circumstances of the case, appellants were charged for offence under Section 498-A, 304-B I.P.C. and under Section 3/4 of Dowry Prohibition Act, but the trial Court convicted the appellants only for offence under Sections 498-A and 306 I.P.C. because the prosecution had failed to prove the demand of dowry and cruelty soon before the death of deceased. According to Section 113-A of the Evidence Act, if a woman commits suicide within a period of seven years from the date of her marriage and it is alleged by the prosecution that she was subjected to cruelty by her husband or relative of her husband, the Court may presume, having regard to all the other circumstances of this case, that such suicide had been abetted by her husband or such relative of her husband. Nanhake (P.W.-1) has specifically stated that his sister-Guddi Devi's marriage was solemnized with appellant-Dinesh Kumar on 16.05.1993. Shanti Devi (P.W.-2), the mother of the deceased has also stated that the marriage of the deceased was solemnized four years ago from her death. Although, the appellant-Dinesh Kumar in his statement under Section 313 of the Code, has stated that the deceased was married with him eight years ago from her death but he had not placed any reliable evidence in this regard and Bharat (D.W.-1), whose statement was recorded in 2003, stated that the deceased was married thirteen years ago, had admitted that he did not know the date or day of marriage of the deceased with the appellant-Dinesh Kumar. In addition to above, the appellants had not produced the *"Pandit and Nai"* who had played key role in solemnizing the marriage of the deceased with the appellant-Dinesh Kumar. Thus, it is clear that the death of the deceased was caused within seven years of her marriage. In addition to above, both the prosecution witness, Nanhke (P.W.-1) and Smt. Shanti Devi (P.W.-2) have categorically stated that the deceased was being tortured by the appellants for demand of dowry. Thus, in view of the law laid down by Supreme Court in ***Iqbal Singh (supra) and Dalbir Singh (supra)*** as well as the provisions as provided under Section 113-A of Evidence Act, the trial Court has not committed any illegality or infirmity for drawing the said presumption for offence under Section 306 I.P.C. and the submission of learned

counsel for the appellants, in this regard, has no force.

36. It is also pertinent to note at this juncture that as to whether the appellants have succeeded to lead any evidence in their defence regarding their innocence.

37. The appellant-Dinesh Kumar, in his statement recorded under Section 313 of the Code, has stated that the deceased had committed suicide on 25.04.1998 at about 2:00 p.m. and the information whereof was given on 26.04.1998. It is further stated by him at that time, the appellants were threshing wheat crops and no one was present in his house. The appellants had not stated that how and when they got information regarding the suicidal death of the deceased and why the information of death of deceased was given to concerned police station after eighteen hours of her death whereas Dr. B. B. Tripathi (P.W.-4) who conducted the post-mortem of deceased, had specifically stated that deceased would have died in the intervening night of 25-26/4/1998. This witness was not cross-examined by the defence on the point of time of death of deceased as stated by him (P.W.-4). Thus, the appellant-Dinesh Kumar's statement recorded under Section 313 of the Code, that the deceased had died on 25.04.1998 at about 2:00 p.m. and he was threshing wheat crops becomes doubtful in the light of statement of Dr. B. B. Tripathi (P.W.-4). In view of above, it is clear that the death of deceased was happened in the presence of the appellants. So far as defence of the appellants that the deceased had committed suicide in frustration as she was suffering from abdominal disease, is concerned, the appellants had not produced any documentary evidence that if the deceased was suffering from abdominal disease what efforts was made by them for her treatment whereas Nanhke (P.W.-1) and Smt. Shanti Devi (P.W.-2) had categorically denied that the deceased was suffering from abdominal disease. Thus, the appellants have failed to lead any satisfactory evidence to rebut the statutory presumption of Section 113-A of Evidence Act and in the light of law laid down by Hon'ble Supreme Court in ***Trimukh Maroti Kirkan (supra)*** their failure to produce any evidence in their defence to rebut the aforesaid statutory presumption of Section 113-A of Evidence Act, further strengthen of prosecution evidence and the submission of learned counsel for the appellants has got no force.

38. Now the question arises as to whether all the appellants are liable to be convicted in this case.

39. Admittedly, the appellant-Dinesh Kumar is husband of the deceased whereas the appellants-Durg Vijay and Chameli are father-in-law and mother-in-law of the deceased. In statement of 313 of the Code, recorded in 2003, the appellant-Dinesh Kumar had disclosed his age as 30 years, the appellant-Durg Vijay as 70 years and the appellant-Chameli as 60 years. It means that at the time of occurrence i.e. in 1998, the appellant-Dinesh Kumar was 25 years old, the appellant-Durg Vijay was 65 years whereas the appellant-Chameli was 55 years old. It cannot be presumed that the appellant-Durg Vijay and the appellant-Chameli who were old aged person at the time of occurrence, were in position to govern either the appellant-Dinesh Kumar or the deceased or to control or interfere in their family relations. The appellants-Durg Vijay and Chameli had categorically stated that they were leaving separately from their son. Nanhke (P.W.-1) in examination-in-chief had specifically stated that his

brother-in-law-Dinesh Kumar had demanded she-buffalo and transistor *("ukt dahej ke alava mere bahnoi dinesh ne ek bhais aur ek transistor ki maang ki thi.").* The prosecution has not made any specific allegation and made only general allegation, for either demand of dowry or harassment to deceased, against the appellant-Durg Vijay and Chameli.

40. 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 vs. State of Punjab, (2000) 5 SCC 207,*** 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 overenthusiasm 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."

41. 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)***

42. In view of above, if the said occurrence was taken place inside the house of appellant-Dinesh Kumar where his presence was most probable, looking into the whole facts and circumstances of this case, the prosecution evidence is not reliable and trustworthy so far it relates to the appellants-Durg Vijay and Chameli and consequently the prosecution has failed to prove its case beyond reasonable doubt against the appellants-Durg Vijay and Chameli and they are liable to be acquitted, whereas it has successfully proved its case beyond reasonable doubt against the appellant-Dinesh Kumar (husband of the deceased). The impugned judgment so far as it concerned for appellant-Dinesh Kumar, is well discussed, well reasoned, it requires no interference and liable to be affirmed.

43. Now coming to the question of sentence whether the sentence passed by trial Court, is just and proper or not.

44. The appellant-Dinesh Kumar has been convicted for the offence under Sections-498-A and 306 I.P.C. He has been sentenced only for seven years rigorous imprisonment with fine of Rs.2000/-for offence under Section 306 I.P.C. and for one year rigorous imprisonment with fine of Rs.1000/- for offence under Section 498-A I.P.C. It has further been directed that all sentences shall run concurrently. Thus, the maximum sentence, awarded against the appellants, is only for seven years.

45. It is settled principle of sentencing and penology that undue sympathy in awarding the sentence with accused is not required. The object of sentencing in criminal law should be to protect the society and also to deter the criminals by awarding appropriate sentence. In this regard Hon'ble Supreme Court has observed in ***State of Madhya Pradesh vs. Saleem @ Chamaru, AIR 2005 SC 3996*** which is as under:-

"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."

46. In this case, a helpless young woman had died inside the house of the appellant. 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-Dinesh Kumar, 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-Dinesh Kumar, is affirmed.

47. The appellant-Dinesh Kumar is on bail and his bail bonds is cancelled. He is directed to surrender before the concerned Court forthwith to serve out the aforesaid sentence.

48. 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 appellants-Durg Vijay and Chameli, is set aside and they are acquitted from the charges levelled against them. They are on bail. Their bail bonds are cancelled.

49. The appeal is ***partly allowed*** and the impugned judgment and order is modified to the extent as above.

50. Keeping in view the provision of Section 437-A of the Code, appellants-Durg Vijay and Chameli are 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, they, on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

51. A copy of this judgment along with lower court record be sent to trial Court by FAX for immediate compliance.

(2021)01ILR A76
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 12016 of 2020

Ram Dhani & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Santosh Kumar Singh

Counsel for the Opposite Party:
C.S.C., Sri Sunil Kumar Singh

(A) Civil Law - U.P. Revenue Code, 2006 - Section 116 - suit for division of holdings , Section 117 - Duty of Court in suits for division of holding - Uttar Pradesh Revenue Code Rules, 2016 - Rule 108 - Suit for division for several holdings, Rule 109 - Preliminary and Final decrees - Rule 109 (10) - Sub-Divisional Officer shall make an endeavour to decide the suit within the period of six months and if the suit is not decided within such period, the reason shall be recorded - Dispensing justice is the fundamental raison d'etre of the judicial system - Justice to be meaningful has to be delivered in a relevant time frame - Delay invariably defeats justice - order-sheet of the case is equally a reflection and an indictment of the judicial process - Court has ample powers to ensure that the process of law is not stalled by the dilatory tactics of any party - Courts are not helpless and cannot be seen to be helpless. (Para-9,10,15,30)

Petitioners instituted proceeding under Section 116 of the Uttar Pradesh Revenue Code, 2006 before the learned Sub-Divisional Magistrate - Suit was instituted for division of holdings of which the petitioners claim to be co-sharers - seeking direction in the nature of mandamus for deciding the suit within stipulatede period - perusal of the order-sheet shows that the dates were granted mechanically - No effective hearing whatsoever took place for almost two years since the institution of the proceedings.(Para - 3,4)

HELD:- The rule of law cannot be flouted or permitted to fail . It is the obligation of this Court to ensure that the rule of law is upheld under all circumstances - This is a fit case to exercise the jurisdiction under Article 226 of the Constitution of India by issuing strict directions to decide the matter finally within a stipulated period of time - The authority /learned court below has failed to perform its statutory duty. In view of the aforesaid facts, this Court has to issue a mandamus commanding the authority /learned court below to discharge its statutory duty. (Para - 31,32,33)

Writ petition disposed off. (E-6)

List of Cases cited :-

1. Haryana Vs. Raghubir Dayal , (1995) 1 SCC 133

2. N.K. Chauhan Vs St. of Guj. & ors. , (1977) 1 SCC 308

3. P.T. Rajan Vs T.P.M. Sahir & ors. , (2003) 8 SCC 498

4. Sharif-Ud-Din Vs.Abdul Gani Lone , (1980) 1 SCC 403

5. Vikas Trivedi Vs St. of U.P. & ors. , (2013) 2 UPLBEC 1193

6. Karnal Improvement Trust, Karnal Vs Smt. Parkash Wanti (Dead) & anr. , (1995) 5 SCC 159

7. Tribhuwan Prasad Vs Uttar Pradesh Sarkar & ors. , 2018 (9) ADJ 466.

8. Matters Under Article 227 No.237 of 2020 (Mrs. Madhuri Saxena (since deceased) through L.R. Vs Sahkari Awas Evam Vitt Nigam Ltd. Sarojni Marg Lucknow U.P.)

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

1. Heard Sri Santosh Kumar Singh, learned counsel for the petitioners, learned Standing counsel for the respondents No.1 and 2 and Sri Sunil Kumar Singh, learned counsel for the respondent No.3.

2. The petitioners have prayed for the following prayer in the instant writ petition:

"To issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to decide the suit no. RST/00213/2018, computer Suit No. T-201814700200213 (Ram Sanehy Vs. Lalman) under Section 116 of U.P. Revenue Code, 2006, within stipulated period which may be fixed by this Hon'ble Court."

3. The petitioners instituted proceeding under Section 116 of the Uttar Pradesh Revenue Code, 2006 before the learned Sub-Divisional Magistrate, Pindara, District-Varanasi, which was registered as Suit No.429/1125 of 2017 (Ram Sanehi and others Vs. Lalman and others). The suit was instituted for division of holdings of which the petitioners claim to be co-sharers.

4. The order-sheet is appended to the writ petition as Annexure-4. The order-sheet records the following dates in the proceedings, namely, 16.04.2018, 10.05.2018, 21.06.2018, 23.07.2018, 24.08.2018, 14.09.2018, 15.10.2018, 14.11.2018, 05.12.2018, 27.12.2018, 29.01.2019, 01.05.2019, 06.06.2019, 01.07.2019, 18.07.2019, 04.09.2019, 17.10.2019, 18.11.2019, 27.11.2019, 13.12.2019, 03.01.2020, 20.06.2020 and 04.07.2020. However, a perusal of the order-sheet shows that the dates were granted mechanically. No effective hearing whatsoever took place for almost two years since the institution of the proceedings. The first effective hearing happened when the order dated 08.06.2020 was passed by the respondent No.2-learned Sub-Divisional Magistrate (Judicial), Tehsil Pindra, District-Varanasi. The matter thus remains pending before the respondent No.2-learned Sub-Divisional Magistrate (Judicial), Tehsil Pindra, District-Varanasi. The proceedings have not moved forward thereafter. Hence, the writ petition.

5. The proceedings in a suit for division of holdings is controlled and guided by the provisions of the Uttar Pradesh Revenue Code, 2006 read with Rules framed thereunder.

6. Sections 116 and 117 provide the statutory backdrop for a suit for division of holdings. The provisions of Sections 116 and 117 are reproduced hereunder:

"116. Suit for division of holding.- (1) A bhumidhar may sue for the division of the holding of which he is a co-sharer.

[(2) In every such suit, the Court may also divide the trees, wells and other improvements existing on such holding but where such division is not possible, the trees, wells and other improvements aforesaid and valuation thereof shall be divided and adjusted in the manner prescribed.]

(3) One suit may be instituted for the division of more holdings than one where all the parties to the suit other than the[Gram Panchayat]are jointly interested in each of the holdings.

(4) To every suit under this section, the[Gram Panchayat]concerned shall be made a party.

117. Duty of Court in suits for division of holding.- (1) In every suit for division of holding under Section 116 the Court of Assistant Collector shall -

(a) follow such procedure as may be prescribed;

(b) apportion the land revenue payable in respect of each such division.

(2) A division of holding referred to in Section 116 shall not affect the joint liability of the tenure-holders there of in respect of the land revenue payable before the date of the final decree."

7. The relevant Rules material to the controversy provide for the procedure and the time-line for conclusion of the proceedings are Rules 108 and 109 of the Uttar Pradesh Revenue Code Rules, 2016. The said Rules are extracted hereunder:

"108. Suit for division for several holdings (Section 116).-Where the suit relates to the division of more than one holding, the particulars specified in rule 107 shall be mentioned in the plaint in respect of all such holdings. "

109. Preliminary and Final decrees (Section 117).-(1) If the plaint referred to in rule 107 or rule 108 is in order, it shall be registered as a suit and the defendants shall be called upon to file their written statements. The suit shall then be decided according to the provisions of the Code of Civil Procedure, 1908.

(2) Before making a division the court shall-

(a) determine separately the share of the plaintiff and each of the other co-tenure holders ;

(b) record which, if any, of the co-tenure holders wish to remain joint ; and

(c) make valuation of the holding (or holdings) in accordance with the circle rate fixed by the Collector applicable to each plot in the holding.

(3) If the suit is decreed, the Court shall pass a preliminary decree declaring the share of the plaintiff.

(4) After the preparation of preliminary decree the Sub Divisional Officer shall get the Kurra prepared through the Lekhpal.

(5) The Lekhpal shall submit the Kurra report within a period of one month from the date of receiving the order in this regard and at the time of preparation of Kurra he shall observe the following principles-

(a) the plot or plots shall be allotted to each party in proportionate to his share in the holding;

(b) the portion allotted to each party shall be as compact as possible;

(c) as far as possible no party shall be given all the inferior or all the superior classes of land;

(d) as far as possible existing fields shall not be split up;

(e) Plots which are in the separate possession of a tenure holder shall, as far as possible, be allotted to such tenure holder if they are not in access of his share;

(f) If the plot or any part thereof is of commercial value or is adjacent to road, abadi or any other land of commercial value, the same shall be allotted to each tenure holder proportionately and in the case of second condition the same shall be allotted proportionately adjacent to road, abadi or other land of commercial value; and

(g) If the co-tenure holders are in separate possession on the basis of mutual consent or family settlement, the Kurra shall, as far as possible, be fixed accordingly.

(6) When the report regarding Kurra is submitted by the Lekhpal, the objection shall be invited thereon and thereafter the appropriate order shall be passed by the Sub Divisional Officer after affording opportunity of hearing to the parties and considering the objection, if any, filed against the report submitted by the Lekhpal.

(7) If the report and Kurra is confirmed by the Sub Divisional Officer, the final decree shall follow it.

(8) At the stage of the final decree, the Court shall-

(a) Separate the share of the plaintiff from that of the defendant by metes and bounds.

(b) Place on record a map showing in different colours the properties given to plaintiff as distinct from those given to the defendant.

(c) Apportion the land revenue payable by the parties.

(d) Direct the record of rights and map to be corrected accordingly.

(9) If, for adjusting the equities between the parties, payment of compensation regarding trees, wells or other improvements becomes necessary, the revenue Court concerned may also pass necessary orders at the stage of final decree.

(10) The Sub-Divisional Officer shall make an endeavour to decide the suit within the period of six months and if the suit is not decided within such period, the reason shall be recorded."

8. The constitutional courts are cognizant of the problem of delays in our judicial system. They have consistently attempted to purge the legal system of this menace. Various judgments have identified some of the causes of delays and appropriate judicial directions have been issued to address the problem.

9. Dispensing justice is the fundamental raison d'etre of the judicial system. Timely delivery of justice is indispensable to retaining the faith of the common man in the justice dispensation system.

10. The foremost goal set out in the Preamble of the Constitution, is to secure to all citizens: Justice, social, economic and political.

10.1 Justice to be meaningful has to be delivered in a relevant time frame. Delay invariably defeats justice. Indefinite delays are the bane of our judicial system. Interminable legal proceedings reflect the apathy of an impersonal system to the plight of helpless litigants. So long as timely justice is denied, so long the constitutional promise of justice will not be redeemed, and the constitutional mandate of the judicial system will not be implemented.

11. The constitutional courts are seized with, and the legislatures have taken cognizance of the malaise of delays in the judicial process. Delays in the judicial process have earned the displeasure of constitutional courts, and have evoked the concern of the legislatures. Law will not countenance delays in the judicial process. This is evident from the imperative directions issued by the constitutional courts to purge the judicial system of delays. This will also be apparent from the timelines set by the legislature to cure the

mischief of delays in the judicial process. The judicial system will have to evolve an ethos to be alert to, and endeavour to respect timelines created by the legislature.

12. The failure to implement the statutory mandate can be determined once the nature of the statutory mandate is understood. Understanding the nature of the statutory mandate is essentially an exercise in interpretation of the statute.

13. The words of a statute are the best guide to legislative intent. The settled canons of interpretation of statutes are the best tools to ascertain the scope of the statutory duties.

14. The intent of the legislature is clearly to ensure an expeditious disposal of the appeal by the appellate authority. The legislature was clearly aware of the realities of governance and the limitations of quasi judicial authorities. In such circumstances, the legislature was conscious that it may not be possible to adhere to the letter of a strict time frame. But it was within the reach of the appellate authority to comply with the spirit of deciding the appeal with dispatch and expedition. The intendment of the legislature is revealed by the words employed in the provisions.

15. The legislature has taken a practical view. The legislature has set pragmatic standards which are achievable and not created idealistic goals which are beyond reach. The realities of administration have been balanced with the ideals of justice.

16. The legislative mandate to the appellate authority under Rule 109 (10) of the Uttar Pradesh Revenue Code Rules, 2016 is as under:

"109 (10) The Sub-Divisional Officer shall make an endeavour to decide the suit within the period of six months and if the suit is not decided within such period, the reason shall be recorded."

17. The word "shall" is indicative of the mandatory nature of the provision, but it is not conclusive. The Hon'ble Supreme Court considered the import and consequences of the word "shall" used by the legislature in different statutes. The import of the aforesaid provision and the nature of the statutory duty can be understood in the legal setting of authorities in point, and settled canons of interpretation of statutes.

18. The Hon'ble Supreme Court in the case of State of ***Haryana Vs. Raghubir Dayal,*** reported at ***(1995) 1 SCC 133,*** undertook this exercise and held thus:

"5. The use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be ascribed to the word 'shall' as mandatory or as directory, accordingly/Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something

and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory."

15. Clearly the consequences of using the word "shall" can vary and are not uniform. The mandatory effect of the word "shall" can be diluted depending upon the context in which the word "shall" is employed and the statutory scheme in which it is placed. In the context of the Rule 109(10) of the Uttar Pradesh Revenue Code Rules, 2016, the word "shall" is also qualified by the words "as far as practicable". The latter words limit the mandatory effect of the word "shall".

19. The phrase "as far as practicable" was interpreted by the Hon'ble Supreme Court in the case of ***N.K. Chauhan Vs. State of Gujarat and others,*** reported at ***(1977) 1 SCC 308,*** the Hon'ble Supreme Court held thus:

"26. What does 'as far as practicable' or like expression mean, in simple anglo-saxon ? Practicable, feasible, possi- ble, performable, are more or less interchangeable. A skiagraph of the 1959 Resolution reveals that the revival of the direct recruitment, method was motivated by 'the inter- est of administration'--an overriding object which must cast the benefit of doubt if two meanings with equal persuasive- ness contend. Secondly, going by the text, 50% of the substantive vacancies occurring in the cadre should be filled in by selection in accordance With appended Rules. 'As far as practicable' finds a place in the Resolution and the Rule. In the context what does it qualify ? As far as possible 50% ? That is to say, if 50% is not readily forth- coming, then less ? Within what period should be impracticabilitv to felt ? What is the content of impracticabi- litv' in the given administrative 'setting ? Contrariwise, can you not contend that impracticability isnot a license to deviate, a discretion to disobey or a liberty with the ratio ? Administrative tone is too impor- tant to be neglected but if sufficient numbers to fill the direct recruits' quota are not readily available, substantive vacancies may be left intact to be filled up when direct recruits are available. Since the exigencies of administration cannot wait, expediency has a limited role through the use of the words 'as far as practicable'. Thereby Government is authorised to make ad hoc appointments by promotion or by creation of ex cadre posts to be filled up by promotees, to be absorbed in the 50% portion falling to the promotional category in later years. In short 'as far as practicable means, not interfering with the ratio which fulfils the interest of administration, but flexible provision clothing government with powers to meet special situations where the normal process of the government Reso- lution cannot flow smooth. It is a matter of accent and import which affords the final test in the choice between the two parallel interpretations.

27. We have given close thought to the competing contentions and are inclined to the view that the former is the better. Certainly, Shri Garg is right that the primary purpose of the quota system is to improve administrative efficiency. After all, the Indian administration is run for the service of the people and not for opportunities for promotion to a few persons. But theories of public administration and experiments in

achieving efficiency are matters of governmental policy and business management. Apparently, the State, having given due consideration to these factors, thought that a blended brew would serve best. Even so, it could not have been the intention of government to create artificial situations, import legal fictions and complicate the composition of the cadre by deviating from the natural course. The State probably intended to bring in fresh talent to the extent reasonably available but not at the sacrifice of sufficiency of hands at a given time nor at the cost of creating a vacuum by keeping substantive vacancies unfilled for long. The straightforward answer seems to us to be that the State, in tune with the mandate of the rule, must make serious effort to secure hands to fill half the number of vacancies from the open market. If it does not succeed, despite honest and serious effort, it qualifies for departure from the rule. If it has become non-feasible impracticable and procrastinatory to get the requisite quota of direct recruits, having done all that it could, it was free to fill the posts by promotion of suitable hands if the filling up of the vacancies was administratively necessary and could not wait. 'Impracticable' cannot be equated with 'impossible'--nor with 'unpalatable'--and we cannot agree with the learned judges of the High Court in construing it as colossally incapable of compliance. The short test, therefore, is to find out whether the government, in the present case, has made effective efforts, doing all that it reasonably can, to recruit from the open market necessary numbers of qualified hands. We do not agree that the compulsion of the rule goes to the extreme extent of making government keep the vacancies in the quota of the direct recruits open and to meet the urgent needs of administration by creating ex cadre posts or making ad hoc appointments or resorting to other out-of-the-way expedients. The sense of the rule is that as far as possible the quota system must be kept up and if not 'practicable', promotees in the place of direct recruits or direct recruits in the place of promotees may be inducted applying the regular procedures, without suffering the seats to lie indefinitely vacant."

20. In the case of ***P.T. Rajan Vs. T.P.M. Sahir and others,*** reported at ***(2003) 8 SCC 498*** while considering the same issue and similar provision, the Hon'ble Supreme Court held thus:

"48. Furthermore even if the statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory. Such a provision would be directory in nature. It is well-settled pinciple of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory."

21. A mandatory provision is required to be complied with strictly on pain of invalidation of the action. But merely because a provision is held to be directory, it does not provide an option of non-compliance to the authorities. The law has to be complied with in all circumstances. This is the essence of the rule of law. However, the rigors of compliance may vary depending upon the statutory provision. In case of a directory provision, a substantial compliance of the same would suffice to meet the ends of law. The Hon'ble Supreme Court has often dealt with the distinction between a mandatory provision and a directory provision, and the issue of compliance of directory provisions. The Hon'ble Supreme Court in the case of

Sharif-Ud-Din Vs. Abdul Gani Lone, reported ***(1980) 1 SCC 403*** held thus:

"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 (emphasize added). 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."

22. A Full Bench of this Court in the case of ***Vikas Trivedi Vs. State of U.P. and others,*** *reported at* ***(2013) 2 UPLBEC 119***3 held as under:

"15. Maxwell On the Interpretation of Statutes (Twelfth Edition) in Chapter 13,while discussing "Imperative And Directory Enactments" said following:

'The first such question is: when a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? In some cases the conditions or forms prescribed by the Statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than liability to a penalty, if any were imposed, for breach of the enactment. An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.' It is impossible to lay down any general rule for determining whether a provision is

imperative or directory. 'No universal rule', said Lord Campbell, L.C., 'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.' And Lord Penzance said: 'I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provisions that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

"76. At this juncture a note of caution is required to be given. All provisions of the statute are required to be complied with. It is useful to quote paragraph 5-052 of De-Smith Judicial Review 6th Edition in which while dealing with mandatory and directory statutes, following was observed:-

"5-052. A second reason for the tangle in this area is the use of the terms "mandatory" and "directory"; the latter term is especially misleading. All statutory requirements are prima facie mandatory. However, in some situations the violation of a provision will, in the context of the statute as a whole and the circumstances of the particular decision, not violate the objects and purpose of the statute. Condoning such a breach does not, however, render the statutory provision directory or discretionary. The breach of the particular provision is treated in the circumstances as not involving a breach of the statute taken as a whole. Furthermore, logically, a provision cannot be mandatory if a court has discretion not to enforce it."

23. In the case of ***Karnal Improvement Trust, Karnal Vs. Smt. Parkash Wanti (Dead) and another,*** reported at ***(1995) 5 SCC 159,*** the Hon'ble Apex Court laid down the law in the following terms:

"11. There is distinction between ministerial acts and statutory or quasi-judicial functions under the statute. When the statute requires that something should be done or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, the question often arise: What intention is to be attributed by inference to the legislature? It has been repeatedly said that no particular rule can be laid down in determining whether the command is to be considered as a mere direction or mandatory involving invalidating consequences in its disregard. It is fundamental that it depends on the scope and object of the enactment. Nullification is the natural and usual consequence of disobedience, if the intention is of an imperative character. The question in the main is governed by considerations of the object and purpose of the Act; convenience and justice and the result that would ensure. General inconvenience or injustice to innocent persons or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment would be kept at the back of the mind. The scope and purpose of the statute under consideration must be regarded as an integral scheme. The general rule is that an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially. When a public duty, as held

before, is imposed and statute requires that is shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements are not essential and imperative."

24. Rule 109 (10) as extracted above determines the time frame of the aforesaid proceedings. The statutory mandate of Rule 109 (10) can be distilled by consideration of the phraseology employed by the legislature while enacting the rule, the settled canons of interpretation of statutes. Benefit shall also be derived from authorities in point discussed in the preceding paras.

The word "shall" in Rule 109(10) is qualified by the word "endeavour". The mandatory nature of the word "shall" is also diluted by the phrase "if the suit is not decided within such period". The time period provided for deciding the suit for partition of holdings under Section 116 of the Uttar Pradesh Revenue Code, 2006 read with rules, as provided in Rule 109 (10) of the Uttar Pradesh Revenue Code Rules, 2016 is directory in nature. However, the requirement to record reasons for exceeding the time-line of six months is mandatory.

25. I had the occasion to consider the nature of the legislative mandate to the courts, where directory provisions in a statute require the courts to render a final decision in a specified time frame in ***Tribhuwan Prasad Vs. Uttar Pradesh Sarkar and others***, reported at ***2018 (9) ADJ 466.*** In ***Tribhuwan Prasad (supra)*** the time frame provided in the statute for deciding the appeal was two months.

26. In **Tribhuwan Prasad (supra)** it was found that the provision containing a time frame to decide the appeal was directory, and then the consequences of the said holding were construed on the foot of good authority. The directory nature of the provision may not require strict adherence but insists on substantial compliance. Most pertinently it does not permit indefinite enlargement of the time fixed by the statute:

"21. Statutes fixing time-lines to accomplish an action, as discussed above, were held to be directory in nature. The legislative intent was sought to be defeated by a highly delayed compliance on the pretext of the provision being directory in nature. The action of the authorities was invalidated and such interpretation was negatived by the Hon'ble Supreme Court. Inordinate delay does not satisfy the requirement of substantial compliance of a directory provision. The Hon'ble Supreme Court in the case of State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and another, reported at (1987) 2 SCC 602, while laying down the law, dispelled all such doubts. The relevant parts of the judgement are being extracted for ease of reference:

"14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performance, conduct or character, as the case may. The adverse remarks should not be understood in terms of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career. The whole object of the making of

adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. In the instant case, it was communicated to the respondent after twenty seven months. It is true that the provisions of Rules 6, 6A and 7 are directory and not mandatory, but that does not mean that the directory provisions need not be complied with even substantially. Such provisions may not be complied with strictly, and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provisions of Rules 6, 6A and 7 require that everything including the communication of the adverse remarks should be completed within a period of seven months, this period cannot be stretched to twenty seven months, simply because these Rules are directory, without serving any purpose consistent with the spirit and objectives of these Rules. We need not, however, dilate upon the question any more and consider whether on the ground of inordinate and unreasonable delay, the adverse remarks against the respondent should be struck down or not, and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent."

27. Thereafter, the duties of the court and the manner of implementation of a directory provision of law were laid down :

"23. In case the appeal is decided within two months, the letter and spirit of the statute is implemented. However, mere failure to decide the appeal within two months does not violate the statutory mandate. In the latter case, the statutory obligation will be defined by the quality of the efforts made to decide the appeal with promptitude and dispatch. The obligation will be met if the appeal is decided within a reasonable time, after the expiry of two months from its institution.

24. Statutes of limitation are statutes of repose. Statutes with time lines for decision making are statutes of endeavour. Statutory duty is discharged not only when the act is done but also when effort is made. However, the leeway to the authority is not unlimited and the time to accomplish the act is not indefinite. The statutory duty of the appellate authority, in the event the appeal is not decided within two months is to be seen.

25. The appellate authority shall have discharged its statutory duties initially, if it makes efforts commensurate to decide the appeal expeditiously, and finally when it enters a judgement, in a reasonable time after the expiry of two months. In such circumstances, the appellate authority can implement the law, by making honest endeavours and serious efforts to decide the appeal with dispatch and expedition. This is the statutory duty of the appellate authority. While the statutory duty of the appellate authority is to make earnest efforts to decide expeditiously, the proof of its performance is in the order-sheet of the court. The order-sheet of the appellate court is the most reliable evidence of the sincerity or earnestness of the efforts made by the appellate authority. The order-sheet of the appellate court is true testimony to the accomplishment of the statutory duty or the failure of the authority to perform its statutory duty. In the latter case the authority is liable to be mandamused."

28. Similar directory provisions providing for a time period to conclude

legal proceedings also exist in the Arbitration Act. The mandate of Section 34(5)(6) of the Arbitration and Conciliation Act, 1996 came up for consideration before this Court in ***Matters Under Article 227 No.237 of 2020 (Mrs. Madhuri Saxena (since deceased) through L.R. Vs. Sahkari Awas Evam Vitt Nigam Ltd. Sarojni Marg Lucknow U.P.)*** rendered on 14.08.2020. The duty of the Court to implement a statutory mandate of Sections 34 and 35 of the Arbitration and Conciliation Act, 1996 were cast in the following paragraphs:

"40. A composite reading of Section 34 (5) and (6) of the Arbitration and Conciliation Act, 1996, the law laid by the Hon'ble Supreme Court in ***State of Bihar and others (supra)*** and this Court in ***Tribhuwan Prasad (supra*)** yields these results. Section 34(5) and (6) of the Arbitration and Conciliation Act, 1996 being directory in nature, prevent the courts from being rushed into decisions by breaching fundamental norms of fairness and justice. The timeline set by the statute, cannot stampede the courts into passing orders which cause miscarriage of justice. However, the courts cannot extend the statutory time frame indefinitely or unreasonably. Neither can the courts be purblind to the timeframe provided in the statute on the pretext that provision is directory. Substantial compliance of the said provisions is sufficient to satisfy the legislative mandate. What substantial compliance entails in regard to these provisions needs to be understood clearly to enable the courts to implement the law faithfully. The duties of the court while deciding an application under Section 34 of the Arbitration and Conciliation Act, 1996 are distilled hereinunder.

41. The courts always have to be alert to the statutory time period of one year to decide the application, and make sincere efforts to adhere to the stipulated time line. In case the application is not decided within the statutory time limit of one year, the court should make all out endeavours to decide it within a reasonable time frame thereafter. At all times, the mandate of law requires the court to proceed with full diligence, and make earnest endeavours to decide the application under Section 34 of the Arbitration and Conciliation Act, 1996, within the time prescribed by the statute or in proximity to it. An unreasonable delay in deciding the matter represents a failure to implement the law. If serious efforts to decide matter within the statutory time frame is the requirement of the law, the order-sheet of the court is the most reliable evidence of the implementation of the law."

29. From the facts of the case prised out at the very inception, and the law discussed in the preceding paragraphs these facts are established. The proceedings under Section 116 of the Uttar Pradesh Revenue Code Rules, 2016 could not be concluded within the prescribed statutory time limit, or in a time frame proximate to it. No end to the proceedings is in sight. And if the order-sheet of the court below is a guide, the proceedings could well linger indefinitely. The delay in deciding the case is unreasonable and unacceptable. Further the reasons for failure to decide the suit within the aforesaid period have not been recorded in violation of the mandate of Rule 116 of the Uttar Pradesh Revenue Code Rules, 2016.

30. The adherence to the law laid down by this Court in various authorities discussed earlier is not in evidence. The legislative mandate of Section 116 of the Uttar Pradesh Revenue Code Rules, 2016

has not been implemented. The stakeholders have shown apathy towards the litigant, and indifference to the noble charter of the legal profession. Honest endeavours and earnest efforts to conclude the proceedings with diligence and dispatch are not disclosed from the order-sheet. No reasons for failing to decide as required under Rule 110(10) are in the order-sheet. The order-sheet of the case is equally a reflection and an indictment of the judicial process. The court has ample powers to ensure that the process of law is not stalled by the dilatory tactics of any party. The courts are not helpless and cannot be seen to be helpless.

31. The rule of law cannot be flouted or permitted to fail. It is the obligation of this Court to ensure that the rule of law is upheld under all circumstances.

32. In light of these facts and the authorities at hand, I am of the opinion that this is a fit case to exercise the jurisdiction under Article 226 of the Constitution of India by issuing strict directions to decide the matter finally within a stipulated period of time.

33. The authority /learned court below has failed to perform its statutory duty. In view of the aforesaid facts, this Court has to issue a mandamus commanding the authority /learned court below to discharge its statutory duty.

34. A writ of mandamus is issued directing the respondent No.2/learned Sub-Divisional Magistrate, Tehsil Pindra, District-Varanasi/learned court below or any other authority, before whom the aforesaid Suit No.RST/00213/2018, Computerized Suit No.T-201814700200213 (Ram Sanehy and another Vs. Lalman and others) under Section 116 of U.P. Revenue Code, 2006 is pending, to execute the following directions:

I. The suit shall be decided by the respondent No.2/learned Sub-Divisional Magistrate, Tehsil Pindra, District-Varanasi/learned court below within a period of four months from the date of production of a computer generated copy of this order, downloaded from the official website of the High Court Allahabad.

The computer generated copy of such order shall be self attested by the applicant (party concerned) along with a self attested identity proof of the said person (preferably Aadhar Card) mentioning the mobile number to which the said Aadhar Card is linked. The 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.

II. The respondent No.2/learned Sub-Divisional Magistrate, Tehsil Pindra, District-Varanasi/learned court below shall give shorter dates and not grant any adjournment to the parties.

III. In case any adjournment is granted for preventing any miscarriage of justice, the respondent No.2/learned Sub-Divisional Magistrate, Tehsil Pindra, District-Varanasi/learned court below shall record reasons for the same.

IV. Further, the party seeking an adjournment shall be liable to pay costs to the extent of at least Rs.5,000/- per adjournment.

V. The respondent No.2/learned Sub-Divisional Magistrate, Tehsil Pindra, District-Varanasi/learned court below, if necessary, shall proceed on a day to day basis to ensure that the above stipulated

time-line of four months is strictly adhered to.

33. With the aforesaid directions, the writ petition is disposed of.

(2021)01ILR A89
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.01.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR-II, J.

Criminal Appeal No. 116 of 2021

Mewa Lal Bhargav ...Appellant (In Jail)
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Janendra Kumar Verma

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

Criminal Law - Code of Criminal Procedure, 1973- Sections 156(3), 203- Dismissal of complaint under section 156(3) of the Cr.P.C at pre-cognizance stage- Options before the Magistrate- (i) At the pre-cognizance stage- he may direct to concerned police station to register F.I.R. on the basis of facts narrated in the complaint if commission of congnizable offence disclosed prima facie and Investigating officer would conduct the investigation.(ii) At the post cognizance- after taking cognizance, he may adopt procedure of complaint cases provided under Section 200 and 202 Cr.P.C. If the Magistrate is not satisfied with the conclusions arrived at by the Investigating Officer in report submitted under section 173 Cr.P.C. then the Magistrate may take cognizance upon original complaint sent to S.H.O. at pre-cognizance stage and proceed further to examine the complaint under section 200 Cr.P.C. and his witnesses under section 202 Cr.P.C.

At the pre-cognizance stage, if the contents of the Complaint prima facie disclose the commission of a cognizable offence, the Magistrate may direct the police to register an F.I.R and conduct regular investigation. At the post Cognizance stage the Magistrate may follow the procedure under sections 200 and 202 of the Cr.P.C and in case where the Magistrate is not satisfied with the Police Report submitted under section 173 of the Cr.P.C then he may take cognizance of the Complaint and proceed in the matter like a complaint case.

Criminal Law - Code of Criminal Procedure, 1973- Section 203 - Rejection of a complaint at the pre-cognizance stage under Section 156(3) Cr.P.C. does not debar institution of second regular complaint. It would be post-cognizance stage, if the Magistrate takes cognizance on the original complaint or after rejection at pre-cognizance stage, if second complaint is filed by the complainant. The Magistrate may dismiss the complaint under Section 156(3) Cr.P.C. if by way of instituting complaint, defence version is created to absolve the complainant from the case registered earlier or on the basis of allegations made in the complainant, if dispute is purely of civil nature or the Magistrate considers that the complaint is false and frivolous.

A second complaint is not barred where the Magistrate dismisses the earlier complaint at the pre-cognizance stage. However, a Magistrate can exercise his discretion and reject the complaint at the pre-cognizance stage wherte he finds that either the averments in the Complaint do not disclose the commission of a cognizable offence or where the Complaint is false, frivolous or vexatious.

Criminal Appeal rejected.(E-2)

Judgements/ Case law relied upon-

1. Tula Ram Vs Kishore Singh, (1977) 4 SCC 459

2. H.S. Bains, Director, Small Saving-cum-Dy. Secy. Finance Vs State (Union Territory of Chandigarh), (1980) 4 SCC 631.

3. Mohd. Yusuf Vs Smt. Afaq Jahan & anr., 2006(54)ACC Page 530.

4. Ramhit & ors. Vs St. of U.P. & ors. 1997 (34) ACC Page 683 Cri. Misc. Appln. No. 4775/1996 decided on 13th Dec., 1996 :

5. Awadh Bihari Vs IXth A.D.J. Allahabad (Cr. Misc. W.P. No. 776/1997) 1997 ACC 775

6. Vinai Pandey son of late Takeshwar Pandey Vs State of U.P. through its Home Secretary Govt. of U.P. (27.02.2004-All HC) 2005 Cri. L. J. 3225 : Cri. Misc. W.P. No. 7916/2003.

7. Ajay Malviya Vs St. of U.P. & ors.(1997) 4 SCC 459

8. Suresh Chand Jain Vs St. of M.P., (2001) 2 SCC 628

9. Aleeque Padamsee Vs U.O.I., (2007) 6 SCC 171

10. Anju Chaudhary Vs St. of U.P., (2013) 6 SCC 384

11. Lalita Kumari Vs St. of U.P., (2012) 4 SCC 1

12. St. of Har. Vs Bhajan Lal ,1992 SCC(Cri.) 426

13. Ramesh Kumari Vs State (NCT of Delhi), (2006) 2 SCC 677

14. Parkash Singh Badal Vs St. of Punj. (2007) 1 SCC 1

15. Rajinder Singh Katoch Vs Chandigarh Admin., (2007) 10 SCC 69

16. St. of U.P Vs Bhagwant Kishore Joshi ,AIR 1964 SC 221

17. P. Sirajuddin Vs St. of Madras reported as (1970) 1 SCC 595

18. Sevi & anr. Vs St. of T.N, 1981 Supp SCC 43

19. C.B.I .Vs Tapan Kumar Singh, (2003) 6 SCC 175 : 2003 SCC (Cri) 1305

20. Priyanka Srivastava Vs St. of U.P., (2015) 6 SCC 287

21. Anil Kumar Vs M.K. Aiyappa [(2013) 10 SCC 705 : (2014) 1 SCC (Cri) 35]

22. Ram Babu Gupta Vs St. of U.P., 2001 SCC OnLine All 264

23. Prem Narain Gupta Vs St. of U.P., 1997 SCC OnLine All 618

24. Bundhu Shah Vs 1st A.D.J. Siddhartha Nagar & ors, (1997) 35 ACC 580

25. Prem Wati Vs St.of U.P., 1998 SCC OnLine All 416

26. Gulab Chand Upadhyaya Vs St. of U.P., 2002 SCC OnLine All 1221

27. Chandrika Singh Vs St. of U.P., 2007 SCC OnLine All 1022

28. Sukhwasi Vs St. of U.P, 2007 SCC OnLine All 1088

29. Gopal Das Vs St. of Assam AIR 1961 SC 986

30. Laxmi Narayan Vs Narayana (1976) Cri.L.J. 1361 SC

(Delivered by Hon'ble Virendra Kumar-II, J.)

1. Heard Shri Janendra Kumar Verma, learned counsel for appellant and the learned AGA for the State.

2. This appeal under Section 14-A(2) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to the 'Act, 1989') has been preferred assailing the impugned order dated 15.12.2020 passed by learned Second Additional Sessions Judge/ Special

Judge, S.C./S.T. Act, District Lakhimpur Kheri in Criminal Misc. Case No. 673/2020, Mewa Lal Bhargav Vs. Ram Milan Mishra & another, by which the complaint instituted by the appellant under Section 156(3) Cr.P.C. has been dismissed at pre-cognizance stage and discretion has not been exercised in favour of complainant.

3. I have perused the record made available by the appellant/ complainant.

4. A primary duty to register First Information Report (F.I.R) regarding cognizable offence is of the Station House Officer of the concerned Police Station, if the Police Officer/Incharge does not register the F.I.R. then the Magistrate having jurisdiction to hear criminal case of the police station concerned has been empowered to issue directions under section 156(3) Cr.P.C to register and investigate the fact and circumstances narrated in the complaint. the relevant provisions defining the complaint and the procedure adopted by the concerned Magistrate is provided under the various provision of the Cr.P.C. At a post cognizance stage, the Magistrate is empowered to take cognizance on the complaint and may adopt procedure provided under section 200, 202 of Cr.P.C. The relevant provisions are as follows:-

Jurisdiction of the Magistrate Court u/s 156(3) of Cr.P.C.

Relevant Provision of Cr.P.C.regarding written complaint instituted in the magistrate court.

Provision of Sec. 2(d) of Cr.P.C defines complaint and Section 154 of Cr.P.C provides procedure for recording of First Information Report at Police Station

Section 2(d) of Cr.P.C.-

"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.--A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

Section 154 in the Code of Criminal Procedure, 1973

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 156 in the Code of Criminal Procedure, 1973

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.

Section 190 in the Code of Criminal Procedure, 1973

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.

5. Following expositions of law of Hon'ble Supreme Court and this Court regarding provisions under Section 156(3) Cr.P.C. are relevant, which are as follows:

Following are the case law decided by the Hon'ble Supreme Court on Section 156(3) of Cr.P.C

Hon'ble Supreme Court held in the case of **R. R. Chari Vs. State of U.P.,** reported in **AIR 1951 SC 207** as under:

It is clear from the wording of the section that the initiation of the proceedings against a person commences on the cognizance of the offence by the Magistrate under one of the three contingencies mentioned in the section. The first contingency evidently is in respect of non-cognizable offences as defined in the Criminal Procedure Code on the complaint of an aggrieved person. The second is on a police report, which evidently is the case of a cognizable offence when the police have completed their investigation and come to the Magistrate for the issue of a process. The third is when the Magistrate himself takes notice of an offence and issues the process. It is important to remember that in respect of any cognizable offence, the police, at the initial stage when they are investigating the matter, can arrest a person without obtaining an order from the Magistrate. Under Section 167(b) of the Criminal Procedure Code the police have of course to put up the person so arrested before a Magistrate within 24 hours and obtain an order of remand to police custody for the purpose of further investigation, if they so desire. But they have the power to arrest a person for the purpose of investigation without

approaching the Magistrate first. Therefore in cases of cognizable offence before proceedings are initiated and while the matter is under investigation by the police the suspected person is liable to be arrested by the police without an order by the Magistrate. It may also be noticed that the Magistrate who makes the order of remand may be one who has no jurisdiction to try the case.

In our opinion having regard to the wording of Section 3 of the Act the assumption that the Magistrate can issue a warrant only after taking cognizance of an offence under Section 190 of the Criminal Procedure Code is unsound. The proviso to Section 3 of the Act expressly covers the case of a Magistrate issuing a warrant for the arrest of a person in the course of investigation only and on the footing that it is a cognizable offence.

"What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) of the 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 indicated in the subsequent provisions of this Chapter--proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence".

In the case of **Gopal Das Sindhi Vs. State of Assam, reported as AIR 1961 SC 986,** Hon'ble Supreme Court observed as under -

When the complaint was received by Mr Thomas on August 3, 1957, his order, which we have already quoted, clearly indicates that he did not take cognizance of the offences mentioned in the complaint but had sent the complaint under Section 156(3) of the Code to the Officer Incharge of Police Station Gauhati for investigation. Section 156(3) states "Any Magistrate empowered under Section 190 may order such investigation as above-mentioned". Mr Thomas was certainly a Magistrate empowered to take cognizance under Section 190 and he was empowered to take cognizance of an offence upon receiving a complaint. He, however, decided not to take cognizance but to send the complaint to the police for investigation as Sections 147, 342 and 448 were cognizable offences. It was, however, urged that once a complaint was filed the Magistrate was bound to take cognizance and proceed under Chapter XVI of the Code. It is clear, however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because Section 200 states that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint.

We cannot read the provisions of Section 190 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. We are unable to construe the word "may' in Section 190 to mean "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 offence 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 XVI of the Code. Numerous cases were cited before us in support of the submissions made on behalf of the appellants. Certain submissions were also made as to what is meant by "taking cognizance". It is unnecessary to refer to the cases cited. The following observations of Mr Justice Das Gupta in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v.Abani Kumar Banerjee [AIR 1950 Cal 437] :

"What is taking cognizance has not been defined in the Code of Criminal Procedure and I have no desire to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) of the Cr PC, 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 indicated in the subsequent provisions of this Chapter --proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

were approved by this Court in **R.R. Chari v. State of Uttar Pradesh[1951 SCR 312].** It would be clear from the observations of Mr Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, e.g. ordering investigation under Section 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence. The observations of Mr Justice Das Gupta above-referred to were also approved by this Court in the case of **Narayandas Bhagwandas Madhavdas v. State of West Bengal** [1960 (I) SCR 93] .

It will be clear, therefore, that in the present case neither the Additional District Magistrate nor Mr Thomas applied his mind to the complaint filed on August 3, 1957, with a view to taking cognizance of an offence. The Additional District Magistrate passed on the complaint to Mr Thomas to deal with it. Mr Thomas seeing that cognizable offences were mentioned in the complaint did not apply his mind to it with a view to taking cognizance of any offence; on the contrary in his opinion it was a matter to be investigated by the police under Section 156(3) of the Code. The action of Mr Thomas comes within the observations of Mr Justice Das Gupta. In the circumstances, we do not think that the first contention on behalf of the appellants has any substance.

In the case of Jamuna Singh Vs. Bhadai Shah, reported in AIR 1964 SC 1541 Hon'ble Supreme Court observed as under:-

(i) when on a petition of complaint being filed before him a Magistrate applies his mind for proceeding under the various provisions of Chapter 16 of the Code of Criminal Procedure, he must he held to have taken cognizance of the offences mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under Section 156(3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence. It was so held by this Court in R.R. Chari v. State of U.P.[(1951) SCR 312] and again in Gopal Dass v. State of Assam [AIR 1961 SC 986] . In the present case,it is clear here from the very fact that he took action under s. 200 of the Code of Criminal Procedure, that he had taken cognizance of the offences mentioned in the complaint, it was open to him to order investigation only under s. 202 of the Code of Criminal Procedure and not under s. 156(3) of the Code. It would be proper in these circumstances to hold that though the Magistrate used the words "for instituting a case" in this order of November 22, 1956 he was actually taking action under s. 202 of the Code of Criminal Procedure, that being the only section under which he was in law entitled to Act.

Cognizance having already been taken by the Magistrate before he made the order there was no scope of cognisance being taken afresh of the same offence after the police officer's report was received. There is thus no escape from the conclusion that the case was instituted on Bhadai Sah's complaint on November 22, 1956, and not on the police report submitted later by the Police Sub-Inspector, Baikunthpur. The contention that the appeal did not lie under Section 417(3) of the Code of Criminal Procedure must therefore be rejected.

(ii) The order of the Magistrate asking the police to institute a case and to send a report should properly and reasonably be read as one made under Section 202 of the Code of Criminal Procedure. So, the argument that the learned Magistrate acted without jurisdiction cannot be accepted. At most it might be said that in so far as the learned Magistrate asked the police to institute a case he acted irregularly. There is absolutely no reason, however, to think that that irregularity has resulted in any failure of justice.

An examination of these provisions makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence, a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such fact's made by any police officer it is a case instituted in the Magistrate's Court on a police report.

It is well settled now that when on a petition of complaint being filed before him a Magistrate applies his mind for proceeding under the various provisions of Chapter 16 of the Code of Criminal Procedure, he must he held to have taken cognizance of the offences mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under Section 156(3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence.

(i) *Tula Ram v. Kishore Singh,* (1977) 4 SCC 459

(ii) *H.S. Bains, Director, Small Saving-cum-Dy. Secy. Finance v. State (Union Territory of Chandigarh),* (1980) 4 SCC 631

(iii) Mohd. yusuf v. Smt. Afaq Jahan and Anr., 2006(54)ACC Page 530

and also decided by the Hon'ble Allahabad High Court following cases:

(i). Ramhit and others Vs. State of U.P. and others 1997 (34) ACC Page 683 : Cri. Misc. Appln. No. 4775/1996 decided on 13th December, 1996 : Awadh Bihari Vs. IXth A.D.J. Allahabad (Cr. Misc. W.P. No. 776/1997) 1997 ACC 775 (decided on : 01/0/1997)

(ii). Vinai Pandey son of late Takeshwar Pandey vs. State of U.P. through its Home Secretary Govt. of U.P. (27.02.2004-All HC)

2005 Cri. L. J. 3225 : Cri. Misc. W.P. No. 7916/2003

(iii) Ajay Malviya vs. State of U.P. and others (decided on 06.07.2000 ALL HC) : (1997) 4 SCC 459.

(2) The following legal proposition emerge on a careful consideration of the facts and circumstances of this cases:

(i) That a Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.

(ii) Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

(iii) In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

(iv) Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190.

It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) of the 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 indicated in the subsequent provisions of this Chapter -- proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for

taking action of some other kind, e.g. ordering investigation under Section 156(3), or issuing a search warrant"

Section 156(3) appears in Chapter 12 which deals with information to the police and the powers of the police to investigate a crime. This section is therefore placed in a Chapter different from Chapter 14 which deals with initiation of proceedings against an accused person. It is, therefore, clear that Sections 190 and 156(3) are mutually exclusive and work in totally different spheres. In other words, the position is that even if a Magistrate receives a complaint under Section 190 he can act under Section 156(3) provided that he does not take cognizance. The position, therefore, is that while Chapter 14 deals with post cognizance stage Chapter 12 so far as the Magistrate is concerned deals with pre-cognizance stage, that is to say once a Magistrate starts acting under Section 190 and the provisions following he cannot resort to Section 156(3). Mr Mukherjee vehemently contended before us that in view of this essential distinction once the Magistrate chooses to act under Section 156(3) of the Code it was not open to him to revive the complaint, take cognizance and issue process against the accused. Counsel argued that the Magistrate in such a case has two alternatives and two alternatives only -- either he could direct re-investigation if he was not satisfied with the final report of the police or he could straightaway issue process to the accused under Section 204. In the instant case the Magistrate has done neither but has chosen to proceed under Section 190(1)(a) and Section 200 of the Code and thereafter issued process against the accused under Section 204. Attractive though the argument appears to be we are however unable to accept the same. In the first place, the argument is based on a fallacy that when a Magistrate orders investigation under Section 156(3) the complaint disappears and goes out of existence. The provisions of Section 202 of the present Code debar a Magistrate from directing investigation on a complaint where the offence charged is triable exclusively by the Court of Session. On the allegations of the complainant the offence complained of was clearly triable exclusively by the Court of Session and therefore it is obvious that the Magistrate was completely debarred from directing the complaint filed before him to be investigated by the police under Section 202 of the Code.

But the Magistrate's powers under Section 156(3) of the Code to order investigation by the police have not been touched or affected by Section 202 because these powers are exercised even before cognizance is taken. In other words. Section 202 would apply only to cases where the Magistrate has taken cognizance and chooses to enquire into the complaint either himself or through any other agency. But there may be circumstances as in the present case where the Magistrate before taking cognizance of the case himself chooses to order a pure and simple investigation under Section 156(3) of the Code.

The question is, having done so, is he debarred from proceeding with the complaint according to the provisions of Sections 190, 200 and 204 of the Code after receipt of the final report by the police?

From a combined reading of the above provisions it is abundantly clear that when a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance upon the same under Section 190 (1)(a) of the Code and proceed with the same in accordance with provisions of Chapter XV.

The other option available to the Magistrate in such a case is to send the complaint to the appropriate Police Station under Section 156 (3) for investigation. once such a direction is given under Sub-section (3) of Section 156 the police is required to investigate into that complaint under Sub-section (1) thereof and on completion of investigation to submit a 'police report' in accordance with Section 173 (2) on which a Magistrate may take cognizance under Section 190 (1)(b) but not under section 190 (1)(a). Since a complaint filed before a Magistrate cannot be a police report in view of the definition of complaint referred to earlier and since the investigation of a 'cognizable case' by the police under Section 156 (1) has to culminate in a police report the complaint as soon as an order under Section 156 (3) is passed thereon -transforms itself to a report given in writing within the meaning of Section 154 of the Code, which is known as the First Information Report (FIR). As under Section 156 (1) the police can only investigate a cognizable 'case', it has to formally registered a case on that report.

The proper order would be as follows:-

'to register a case at the police station treating the complaint as *the First Information Report* and investigate into the same.'

In the case of **Suresh Chand Jain v. State of M.P.,** reported as **(2001) 2 SCC 628** the Apex court observed as under-

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.

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.

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.

In the case of **Aleeque Padamsee Vs. Union of India,** reported as **(2007) 6 SCC 171,** Hon'ble Supreme Court after considering provision of Section 154, 156, 190 and 200 to 203 Cr.P.C, has held that:

The writ petitions are finally disposed of with the following directions:

(1) If any person is aggrieved by the inaction of the police officials in registering the FIR, the modalities contained in Section 190 read with Section 200 of the Code are to be adopted and observed.

(2) It is open to any person aggrieved by the inaction of the police officials to adopt the remedy in terms of the aforesaid provisions.

(3) So far as non-grant of sanction aspect is concerned, it is for the Government concerned to deal with the prayer. The Government concerned would do well to deal with the matter within three months from the date of receipt of this order.

(4) We make it clear that we have not expressed any opinion on the merits of the case.

In the case of **Anju Chaudhary v. State of U.P.,** reported as **(2013) 6 SCC 384,** Hon'ble Supreme Court observed as under-

7. The complaint application under Section 156 CrPC was filed by Parvaz on 16-11-2007, nearly 10 months after the date of occurrence. This application, which was heard by the learned Chief Judicial Magistrate, was rejected vide order dated 29-7-2008. The learned Magistrate expressed the opinion that since Crime Case No. 145 of 2007 had already been registered, as noticed above, there was no propriety to register an FIR again.

7.11 .....As such, there was no legal bar in this case to get the first information report registered on the basis of the application moved by the applicant revisionist under Section 156(3) CrPC and its investigation by the police, because all the allegations made in the said application and in the FIR registered at Case Crime No. 145 of 2007 are not the same.

7.14. On the plain construction of the language and scheme of Sections 154, 156 and 190 of the Code, it cannot be construed or suggested that there can be more than one FIR about an occurrence. However, the opening words of Section 154 suggest that every information relating to commission of a cognizable offence shall be reduced into writing by the officer-in-charge of a police station. This implies that there has to be the first information report about an incident which constitutes a cognizable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence.

It is further held that however, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of Section 154 of the Code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent

abuse of power by the investigating authority of the police. Therefore, second FIR for the same incident cannot be registered. Of course, the investigating agency has no determinative right. It is only a right to investigate in accordance with the provisions of the Code.

The filing of report upon completion of investigation, either for cancellation or alleging commission of an offence, is a matter which once filed before the court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, re-examination by the investigating agency on its own should not be permitted merely by registering another FIR with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of investigating powers by the police cannot be ruled out. It is with this intention in mind that such interpretation should be given to Section 154 of the Code, as it would not only further the object of law but even that of just and fair investigation. More so, in the backdrop of the settled canons of criminal jurisprudence, reinvestigation or de novo investigation is beyond the competence of not only the investigating agency but even that of the learned Magistrate.

33. Hon'ble Supreme Court has futher observed that While examining the abovestated principles in conjunction with the scheme of the Code, particularly Sections 154 and 156(3) of the Code, it is clear that the law does not contemplate grant of any personal hearing to a suspect who attains the status of an accused only when a case is registered for committing a particular offence or the report under Section 173 of the Code is filed terming the suspect an accused that his rights are affected in terms of the Code. Absence of specific provision requiring grant of hearing to a suspect and the fact that the very purpose and object of fair investigation is bound to be adversely affected if hearing is insisted upon at that stage, clearly supports the view that hearing is not any right of any suspect at that stage.

34. Even in the cases where report under Section 173(2) of the Code is filed in the court and investigation records the name of a person in column (2), or even does not name the person as an accused at all, the court in exercise of its powers vested under Section 319 can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

35. Of course, situation will be different where the complaint or an application is directed against a particular person for specific offence and the court under Section 156 dismisses such an application. In that case, the higher court may have to grant hearing to the suspect before it directs registration of a case against the suspect for a specific offence. We must hasten to clarify that there is no absolute indefeasible right vested in a suspect and this would have to be examined in the facts and circumstances of a given case. But one aspect is clear that at the stage of registration of a FIR or passing a direction under Section 156(3), the law does not contemplate grant of any hearing to a suspect.

Power of the Magistrate under Section 156(3) Cr.P.C.

37. Investigation into commission of a crime can be commenced by two different modes: first, where the police officer registers an FIR in relation to commission of

a cognizable offence and commences investigation in terms of Chapter XII of the Code; the other is when a Magistrate competent to take cognizance in terms of Section 190 may order an investigation into commission of a crime as per the provisions of that Chapter XIV. Section 156 primarily deals with the powers of a police officer to investigate a cognizable case. While dealing with the application or passing an order under Section 156(3), the Magistrate does not take cognizance of an offence. 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 said purpose, he is not said to have taken cognizance. It is an order in the nature of a pre-emptory reminder or intimation to the police to exercise its primary duty and power of investigation in terms of Section 151 of the Code. Such an investigation embraces the continuity of the process which begins with collection of evidence under Section 156 and ends with the final report either under Section 159 or submission of charge-sheet under Section 173 of the Code. (Refer to Mona Panwar v. High Court of Judicature of Allahabad [(2011) 3 SCC 496 : (2011) 1 SCC (Cri) 1181]. In Dilawar Singh v. State of Delhi [(2007) 12 SCC 641 : (2008) 3 SCC (Cri) 330 : (2007) 9 SCR 695] , this Court as well stated the principle that investigation beginning in furtherance of an order under Section 156(3) is not anyway different from the kind of investigation commenced in terms of Section 156(1). They both terminate with filing of a report under Section 173 of the Code. The Court signified the point that when a Magistrate orders investigation under Chapter XII he does so before taking cognizance of an offence. The Court in para 18 of the judgment held as under:

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 complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

43..... This Court in the case of Mohan Baitha v.State of Bihar, (2001) 4 SCC 340, held that the expression 'same transaction' from its very nature is incapable of exact definition

44. It is not possible to enunciate any formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. Such things are to be gathered from the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design.

In the case of **Lalita Kumari v. State of U.P.,** reported as **(2012) 4 SCC 1,** Hon'ble Apex Court has held as under:

"94.We deem it appropriate to give a brief ratio of these cases."

94.1. In the case of **State of Haryana vs. Bhajan Lal** reported as **1992**

SCC(Cri.) 426, this Court observed as under(SCC p.355 para 33):

"33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

94.2. In **Ramesh Kumari vs. State (NCT of Delhi)** reported as **(2006) 2 SCC 677**:(SCC p. 681, para 5)

"5. ... the provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of such an information disclosing cognizable offence."

94.3. In **Parkash Singh Badal vs, State of Punjab** reported as **(2007) 1 SCC 1** this Court observed as under: (SCC p. 41, para 68)

"68. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

94.4 In **Aleeque Padamsee vs. Union of India** reported as **(2007) 6 SCC 171** this Court observed as under: (SCC p. 175, para 7)

"7. ... The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to their notice show that cognizable offence has been made out."

95.There is another set of cases where this Court has taken a contrary view.

95.1. In **Rajinder Singh Katoch vs. Chandigarh Admin.,** reported as **(2007) 10 SCC 69** : this Court observed as under: (SCC p. 71, para 11)

"11. We are not oblivious to the decision of this Court in Ramesh Kumari v. State (NCT of Delhi) [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678] wherein such a statutory duty has been found in the police officer. But, as indicated hereinbefore, in an appropriate case, the police officers also have a duty to make a preliminary enquiry so as to find out as to whether allegations made had any substance or not."

95.2 In **State of u.p vs. Bhagwant Kishore Joshi** reported as **AIR 1964 SC 221:** Mudholkar, J. in his concurring judgment has observed as under: (AIR p. 227, para 18)

"18. ... I am of opinion that it is open to a police officer to make preliminary enquiries before registering an offence and making a full-scale investigation into it."

95.3. In **P. Sirajuddin vs, State of Madras** reported as **(1970) 1 SCC 595,** this Court quoted the observations of the High Court as under: (SCC p. 600, para 12)

"(a) "substantial information and evidence had been gathered before the so-called first information report was registered';"

95.4. In **Sevi and Another vs, State of Tamilbadu** reported as **1981 Supp SCC 43,** this Court observed as under: (SCC p. 44, para 3)

"3. ... If he was not satisfied with the information given by PW 10 that any cognizable offence had been committed he was quite right in making an entry in the general diary and proceeding to the village to verify the information without registering any FIR."

96. It is quite evident from the ratio laid down in the aforementioned cases that different Benches of this Court

have taken divergent views in different cases. In this case also after this Court's notice, the Union of India, the States and the Union Territories have also taken or expressed divergent views about the interpretation of Section 154 CrPC.

97. We have carefully analysed various judgments delivered by this Court in the last several decades. We clearly discern divergent judicial opinions of this Court on the main issue: whether under Section 154 CrPC, a police officer is bound to register an FIR when a cognizable offence is made out or he (police officer) has an option, discretion or latitude of conducting some kind of preliminary enquiry before registering the FIR.

98. The learned counsel appearing for the Union of India and different States have expressed totally divergent views even before this Court. This Court also carved out a special category in the case of medical doctors in the aforementioned cases of Santosh Kumar [(2006) 6 SCC 1 : (2006) 3 SCC (Cri) 1] and Suresh Gupta [(2004) 6 SCC 422 : 2004 SCC (Cri) 1785] where preliminary enquiry had been postulated before registering an FIR. Some counsel also submitted that the CBI Manual also envisages some kind of preliminary enquiry before registering the FIR.

99. The issue which has arisen for consideration in these cases is of great public importance. In view of the divergent opinions in a large number of cases decided by this Court, it has become extremely important to have a clear enunciation of law and adjudication by a larger Bench of this Court for the benefit of all concerned--the courts, the investigating agencies and the citizens.

A Constitutional Bench of Supreme Court held in the case of **Lalita Kumari v. Govt. of U.P., (2014) 2 SCC** 1 has observed as follows: -

115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

118. Similarly, in **CBI v. Tapan Kumar Singh,** (2003) 6 SCC 175 : 2003 SCC (Cri) 1305 , this Court has validated a preliminary inquiry prior to registering an FIR only on the ground that at the time the first information is received, the same does not disclose a cognizable offence.

119. Therefore, in view of various counterclaims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation,

the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

Conclusion/Directions

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.

In the case of **Priyanka Srivastava v. State of U.P.,** reported as **(2015) 6 SCC 287,** Hon'ble Supreme Court held as under:

1- The present appeal projects and frescoes a scenario which is not only disturbing but also has the potentiality to create a stir compelling one to ponder in a perturbed state how some unscrupulous, unprincipled and deviant litigants can ingeniously and innovatively design in a nonchalant manner to knock at the doors of

the court, as if, it is a laboratory where multifarious experiments can take place and such skilful persons can adroitly abuse the process of the court at their own will and desire by painting a canvas of agony by assiduous assertions made in the application though the real intention is to harass the statutory authorities, without any remote remorse, with the inventive design primarily to create a mental pressure on the said officials as individuals, for they would not like to be dragged to a court of law to face in criminal cases, and further pressurise in such a fashion so that financial institution which they represent would ultimately be constrained to accept the request for "one-time settlement" with the fond hope that the obstinate defaulters who had borrowed money from it would withdraw the cases instituted against them. The facts, as we proceed to adumbrate, would graphically reveal how such persons, pretentiously aggrieved but potentially dangerous, adopt the self-convincing mastery methods to achieve so. That is the sad and unfortunate factual score forming the fulcrum of the case at hand, and, we painfully recount.

3. .....it is further observed that the respondent 3, possibly nurturing the idea of self-centric Solomon's wisdom, filed Criminal Complaint Case No. 1058 of 2008, under Section 200 CrPC against V.N. Sahay, Sandesh Tiwari and V.K. Khanna, the then Vice-President, Assistant President and the Managing Director, respectively for offences punishable under Sections 163, 193 and 506 of the Penal Code, 1860 (IPC). It was alleged in the application that the said accused persons had intentionally taken steps to cause injury to him. The learned Magistrate vide order dated 4-10-2008, dismissed the criminal complaint and declined to take cognizance after recording the statement of the complainant under Section 200 CrPC and examining the witnesses under Section 202 CrPC.

5..... The order passed against the said accused persons at that time was an adverse order inasmuch as the matter was remitted. It was incumbent to hear the respondents though they had not become accused persons. A three-Judge Bench in Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel [(2012) 10 SCC 517 : (2013) 1 SCC (Cri) 218] has opined that in a case arising out of a complaint petition, when it travels to the superior court and an adverse order is passed, an opportunity of hearing has to be given. The relevant passages are reproduced hereunder: (SCC pp. 540-41 & 544, paras 46, 48 & 53)

6.46. ..... If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

6.48. .....the dismissal of complaint by the Magistrate under Section 203 of the Code either at the stage of Section 200 itself or on completion of inquiry by the Magistrate under Section 202 or on receipt of

the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401, it cannot be said that the person against whom the allegations of having committed the offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203--although it is at preliminary stage--nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed the crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or the Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get the right of hearing before the Revisional Court although such order was passed without their participation. The right given to "accused' or "the other person' under Section 401(2) of being heard before the Revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of the complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post-process stage.

6.53. .....In other word, where the complaint has been dismissed by the Magistrate under Section 203, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401(2) of the Code. If the Revisional Court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process."

14. The labyrinth maladroitly created by Respondent 3 does not end here. It appears that he had the indefatigable spirit to indulge himself in the abuse of the process of the court. Respondent 3 had filed an application under Section 156(3) CrPC before the learned Additional Chief Judicial Magistrate on 30-10-2011, against the present appellants, who are the Vice-President and the valuer respectively. In the body of the petition, as we find in Paras 19 and 20, it has been stated thus:

"That the aforesaid case was referred to the Deputy Inspector General of Police, Varanasi through speed post but no proceeding had been initiated till today in that regard.

That the aforesaid act done by the aforesaid accused prima facie comes in the ambit of Sections 465, 467, 471, 386, 504, 34 and 120-B IPC and in this way cognizable offence is made out and proved well."

15. ..... "It has been stated clearly in the application by the applicant

that it is the statement of the applicant that he had already given 3 post-dated cheques to the financial bank for payment and despite the availability of the post-dated cheques in the financial society, even a single share in the loan account has not been got paid. The opposite parties deliberately due to conspiracy and prejudice against applicant have not deposited previously mentioned post-dated cheques for payment and these people are doing a conspiracy to grab the valuable property of the applicant. Under a criminal conspiracy, illegally and on false and fabricated grounds a petition has been filed before the District Collector (Finance and Revenue), Varanasi, which comes under the ambit of cognizable offence. Keeping in view the facts of the case, commission of cognizable offence appears to be made out and it shall be justifiable to get done the investigation of the same by the police."

Hon'ble Supreme Court has futher observed as follows:-

19. We have narrated the facts in detail as the present case, as we find, exemplifies in enormous magnitude to take recourse to Section 156(3) CrPC, as if, it is a routine procedure. That apart, the proceedings initiated and the action taken by the authorities under the Sarfaesi Act are assailable under the said Act before the higher forum and if, a borrower is allowed to take recourse to criminal law in the manner it has been taken, it needs no special emphasis to state, has the inherent potentiality to affect the marrows of economic health of the nation. It is clearly noticeable that the statutory remedies have cleverly been bypassed and prosecution route has been undertaken for instilling fear amongst the individual authorities compelling them to concede to the request for one-time settlement which the financial institution possibly might not have acceded. That apart, despite agreeing for withdrawal of the complaint, no steps were taken in that regard at least to show the bona fides. On the contrary, there is a contest with a perverse sadistic attitude. Whether the complainant could have withdrawn the prosecution or not, is another matter. Fact remains, no efforts were made.

20. The learned Magistrate, as we find, while exercising the power under Section 156(3) CrPC has narrated the allegations and, thereafter, without any application of mind, has passed an order to register an FIR for the offences mentioned in the application. The duty cast on the learned Magistrate, while exercising power under Section 156(3) CrPC, cannot be marginalised. To understand the real purport of the same, we think it apt to reproduce the said provision:

"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."

21.Dealing with the nature of power exercised by the Magistrate under Section 156(3) CrPC, a three-Judge Bench in Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy [(1976) 3 SCC 252 :

1976 SCC (Cri) 380] , had to express thus: (SCC p. 258, para 17)

"17. ... 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."

22. In **Anil Kumar v. M.K. Aiyappa** [(2013) 10 SCC 705 : (2014) 1 SCC (Cri) 35] , the two-Judge Bench had to say this: (SCC p. 711, para 11)

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] 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."

23. In ***Dilawar Singh v. State of Delhi*** *[(2007) 12 SCC 641 : (2008) 3 SCC (Cri) 330] , this Court ruled thus: (SCC p. 647, para 18)*

"18. ..."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 complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.'

24. In ***CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd.*** *[(2005) 7 SCC 467 : 2005 SCC (Cri) 1697] , the Court while dealing with the power of the Magistrate taking cognizance of the offences, has opined that having considered the complaint, the Magistrate may consider it appropriate to send the complaint to the*

*police for investigation under Section 156(3) of the Code of Criminal Procedure. And again: (Madhao v. State of Maharashtra [**Madhao v. State of Maharashtra,** (2013) 5 SCC 615 : (2013) 4 SCC (Cri) 141] , SCC pp. 620-21, para 18)*

"18. 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 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). 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)."

*25. Recently, in **Ramdev Food Products (P) Ltd. v. State of Gujarat [(2015) 6 SCC 439] ,** while dealing with the exercise of power under Section 156(3) CrPC by the learned Magistrate, a three-Judge Bench has held that: (SCC p. 456, para 22)"*

22.1. 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.

22.2. 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'."

In case of **Lalita Kumari Vs. State of U.P.** reported as **(2014) 2 SCC 1**, the Hon'ble Supreme Court held as under:(SCC pp.35-36, 41, 58-59 & 61 paras 49, 72, 111 & 115, 120)

111. .....The Code gives to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate when he has "reason to suspect the commission of an offence". Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

xxx xxx xxx xxx

115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all

cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crims with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint."

120.6.....

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"

We have referred to the aforesaid pronouncement for the purpose that on certain circumstances the police is also required to hold a preliminary enquiry whether any cognizable offence is made out or not.

Hon'ble Supreme Court has further held that:

27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order.

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same.

30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3). Both the

aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in *Lalita Kumari* [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.

Direction has been given by the Hon'ble Supreme Court in paragraph 35 as follows-

35. A copy of the order passed by us be sent to the learned Chief Justices of all the High Courts by the Registry of this Court so that the High Courts would circulate the same amongst the learned Sessions Judges who, in turn, shall circulate it among the learned Magistrates so that they can remain more vigilant and diligent while exercising the power under Section 156(3) CrPC.

Cases decided by Allahabad High Court

A Full Bench of this Court in the case of **Ram Babu Gupta v. State of U.P., 2001 SCC OnLine All 264 (decided on April 27,2001)** has observed as under:

15-"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 First Information Report. There is nothing illegal in doing so. After all registration of an First Information Report 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 First Information Report should be registered, it is the duty of the officer-in-charge of the police station to register the First Information Report 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.

18.It is futher held that Coming to the second question noted above it is to be at once stated that a provision empowering a court to act in a particular manner and a provision creating a right for an aggrieved person to approach a Court or authority, must be understood distinctively and should not be mixed up. While Sections 154, 155 sub-section (1) and (2) of 156, Cr.P.C. confer right on an aggrieved person to reach the police, 156(3) empowers a Magistrate to act in a particular manner in a given situation. Therefore, it is not possible to hold that where a bare

application is moved before Court only praying for exercise of powers under Section 156(3) Cr.P.C., it will remain an application only and would not be in the nature of a complaint. It has been noted above that the Magistrate has to always apply his mind on the allegations in the complaint where he may use his powers under Section 156(3) Cr.P.C. In this connection it may be immediately added that where in an application, a complainant states facts which constitute cognizable offence but makes a defective prayer, such an application will not cease to be a complaint nor can the Magistrate refuse to treat it as a complaint even though there be no prayer seeking trial of the known or unknown accused. The Magistrate has to deal with such facts as constitute cognizable offence and for all practical purposes even such an application would be a complaint.

In paragraph 45, Hon'ble Full Bench has also held that-

45. It is clear from the scheme of Chapter XII of the Code that it is obligatory upon the police to investigate cognizable offence and book the offender, if any. Therefore where the police fails in its duty to register and investigate a cognizable offence, the aggrieved person may complain to the concerned Magistrate. Where the Magistrate receives a complaint or an application which otherwise fulfils the requirements of a complaint--envisaged by Section 2(d) of Cr.P.C. and the facts alleged therein disclose commission of an offence, he is not always bound to take cognizance. This is clear from the use of the words "may take cognizance' which in the context in which they 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 courses are open to him. 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. Once he takes cognizance he is required to embark upon the procedure embodied in Chapter XV. On the other hand, if on a reading of complaint he finds that the allegations therein clearly disclose commission of a cognizable offence and forwarding of complaint under Section 156(3) Cr.P.C. to the police for investigation will be conducive to justice and valuable time of Magistrate will be saved in inquiring into the matter which was the primary duty of 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. is in the nature of a reminder or intimation to the police to exercise their full powers of investigation under Section 156(1) Cr.P.C. such an investigation begins with the collection of evidence and ends with a report or charge-sheet under Section 173. It is obvious that power to order 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 power under Section 156(3) is exercisable at a pre-cognizance stage while the other at post-cognizance stage. Once the Magistrate has taken cognizance of the offence, it is not within his competence to revert back to pre-cognizance stage and invoke Section 156(3) Cr.P.C. A great care is, therefore, to be taken by the Magistrate while deciding the course to be adopted. That discretion has to be exercised cautiously with application of judicial mind and not in a routine and mechanical manner.

Prem Narain Gupta v. State of U.P., 1997 SCC OnLine All 618 decided on September 4,1997.

Criminal Procedure Code,1973-section 156(3)-power under- Magistrate

may direct the police to register and investigate a case- If a congnizable offence is disclosed- allegation thus made must be specific and not general in nature- prior to direction, no enquiry report is needed.

Paragraph no. 7 Under section 156(3) Cr.P.C., a magistrate may direct the police to register and investigate a case if a cognizable offence is disclosed from the averment made in the application. The allegation must be spacific and not in general in nature.

In the case of **Bundhu Shah Vs.1st A.D.J. Siddhartha Nagar and others,** reported as **(1997) 35 ACC 580-**

In the case, Hon'ble Allahabad High Court held that under section 156(3) Cr.P.C., a magistrate may direct the police to register and investigate a case if a cognizable offence is disclosed from the averment made in the application. The allegation must be spacific and not in general in nature.

Prem Wati v. State of U.P., 1998 SCC OnLine All 416:

3. The point raised regarding competence of the complaint is, however, worth consideration. It was contended that when an application is filed for action under Section 156(3) Cr. P.C. it was at best a complaint and when the Magistrate directed submission of a police report, it could legally be interpreted that an investigation as thought of under Section 202 Cr. P.C. was really directed. When the Magistrate declined to take action upon receipt of the police report, the order should be read as one under Section 203 Cr. P.C. and, as such, the second complaint was barred. The contention of the learned counsel that the application for action under Section 156(3) must be read as a complaint is not acceptable because the simple prayer therein was not for proceeding under Section 200 Cr. P.C. and, in fact, the court did not proceed under Section 200 as he did not examine the complainant at all. The direction for submission of a police report cannot, therefore, be read as directing an investigation under Section 202 Cr. P.C. and, in fact, the order of the Magistrate makes it clear that he had declined to take action under Section 156(3) only and there is no reference to his refusal to summon the accused persons or dismissing the complaint.

Gulab Chand Upadhyaya v. State of U.P., 2002 SCC OnLine All 1221 :

1. The writ petitioner moved an application dated 23-8-2000 under Section 156(3) Cr. P.C. before the Judicial Magistrate alleging that the respondents 4 to 6 herein had threatened and assaulted him, his wife and his brother, and had also damaged his property. It was alleged that the police had refused to register the FIR. It was prayed that a direction be issued by the Magistrate to the police to register the FIR and investigate the case.

2. The Magistrate by his order dated 3-1-2001 directed that the application under Section 156(3) be registered in the Court as a criminal complaint and fixed 5-1-2001 for recording the statement of the complainant under Section 200 Cr. P.C.

3. Instead of giving evidence, as required by the Magistrate, the petitioner preferred a criminal revision against the order dated 3-1-2001, which has been dismissed by the District Judge by judgment dated 11-5-2001.

4. Thus this writ petition under Article 226 of the Constitution of India has been filed with the submission that the Magistrate was not right in directing the

procedure of a complaint case to be adopted, and that he should have directed the police to register and investigate the case.

SECTION156(3) Cr.P.C-

5. Although it may not be strictly necessary for a complainant to approach the police before filing an application under Section 156(3) Cr. P.C. (see para 7 of the Constitution Bench decision of the Supreme Court reported in (1984) 2 SCC 500 : AIR 1984 SC 718, A.R. Antulay v. R.S. Nayak), but as a matter of convenience and expedition, normally every genuine complainant first attempts to lodge an FIR at the police station. Thus most applications invoking Section 156(3) contain the averment that the police have (wrongly) refused to register the FIR of the cognizable offence. Section 154(1) makes it obligatory for officers in charge of police stations to register FIRs of cognizable offences. If the officer in charge of police station refused to do so the complainant has the remedy under Section 154(3) Cr. P.C. to send the substance of the FIR to the Superintendent of Police by post who has the power to investigate the offence himself or depute a subordinate officer to investigate. Experience shows that very few complainants avail of this right under Section 154(3) Cr. P.C. apparently due to lack of knowledge.

6. If even the Superintendent of Police also fails to act, in such a situation a complainant, if he wishes to pursue the matter further, adopts one of the following two alternatives. Either he seeks a direction under Section 156(3) Cr. P.C. or he files complaint under Chapter XV Cr. P.C. before the Magistrate.

7. The causes for non-registration of FIR at police stations in cognizable case can vary widely. The overworked police may be indifferent to the common man's woes, the accused may be influential, registering of FIRs may be refused to keep the crime statistics of that police station low. Also, in some cases the police may be aware of the true state of affairs and may refuse to register false or pre-emptive FIRs.

8. In some of such cases the complainants may genuinely require the assistance of the Court by way of a direction to the police to register and investiage the case.

9. It is also possible that in some cases the complainant, with a poor or false case, knows that there is little or no possibility of securing a conviction. Therefore instead of filing a criminal complaint under Chapter XV of Cr. P.C. the complainant seeks the direction under Section 156(3) so that the accused may be arrested by the police and thereby harassed and humiliated.

SUGGESTION TO MAGISTRATES

11. Of late a manifold increase in the applications under Section 156(3) Cr. P.C. can be noticed. And almost all orders for investigation passed under that section are challenged by the accused by way of revisions or applications under Section 482 Cr. P.C. or sometimes even writ petitions.

*12. In the decision dated 6-12-2001 in Criminal Misc. Application No. 6193 of 2001 ''**Masuriyadih v. Addl. District Judge & others',** (reported in 2002 Current Bail Cases 36) a single Judge of this Court suggested as follows:*

"Orders under Section 156(3) merely mean that an alleged cognizable offence should be investigated. It should not normally be open to the accused to say before the revisional or High Court that the allegation about a cognizable offence should not even be investigated. Thus interference by superior Courts with an order of a Magistrate U/s

156(3) should normally be confined to cases in which there are some very exceptional circumstances.

However, the major problem faced by the accused persons in such cases is the apprehension of arrest pending investigation by the police, and more importantly the apprehension about misuse by the police of this power of arrest. It is this apprehension which is causing the accused to file revisions and thereafter applications U/s 482 Cr. P.C. or writ petitions. Much of this litigation in superior Courts can be curtailed if every Magistrate while passing an order under Section 156(3) Cr. P.C. also examines, having regard to the peculiar facts and circumstances of each case, the advisability of including in his order an incidental direction as to whether the power of arrest by the police (U/s 41 Cr. P.C. ?) for the purpose of investigation should be controlled by saying that the police will not make arrest for the purpose of investigation without first obtaining a warrant for the arrest from the Magistrate,

17. Apart from the reasons given above, it is also clear that under Section 156(3) Cr. P.C. the Magistrate need not allow the application of the complainant in toto. For example if there are 5 offences alleged, it is legally permissible for the Magistrate to order investigation into say 3 offences only, holding that the other offences are not made out. Again if there are say 5 accused, the Magistrate can validly direct registration and investigation against 3 only saying that no offence is made out against the remaining 2 accused. Thus a limited investigation can also be ordered by the Magistrate. Therefore he can also limit the investigation by controlling the power of arrest which is a part of investigation. Lastly, keeping in view the circumstances obtaining in the present times, and the abolishing of anticipatory bail in Uttar Pradesh, the advantages of taking this view far outweigh the disadvantages, and will also reduce the burden on higher Courts. Therefore it was rightly concluded in Masuriyadin's case (supra) that the restriction could be placed by the Magistrate upon the power of arrest of police.

A FURTHER QUESTION

19. However there is no logical reason why the Magistrate cannot himself make a brief inquiry (akin to Section 159 Cr. P.C.) to satisfy himself about the allegations before ordering registration and investigation of the offence. There appears to be no reason why the trained judicial mind of the Magistrate should not be put to use for curbing frivolous applications under Section 156(3) at the very threshold. However at this stage the Magistrate is not holding trial. Therefore, if he finds the story of the complainant unconvincing, the Magistrate may examine the complainant and/or one or two key witnesses or ask for their affidavits, or ask for a copy of the injury report, or make such other inquiry as the circumstances of the case may require, to lend assurance to the case of the complainant before issuing a direction under Section 156(3) Cr. P.C.

GUIDE TO DISCRETION OF MAGISTRATE

21. In these circumstances, the question arises that when a Magistrate is approached by a complainant with an application praying for a direction to the police under Section 156(3) to register and investigate an alleged cognizable offence, why should he

(A) grant the relief of registration of a case and its investigation by the police under Section 156(3) Cr. P.C. and when should he

(B) treat the application as a complaint and follow the procedure of Chapter XV of Cr. P.C.

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, for example

(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 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.

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 thought of a limited nature (see para 7 of JT (2001) 2 (SC) 81 : ((2001) 2 SCC 628 : AIR 2001 SC 571)

In the case of **Chandrika Singh v. State of U.P.,** reported as **2007 SCC OnLine All 1022,** the Allahabad High Court has held as under-

17. In view of this observations of Hon'ble Apex Court on receipt of an application u/S. 156(3) Cr.P.C. the Magistrate may pass an order out right for taking cognizance in the offencc and then proceed in view of the procedure laid down in Chapter XV Cr.P.C. But if the Magistrate is not intending to take cognizance of the offence then he may pass an order for register and investigation of the offence by the police. On receipt of an application u/S. 156(3) Cr.P.C. both the options are open to the Magistrate and if the Magistrate in its discretion adopted any of the course then it cannot be said that the Magistrate has illegally applied his discretion.

*24. In **Vinay Pandey v. State of U.P.** Reported in U.P. Cr.R. Page 670 (sic) the same law has been followed and it has also been held that in an application u/S. 156(3) Cr.P.C. it is not mandatory for the Magistrate to allow every application, Learned Counsel for the revisionist also cited, (1980) 4 SCC 631 : AIR 1980 SC Page 1883 **H.S. Bains v. State.** It has been held by Hon'ble the Apex Court that "Criminal P.C. (2 of 1974), Ss. 156(3), 173(1), 190(1)(b), 200, 203 and 204 -- Complaint case -- Magistrate directing*

investigation u/S. 156(3) -- Police Report stating that no case was made out -- Still Magistrate can take cognizance and issue process." This judgment also does not lay down that in application u/S. 156(3) Cr.P.C. the Magistrate is bound to pass an order for register the case and investigation. In this case the police after investigation submitted a report to the effect that no case is made out. Hon'ble Apex Court held that in such circumstances also the Magistrate can take cognizance and issue process as provided under Chapter XV Cr.P.C.

It will also be material to decide that whether an application u/S. 156(3) Cr.P.C. can be treated as a complaint for the purpose of a procedure as provided under Chapter XV or the revisionist is at liberty to allege that if an application u/S. 156(3) is moved then the Magistrate must pass an order for registration of the case and investigation when a cognizable offence is made out and specially when no prayer has been made in the application u/S. 156(3) Cr.P.C. to treat the application as a complaint and it has not been filed in the format of the complaint then the application u/S. 156(3) Cr.P.C. cannot be treated as complaint. I disagree with this position. As has been stated above that an application u/S. 156(3) Cr.P.C. can be treated as a complaint as has been held by Hon'ble Apex Court in ***Mohd. Yousuf v. Afaq Jahan, (2006 (2) ALJ 8).*** *But in this context another Full Bench decision of this Court is also relevant. The Pull Bench of this court in* ***Ram Babu Gupta v. State of U.P.*** *reported in U.P. Cr.R. at Page 600 (sic):* ***(2001 All LJ 1587)*** *has laid down "Criminal Procedure Code, 1973 -- sections 156(3), 156(2), 156(1), 190 and 202 -- Powers of Court -- The Magistrate may direct the police to register a case and investigate -- Or he may treat the same as a complaint and proceed in matter contemplated in Chapter XV of Code -- He should apply his judicial mind -- Law discussed -- Magistrate if takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Code -- Magistrate may either take cognizance under section 190 or may forward the complaint to police under section 156(3) for investigation."*

26. This controversy must come to an end that an application u/S. 156(3) Cr.P.C. can only be treated as an application for passing an order for registration of the case and investigation and cannot be treated as complaint case. The Magistrate is not bound in each and every case to pass an order to register a case and investigate if cognizable offence is made out. The Magistrate is fully competent to use his judicial discretion in the matter. This is wrong notion that if an application has been moved u/S. 156(3) Cr.P.C. that the only order can be passed for registration in the matter. The Magistrate has got discretion u/S. 190 Cr.P.C. to take the cognizance directly or to pass an order that the police to investigate and then take cognizance on submissions of a report u/S. 173 Cr.P.C. The Magistrate is also expected to act under some guidelines and it should not be let at the arbitrary discretion of the Magistrate to pass an order or not to pass an order to register the case and investigation u/S. 156(3) Cr.P.C. ***Gulab Chand Upadhyaya v. State of U.P., (2002 All LJ 1225)*** *Hon'ble Single Judge of this court laid down the guidelines for the guidance of Magistrate while deciding the application moved u/S. 156(3) Cr.P.C. and these guidelines cannot be said against any provision of law or check on the judicial discretion of the Magistrate Even Hon'ble Apex Court also held that the Magistrate*

has got a discretion to pass an order to register the case and investigation u/S. 156(3) Cr.P.C. Or to treat an application as a complaint case.

In the case of **Sukhwasi v. State of Uttar Pradesh,** reported as **2007 SCC OnLine All 1088,** the Allahabad High Court has held as under-

1- The following question, has been referred, for consideration;"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"?

3-...In the case of "Ram Babu Gupta' (2001 (43) ACC 201) : (2001 All LJ 1587), it was held by the Full Bench of this Court that the Magistrate is supposed to exercise its discretion while acting on an application under Section 156(3) Cr. P.C, and he is not supposed to pass an order in a routine manner, and he has to apply his mind. This naturally means that the Magistrate has an option of refusing for registration of the first information report. This will appear from the following observations made in para-17 of "supra' Full Bench judgment;

"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."

4. It will further become clear from the following observations made in para-40 of the judgment:

"While resorting to the first mode in as much as directing the police for investigation he should not pass order in a routine manner. He should apply his judicial mind and on a glimpse of the complaint, if he is prima facie of the view that allegations made therein constituted commission of a cognizable offence requiring thorough investigation, he may direct the police to perform their statutory duties as envisaged in law."

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.

12. The next point, which remains for consideration is, the question whether the Magistrate can treat an application under Section 156(3) Cr.P.C. as a complaint?

13. It is clear from the judgment of the Supreme Court in the case Suresh ***Chandra Jain v. State of Madhya Pradesh, 2001 (42) ACC 459 :*** *((2001) 2 SCC 628 : AIR 2001 SC 571), that a Magistrate has the authority to treat an application under Section 156(3) Cr.P.C. as a complaint. This will become clear from the reference in the said report to the case of* ***Gopal Das Sindhi v. State of Assam, AIR 1961 SC 986,*** *in which the*

following observations were made: (Para 7)

"If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of filing of the complaint. We cannot read the provisions of Section 190 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. We are unable to construe the word "may' in Section 190 to mean "must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a 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."

14. It becomes clear from the said underlined portion that the Magistrate has the authority to treat an application under Section 156(3) Cr.P.C. as a complaint. Hon'ble Mr. Justice Vinod Prasad has also referred to the case of Suresh Chand Jain ((2001) 2 SCC 628 : AIR 2001 SC 571), "supra' and has extracted the following portion therefrom in order to take a different view: (para 7):--

"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."

15. It has been further held by the Apex Court in the same judgment. "But the significant point to be noticed is when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance."

Scope of Section 156 sub-sec. (3). Cr.P.C. 1. Prior to the Supreme Court decision in Chari's case, there was a controversy as to whether the power to direct investigation under s. 156 (3) was confined to a case under s. 190 (1) (c) i.e., upon his own knowledge or information, but also extended to a case under s. 190 (1) (a0, i.e. when he was move by a complaint. This latter view seems to have been approved by the Supreme Court in Chari's case. In the result, as soon as a petition of compliant is filed, the Magistrate is not bound to take cognizance of the offence but that he may take "action of some other kind, e.g. , ordering investigation under s. 156(3), or issuing a search warrant for the purpose of investigation."

2. The courses open to the Magistrate on receipt of a complaint have been elaborated in a later case of the Supreme Court: **Gopal Das Vs. State of Assam AIR 1961 SC 986 and Laxmi Narayan Vs. Narayana (1976) Cri.L.J. 1361 SC**

S. 190 (1) (a) does not mean that once a complaint is field, the Magistrate is bound to take cognizance if the fact stated in the complaint discloses the commission of an offence. The word 'may' cannot be construed as 'must'. A complaint disclosing a cognizable offence may well justify a Magistrate in sending the complaint, under s. 156 (3), to the Police for investigation. There is no reason why the time of the Magistrate should be wasted when the duty to investigate in cases involving cognizable offences if primarily 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, on receipt of a complaint, without police investigation. But if he does so, then he would have to proceed in the manner provided by Chap XVI of the Code.

3. The character of the subsequent proceedings would depend upon the question whether the magistrate has ordered investigation by the police (s. 202], after examining the complainant on oath under s. 200, or without examining the complaint. There was much confusion on this point, which was removed by the Supreme Court decision in Jamuna Singh's case, according to which-

(a) Whether the Magistrate has taken cognizance of an offence would depend upon the puspose for which he was applied his mind and the step taken by him in pursuance thereof.

(b) When a Magistrate applies his mind for the purpose of applying Chap. XVI, he must be held to have taken cognizance of the offence, e.g. when he examines the compliant on oath because the examination of the complainant contemplated by s. 200 is by a Magistrate taking congnizance of an offence on complaint. Hence, where the Magistrate, after examining the complainant, directs investigation by the Police, the report submitted by the Police on such investigation will fall under ss. 202-203, post. When cognizance had been taken by examining the compliant, there was no scope for cognizance being taken afresh of the same offence, after the receipt of the Police Officer's report. Therefore, the subsequent report by the Police officer, even though it purported to be a charge-sheet, should be treated as merely a consequence of the step the Magistrate has taken under s. 202, and not as a 'Police report' under ss. 156 (3), 190 (1) (b).

(c) But if the Magistrate directs Police investigation, without taking cognizance upon examining the complainant on oath, the report submitted by the Police consequent upon such investigation will fall within s. 156 (3), so as to have the effect of a 'police report' for purposes of s. 190 (1) (b).

Steps which a Magistrate may take after receipt of report of Police investigation, under s. 156.

1. A distinction must be made as between (a) the case where a Magistrate orders investigation by the Police, after taking cognizance upon a complaint, under s. 202 (1), and (b) the case where the Magistrate orders police investigation before taking cognizance upon a complaint, under s. 156 (3).

2. It is this latter contingency which is being dealt with in the present context, namely, where on receipt of complaint, the Magistrate orders Police investigation, without taking cognizance of the offence, upon the complaint. In such a case, the Police after making investigation, will submit a report under s. 173 (1), post. Upon receipt of such Police report, the Magistrate has several courses open to him:

(a) He may straightaway issue process against the accused, disagreeing with the police report to the effect that there is no sufficient ground for proceeding further. Even though he disagree with the Police report, in this case, he would be taking cognizance under s. 190(1)(b), and then issue process.

(b) Where he disagrees with Police report that no offence has been disclosed, the Magistrate may take cognizance of the offence under s. 190(1)(a), on the basis of the original complaint and proceed to examine the

complainant and his witnesses under s. 200 H.S. Bains Vs. State AIR 1980 SC 1883.

(c) He may agree with the Police report that there is no sufficient ground for proceeding further and drop the proceeding.

In the case of **Lalita Kumari Vs. Govt. of U.P. & Ors (decided on 12 November, 2013) [2014(2) SCC 1]**

The Constitutional Bench of Hon'ble Supreme Court has held as above and guidelines have been given to the police officer regarding recording F.I.R. at the police station.

Hon'ble Supreme Court in the case of **H. S. Bains, Director, Small Saving-cum-Dy. Secy. Finance v. State (Union Territory of Chandigarh), (1980) 4 SCC 631 : 1981 SCC (Cri) 93** at page 634 in paras 6 and 8 has observed as follows:

6. It is seen from the provisions to which we have referred in the preceding paras **that on receipt of a complaint a Magistrate has several courses open to him.** He may take cognizance of the offence and proceed to record the statements of the complainant and the witnesses present under Section 200. Thereafter, if in his opinion there is no sufficient ground for proceeding he may dismiss the complaint under Section 203. If in his opinion there is sufficient ground for proceeding he may issue process under Section 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a police officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. **On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173(1). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and straight away issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The police report under Section 173 will contain the facts discovered or unearthed by the police and the conclusions drawn by the police therefrom. The Magistrate is not bound by the conclusions drawn by the police and he may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under Section 200 of the Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156 (3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204.** Thus, a Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do

one of three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190 (1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.

8. **In *Tula Ramv. Kishore Singh* (AIR 1977 SC 2401) the Magistrate, on receiving a complaint, ordered an investigation under Section 156(3). The police submitted a report indicating that no case had been made out against the accused.** The court, however, recorded the statements of the complainant and the witnesses and issued process against the accused. It was contended that the Magistrate acted without jurisdiction in taking cognizance of the case as if upon a complaint when the police had submitted a report that no case had been made out against the accused. This Court held that the Magistrate acted within his powers and observed that the complaint did not get exhausted as soon as the Magistrate ordered an investigation under Section 156(3). We are, therefore, unable to agree with the submission of Shri Sibal that the Magistrate acted without jurisdiction in taking cognizance of the offence and issuing process to the accused notwithstanding the fact that the police report was to the effect that no case had been made out.

6. On the perusal of the above-mentioned provisions of Section 156(3) Cr.P.C. and precedents of Hon'ble Supreme Court and of Allahabad High Court, it is well settled proposition of law that the concerned Magistrate has on institution of written complaint regarding commission of cognizable offence has the following two options:-

(i) At the pre-cognizance stage- he may direct to concerned police station to register F.I.R. on the basis of facts narrated in the complaint if commission of congnizable offence disclosed prima facie and Investigating officer would conduct the investigation. Thus the Magistrate exercises a very limited power under section 156(3) Cr.P.C. and so is it's discretion. It does not travel into the arena of merit of the case, if such case was fit to proceed further.

(ii) At the post cognizance- after taking cognizance, he may adopt procedure of complaint cases provided under Section 200 and 202 Cr.P.C. If the Magistrate is not satisfied with the conclusions arrived at by the Investigating Officer in report submitted under section 173 Cr.P.C. then the Magistrate may take cognizance upon original complaint sent to S.H.O. at pre-cognizance stage and proceed further to examine the complaint under section 200 Cr.P.C. and his witnesses under section 202 Cr.P.C.

7. Rejection of a complaint at the pre-cognizance stage under Section 156(3) Cr.P.C. does not debar institution of second regular complaint. It would be post-cognizance stage, if the Magistrate takes cognizance on the original complaint or after rejection at pre-cognizance stage, if second complaint is filed by the complainant. In genuine cases, if averments of the complainant are true and trustworthy

or these are found so after preliminary inquiry, then the Magistrate under section 156(3) Cr.P.C. may direct the S.H.O. to register F.I.R. and conduct investigation on the basis of averments of the complaint.

8. The Magistrate may dismiss the complaint under Section 156(3) Cr.P.C. if by way of instituting complaint, defence version is created to absolve the complainant from the case registered earlier or on the basis of allegations made in the complainant, if dispute is purely of civil nature or the Magistrate considers that the complaint is false and frivolous. The Magistrate has to power to test the truth and veracity of the allegations levelled against the proposed accused persons and if there is no substance in the averments of the complainant then at pre-cognizance stage, the complaint may be dismissed under section 156(3) Cr.P.C.

9. Likewise, in the facts and circumstances of a particular case, Magistrate may take cognizance on the basis of the complaint instituted before him and may adopt the procedure provided under Sections 200 & 202 of Cr.P.C. and if there is no substance in the prima-facie evidence adduced by the complainant, the complaint may be dismissed under section 203 Cr.P.C.

10. In the present scenario of the society, several false and frivolous complaints are being filed by the unscrupulous litigants. Therefore, heavy duties have been cast upon the concerned Magistrate to exercise above mentioned discretion consciously, expeditiously and judiciously on the basis of the facts and circumstances of each case to ensure that faith of the litigants in the Justice Delivery System of India should be maintained at interest of justice should not be defeated.

11. On the basis of facts narrated in the complaint, the complainant is capable to adduce evidence regarding alleged incident of misappropriation of property of government school and trees, etc., by the respondents. The respondents abused the complainant indicating his caste as per the facts narrated in the complaint. These facts may be proved by adducing evidence by the complainant. This fact that respondents are pressurizing the complainant to compromise the matter is within the knowledge of complainant, it may also be proved by the complainant by adducing evidence.

12. Learned Magistrate has discretion at pre-cognizance stage to direct the concerned S.H.O. for registration of F.I.R. on the basis complaint instituted under Section 156(3) Cr.P.C. and investigate the matter. In the present case, the learned Second Additional Sessions Judge / Special Judge, (S.C./S.T. Act), Lakhimpur Kheri, at pre-cognizance stage, has not exercised the discretion in favour of complainant to direct the concerned S.H.O. to lodge the F.I.R. and to conduct investigation.

13. On the basis of above discussions, this appeal is liable to be dismissed.

14. Dismissed accordingly.

15. Learned Second Additional Sessions Judge / Special Judge, (S.C./S.T. Act), Lakhimpur Kheri has considered the facts on the basis of which complaint under Section 156(3) Cr.P.C. was instituted by the complainant. At post

cognizance stage the complainant may institute regular complaint on the basis of which, the learned Second Additional Sessions Judge/ Special Judge, (S.C./S.T. Act), Lakhimpur Kheri may record statement of complainant under Section 200 Cr.P.C. and the evidence under Section 202 Cr.P.C. and proceed according to law on regular complaint if instituted by the complainant. The impugned order dated 15.12.2020 will have no effect on the regular complaint, if instituted by the complainant.

(2021)01ILR A124
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 1082 of 2014

Kaladhar Chaubey ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri D.K. Singh, Sri Manju Thakur (Amicus Curiae)

Counsel for the Opposite Party:
A.G.A., Sri Rajiv Chaudhary, Sri Prashant Pratap Rai

Evidence Law - Indian Evidence Act, 1872 - Section 3 - Circumstantial Evidence- The circumstantial evidence must be so complete as to exclude every hypothesis other than that of guilt of the accused. In a case based on circumstantial evidence the Courts ought to have a conscientious approach and conviction to be recorded only in case in which all the links of the chain are complete and pointing to the guilt of the accused. Each link unless connected together form a chain may suggest suspicion but the same in itself cannot take place of proof and will not be sufficient to convict the accused.

In a case based on circumstantial evidence the prosecution has to connect all the incriminating circumstances against the accused to form a single chain which would lead to the inescapable conclusion about the guilt of the accused beyond all reasonable doubt- Suspicion alone cannot take the place of proof for convicting the accused.

Evidence Law - Indian Evidence Act, 1872- Section 27- This Section is based on doctrine of confirmation by subsequent facts. That doctrine is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered, it is a guarantee that the confession made was true. But only that portion of the information can be proved which relates distinctly or strictly to the facts discovered. The Section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence, but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. It cannot be lost sight of that Section 27 of the Evidence Act has frequently been misused by the police against an accused. Court should, therefore, be cautious and vigilant about the application of the above provision. The protection afforded by the provisions under Sections 25 and 26 of the Evidence Act is sought to be overcome by the police by taking resort to the provisions of Section 27 of the Evidence Act. No doubt, mere recovery in pursuance of Section 27 of the Evidence Act is not a clinching proof for holding an accused guilty. However, there is no doubt that it is good piece of evidence which may be relied upon as a link in the chain of circumstances in the present case for holding the guilt.

Only that part of the disclosure made by an accused can be relied upon as evidence, that distinctly and strictly relates to the recovery. The recovery alone would not be sufficient to secure the conviction, although it would be a good piece of evidence in the links of the circumstances against the accused.

Evidence Law - Indian Evidence Act, 1872- Circumstantial Evidence- Links in chain of circumstances not complete and reliable- The trial judge though had been cognizant of the fact that the present case is a case of circumstantial evidence and not a case of direct evidence has failed to specifically mention in the judgment as to what are the circumstances which the prosecution is relying in the matter and has failed to mention as to how the chain of circumstances get completed by linking each and every link to come to an irresistible conclusion about the guilt of the accused and has convicted him.

Accordingly Criminal Appeal Allowed. (E-2)

Judgements/ Case Law relied upon:-

1. Queen-Empress Vs Hosh Nak : 1941 All LJ 416

2. Hanumant, son of Govind Nargundkar Vs St. of M.P: AIR 1952 SC 343

3. Khasbaba Maruti Sholke Vs St. of Maha. : (1973) 2 SCC 449

4. Sharad Birdhichand Sarda Vs St. of Maha. : (1984) 4 SCC 116

5. Shivaji Sahabrao Bobade Vs St. of Maha. : [(1973) 2 SCC 793; para 19, p. 807

6. Ram Kishan Mithan Lal Sharma Vs St. of Bom. : AIR 1955 SC 104

7. Pulukari Kottaiah Vs King Emp. AIR 1947 PC 67

8. Delhi Admin. Vs Balkrishan : AIR 1972 SC 3

9. Geejaganda Somaiah Vs St. of Kar. : (2007) 9 SCC 315

10. Shailendra Rajdev Pasvan Vs St. of Guj. : AIR 2020 SC 180 [2019 SCC Online SC 1616]

(Delivered by Hon'ble Samit Gopal, J.)

1. This Criminal Appeal has been preferred against the impugned judgment and order dated 28.11.2013 passed by the Additional Sessions Judge/Special Judge (SC/ST Act), Varanasi in Special Sessions Trial No. 260 of 2011, State of U.P. vs. Kaladhar Chaubey, whereby the appellant has been convicted and sentenced under Section 302 I.P.C. to life imprisonment with fine of Rs.10,000/- and in default of fine to undergo further six months rigorous imprisonment, under Section 201 I.P.C. to three years rigorous imprisonment with fine of Rs.2,000/- and in default of fine to undergo two months rigorous imprisonment and, under Section 3(2)(5) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to undergo life imprisonment and a fine of Rs.10,000/- and in default of payment of fine to undergo six months rigorous imprisonment. Sentences have been ordered to run concurrently. It has further been ordered that the period of incarceration prior to the judgment shall be set off against the sentence of imprisonment.

2. The prosecution case as per the first information report lodged by Indrajeet P.W-1 the first informant who is a resident of village Hathiyar, Police Station Cholapur, district Varanasi is that on 27.2.2011 at about 7.00 P.M. Kaladhar Chaubey came to his house and asked about his brother Santosh @ Pillu Rathore (Nut). In the meantime Santosh reached the house and then Kaladhar Chaubey asked him to accompany up to market and on his saying so both proceeded from the house

on which the first informant asked Santosh as to where he was going, to which he replied that he is going to the market, where he has some work and will return soon. It is further stated that Santosh did not return till late night to the house and then the first informant and other persons went to the house of Kaladhar Chaubey where he did not give satisfactory reply and stated that Santosh after having tea went back and he does not know about him. It is then stated that then brother of the first informant Indrapal said that yesterday at about 9.00 PM both of them were consuming liquor at the country made liquor shop at Ajgara Gumti and Santosh was with you, on which he said that he does not know about him and went away. It is then stated that the first informant along with his friend and family members then started searching for his brother but could not know anything about him. Later, on 01.3.2011 at about 10.30 A.M. when they were going to the police station they met Shri Niwas Singh on the way who was told about the said incident on which he told that on 27.2.2011 at about 11.00 P.M. when he was returning to his house from brick kiln he saw Kaladhar Chaubey throwing some heavy thing in the well from which a sound of throwing of heavy item came and on seeing him, he quickly ran away and then expressed his suspicion and stated that they may see in the well as to whether Kaladhar Chaubey would have murdered their brother and threw him in the well, on which the first informant and many other persons reached at the well and saw that dead body of Santosh was inside it and foul smell was coming out about which he informed the police of Police Station Cholapur. It is stated that the incident was committed in 'orchard' situated in village Chahin.

3. A first information report was got registered by Indrajeet on 1.3.2011 at about 14.30 hours under Sections 302, 201 I.P.C. and 3(2)(5) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The same is Ex. Ka-3 to the records. An application dated 1.3.2011 was given by Indrajeet for lodging of the F.I.R. which is marked as Ex. Ka-1 to the records and the same has been registered as Case Crime No. 40 of 2011 at Police Station Cholapur, District Varanasi which is having a distance of about six kilometers from the place of occurrence.

4. Santosh Nut@Pulli aged about 27 years is the deceased in the present matter. His post mortem examination was conducted on 2.3.2011 at about 3.30 PM by Dr. K.R.R. Singh P.W.-7 which is marked as Ex. Ka-5 to the records. The doctor found the following ante mortem injuries on the body of the deceased which are as under:

"(i) Incised chopped wound of 14cm x 8cm x bone deep upto C3 vertebra esophagus and continuing underneath tissue of C3 vertebra (spine) touching to right pinna and back of neck at mid line with cut right carotid artery.

(ii) Incised chopped wound of 16cm x 5cm x bone deep on right side neck and front of face straight from 1cm below left angle of mouth and 8 cm below right ear pinna with fracture of mandible and maxilla.

(iii) Incised chopped wound of 9cm x 2cm x muscle deep on left side neck just below lobule of left pinna.

(iv) Incised chopped wound of 11cm x 3cm x muscle deep on left side neck and left ear in 1 cm above injury no. (iii)

(v) Incised wound of 4.5cm x 1cm x muscle deep on left side neck 2cm below injury no. (iv) 14cm outer to mid line of neck.

(vi) Incised chopped wound of 10cm x 2cm x bone deep 5cm above left ear pinna on left side of skull with fracture of left temporal and parietal bone.

(vii) Multiple abrasion over 15cm x 4cm area on left side of neck surrounded within an area of 17cm x 13cm on front of left side and back of neck.

(viii) Incised wound of 5cm x 0.2cm x skin deep on medial aspect of right hand 3cm below right wrist.

(ix) Lacerated wound of 2.5cm x 0.5cm x bone deep on both side of trachea at mid line 4cm above junction of both eyebrow.

(x) Multiple abraded contusion in an area of 12cm x 7cm over both side of forehead and left side of face 2cm above left eyebrow and 4cm above right eyebrow.

(xi) Multiple scabbed wound in an area of 18cm x 11cm over front and outer aspect of right knee and leg. "

The cause of death has been opined to be coma and hemorrhagic shock as a result of head injury and injury to neck.

5. The investigation in the present matter was taken up and charge sheet being charge sheet no. A-45 of 2011 dated 1.3.2011 under Section 302, 201 I.P.C. and Section 3(2)(5) SC/ST Act was submitted against the appellant Kaladhar Chaubey. The same is marked as Ex. Ka-8 to the records.

6. The trial court vide order dated 29.10.2011 framed charges against the accused under Sections 302, 201 I.P.C. and Section 3(2)(v) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Accused pleaded not guilty and claimed to be tried.

7. On 03.3.2011 it is stated that on the pointing out of the accused-appellant a '*gandasa*' which was found to be blood stained, one *lota* of steel and one small glass of steel were also got recovered. A recovery memo regarding the said recovered articles was prepared which is marked as Ex. Ka-2 to the records.

8. Certain articles were sent to Chemical Analyst for which after examination a report dated 14.8.2012 was sent by the Chemical Analyst. While conducting analysis, the Chemical Analyst found blood stains on item no. 1 and 6 being '*gandasa*' and a black thread and on item no. 2 to 4 being blood stained mud, shirt and banyan, human blood was found. It was further mentioned in the said report that blood on item no. 1/*gandasa*, item no. 5/underwear and item no. 6/black thread was found to be disintegrated. In so far as the test of blood on item no. 2 being blood stained mud is concerned, the same could not deciphered. Further it was opined that the blood stains on item no.3 and 4 being shirt and baniyan were insufficient for test of blood group.

9. The prosecution in order to prove its case examined Indrajeet P.W.-1 who is the first informant of the case and brother of the deceased and the witness of taking away of the deceased from his house. Shri Niwas Singh P.W.-2 is a witness of the accused-appellant throwing some heavy thing in the well on 27.2.2011 at about 11.00 P.M. who then tells that he saw the said event to Indrajeet P.W.-1 and his father on 1.3.2011 and then they went to the well and found foul smell coming from the well. Indrapal Singh P.W.-3 who is also

the brother of the deceased and Indrapal P.W.-1 is the witness of the accused-appellant taking away the deceased with him on 27.2.2011 at about 7.00 P.M. and further is also a witness of last seen of the accused and the deceased together on 27.2.2011 at about 09.00 P.M. at the country made liquor shop at Ajgara where they were consuming liquor. Arun Kumar Yadav P.W.-4, is a driver by profession and a villager who has stated that in the night of 28.2.2011 at about 12.00 A.M. met the accused-appellant who demanded Rs.500/- from him and was in a drunken condition. Fauzdar Yadav P.W.-5 is the witness to the recovery memo Ex. Ka-2, Basant Lal P.W.-6 is Head Constable who had transcribed the Chik F.I.R. on the basis of an application given by Indrajeet. Dr. K.R.R. Singh P.W.-7 conducted the post mortem examination of the deceased Santosh Nut @Pillu. Ramanand Kushwaha P.W.-8 is the Investigating Officer of the matter who took up the investigation and submitted charge-sheet against the accused-appellant. Vinod Kumar Singh P.W.-9 conducted inquest on the dead body of the deceased and Shyam Dev Yadav P.W.-10 took the articles from Police Station to Forensic Science Laboratory, Varanasi for analysis.

10. The accused-appellant denied the occurrence and claimed false implication due to enmity with the first informant and his family and claimed to be tried.

11. In defense the accused-appellant produced Ram Pyare Pandey as D.W.-1 to show that in the night of occurrence it was dark as it was Dashmi of Krishna Paksha.

12. The trial court after considering the entire evidence on record came to a conclusion that the evidence of witnesses and the entire records goes to show that the accused Kaladhar Chaubey has committed the said offence which has been proved against him beyond reasonable doubts and the prosecution has been successful in proving the case against him and thus, convicted him under the aforesaid sections.

13. We have heard Sri D.K. Singh learned counsel for the appellant and Mrs. Archana Singh, learned A.G.A. for the State of U.P. and have perused the entire record including the impugned judgment and order or conviction.

Sri Rajiv Chaudhary, learned counsel for the first informant has not appeared even when the matter was taken up in the revised list.

14. Learned counsel for the appellant has made the following submissions before us:

(1) The present case is a case of circumstantial in nature and there is no eye witness to the murder of the deceased Santosh @Pillu Rathore (Nut).

(2) The prosecution has not come out with any motive for the accused-appellant to commit the said offence.

(3) Links in chain of events are conspicuously missing and the same even if taken together, did not make a chain so as to implicate the appellant.

(4) The story of last seen of the accused-appellant along with the deceased on 27.2.2011 at about 9.00 P.M. at the liquor outlet at Ajgara Gumti where they are said to have been consuming liquor together is an afterthought as given out in the statement of P.W.-3 Indrapal. The evidence of P.W.-2 and P.W.-3 is not at all trustworthy as their statements under Section 161 Cr.P.C. were recorded after 14 days and 16 days respectively after the

incident and as such their version as coming forward have seen the light of the day after an unexplained delay.

(5) The appellant is said to be arrested on 1.3.2011 but there is no document whatsoever to show conclusively about his arrest on the same day. He was not produced before the concerned Magistrate within 24 hours of his arrest. The prosecution is not at all sure about the date, time and place of arrest of the appellant. This fact also leads to irresistible conclusion that the accused-appellant was arrested, kept in the police lock up, tortured and then was falsely implicated in the present case.

15. Learned Additional Government Advocate for the State on the other hand opposed the submissions of learned counsel for the appellant by arguing that the presence of P.W.-1 Indrajeet, P.W.-3 Indrapal cannot be doubted for the circumstances of taking away the deceased by the accused-appellant on 27.2.2011 at about 9.00 P.M. as they were natural witnesses present in the house. It was further argued that even the evidence of Shri Niwas Singh P.W.-2 who is the witness of the accused-appellant throwing something in the well in the night of the day when he had taken away the deceased with him and later on recovery of the dead body of the deceased from the same well, also does not leave any doubt about the accused-appellant being involved in the murder. It is argued that the testimony of the said three witnesses are in the nature of true and truthful witnesses. The appeal lacks merit which is liable to be dismissed.

16. P.W.-1 Indrajeet is the first informant of the case and the brother of the deceased. In his examination-in-chief he states that on 27.2.2011 at about 7.00 P.M. the accused-appellant Kaladhar Chaubey resident of the same village who has been identified by him in court, came to his house and inquired about his brother Santosh. In the meantime Santosh came there, he then said to his brother to accompany him to market and both of them went out from the house. He asked his brother Santosh where he was going, on which he stated that he is going to market and will return soon. It is stated that till late night Santosh did not come back to the house and then the first informant and other persons went out to search him. In the said process they went to the house of accused-appellant Kaladhar Chaubey and asked about him, on which he did not give a clear reply and stated that Santosh had tea and then went back. Indrajeet and Indrapal had gone to Kaladhar Chabey. Indrapal then said that both the persons were consuming liquor at around 9.00 P.M. at the liquor outlet at Ajgara Gumti, to which Kaladhar Chaubey said that he does not know about it. Both of them then went back. He states that only a search was being done but they did not go to the police station. Even on the next day search continued. He then states that on 1.3.2011 at about 10.00 A.M. when he and other persons were going to police station then on the way they met Shri Niwas Singh and then they told him the entire story and asked him about it, then he told them that on 27.2.2011 at about 11.00 P.M. while he was returning from the brick kiln he saw Kaladhar Chaubey throwing some heavy thing in the well from which a sound of something being thrown came. He further stated that on seeing him, Kaladhar Chaubey ran towards his house. He states that it may be possible that his brother might have been thrown in the well. On hearing the story the first informant and other persons then returned and reached the well and saw the dead body of their brother

in the well where foul smell was coming out. Information was then given to the police station Cholapur. He states to have given an application for lodging of the F.I.R. which was proved by him which is marked as Ex. Ka-1 to the records. He then states that Circle Officer then along with the police force went to the place and got the dead body out from the well and they saw that the neck of it was cut. The neck was mostly cut and little portion remained uncut. He states that later on Circle Officer had got recovered a '*Gandasa*' also.

In the cross examination P.W.-1 states that he has three brothers amongst whom he is the eldest, Indrapal who is P.W.-3, is his younger brother and Santosh the deceased was the youngest brother. He stated to be doing business of milching cows and selling cows also. He is pradhan of village. He states that his younger brother Indrapal P.W.-3 also does the work of milching of cow. The deceased Santosh was also involved in the work of milching of cows and was having a good work. He was not of thin built. He was about 5-1/3 feet of height. He did not use to participate in wrestling. The distance between the house of the accused and his house is about 500 meters. In between both the houses there is a temple of Goddess Bhagwati Mai. He further states that he and his brother Indrapal did not use to consume liquor. Santosh used to consume liquor but never before him. On 27.2.2011 at about 7.00 P.M. the accused came to his house and asked about his brother, at that time he was present at his house and Santosh came then only. He came with a bulb. Santosh then went with the accused-appellant. Santosh stated that he is going to market and will come back soon. Kaladhar Chaubey also said that they are going to market and they will come soon. Santosh was wearing a pant and shirt at that time. Shirt was full sleeves having checks on it and pant was light coloured black pant. He states that after the night passed, then they went to the house of Kaladhar Chaubey and prior to that he has not met his brother Indrapal. They did not go to Kaladhar Chaubey's house on 27.2.2011 in the night. They went to Kaladhar Chaubey's house on 28.2.2011 in the night at about 9.00 P.M. Kaladhar Chaubey was present at his house at that time. His father and brother lived separately. When Kaladhar Chaubey was called his father and brother did not come out. Kaladhar Chaubey used to live at some distance from the house of his brother and father in a 'Marai'. He has shown 'Marai' to the Investigating Officer. When he went to the house of Kaladhar Chaubey it was moonlit night (ujali raat) and a bulb was lit. He states that the dead body of his brother was taken out from the well. Panchayatnama was conducted in his presence at the police station. The dead body was sealed at the police station. When the dead body was taken out from the well it had shirt and underwear. The police brought the dead body from there to the police station. Indrapal on 28.2.2011 had told Kaladhar Chaubey that yesterday i.e. 27.2.2011 at about 7.30 P.M. he with his brother were consuming liquor at Ajgara Gumti. He states that Indrapal had disclosed the fact about Kaladhar Chaubey was consuming liquor in front of him and not prior to it. He states that he does not remember as to whether on 28.2.2011 at about 8-9 P.M. Indrapal would have told the same fact to him or not. The well from which the dead body was taken out is about 40 feet deep. He states that he does not remember the circumference of the well. Well is at a corner in the orchard. On the South of the well their is an old brick kiln of Dina Nath Pandey @ Hosa Maharaj which is not in operation. He does not

know whether there is brick kiln of Avaninder Singh in Ajgara village near the field of Lalchandra Singh or not. He states that distance between brick kiln of Hosa Maharaj which was not functioning and that of Avaninder Singh which is situated in village Ajgara is about one kilometer. He states that the well from where the dead body of his brother was recovered is a pucca well and on one of its side a platform (chabutara) is made. The distance between his house and the well is about 500 meters and at about 150 meters west side of the well there is a 'bans koth'. He states that there are two 'bans kothis' but he has not counted as to how many bamboos are in it. He states that shop of country made liquor in Ajgara is on main road. He can go to his house from the northern road of Nahar. There are some houses in between Nahar and the country made liquor shop situated in Ajgara. Bans kothi and orchard in which the well is situated belong to Rajendra Singh. He further states that recovery of '*gandasa*' was not effected in his presence. He states that on 27.2.2011 he had slept in the night at around 10.30 P.M. His brother Indrapal had come back to the house before he went to sleep. When he had come back to the house after searching his brother Indrapal was present in the house. He did not meet him as they were disturbed. On 27.2.2011 he states that he and his brother were searching separately.

On 28.2.2011 he had gone to the house of Kaladhar Chaubey and had inquired as to where his brother Santosh is. At that time his brother Indrapal had also reached the house of Kaladhar Chaubey. He had gone to the house of Kaladhar Chaubey after searching for whole day on 28.2.2011 and then reached Kaladhar Chaubey's house in the night at about 9-10 P.M. On 27.2.2011 he searched his brother all alone as it was night. He started searching at about 9.00 P.M. He searched his brother near Inter College and also the shops situated adjacent to it. He states that he cannot tell as to who had come on 27.2.2011 after he went to sleep. He states that Santosh did not come to the house on 27.2.2011 after he went to sleep.

He states that he does not know regarding recovery done by Circle Officer of '*Gandasa*', '*lota*' and 'glass'. He states that Circle Officer did not get the said items recovered in his presence. He states that he got an application for lodging of the F.I.R. transcribed at his house at about 1-2 P.M. The police station is situated at a distance about 13-14 kilometers from his house. He had gone to the police station on his motorcycle. He states that on 28.2.2011 he met his brother Indrapal in the evening as he goes out for distribution of milk since morning. He states that he did not see *gandasa* and till date not seen it. He states that he did not go to the police station along with dead body.

The witness was then cross examined about his elections in which he states that around 2-1/2 and 3 months back he had contested the elections of village pradhan. His close rival was a Harijan. He does not remember his name. He states that 5-6 people were contesting the elections. The mother of Dhananjay Yadav was the pradhan prior to him. To a suggestion that since the seat was reserved, Dhananjay Yadav made him to contest the election and got him seat of village Pradhan to which he denies. He denies that Dhananjay Yadav did not help him in the elections. He states that Kaladhar Chaubey was not canvassing for him in the elections. The orchard in which the well is situated, has trees of mango and two cot of bamboos. There are about 7-8 trees of mango. Road is situated at a distance of 10-15 meters from the well and runs from east-west. He states that he

did not ever go at about 2.00 A.M. in the night to the house of Kaladhar Chaubey.

He states that he does not know as to whether he had told the said fact to the Investigating Officer or not and if the Investigating Officer has not written the date of his going to the house of the accused then he cannot give the reason for it. He states that he did not tell in his statement that on 28.2.2011 he went to the house of Kaladhar Chaubey to know about his brother. He states that while going to the police station for getting the F.I.R. lodged he had met Shri Niwas Singh on the way and said fact has been mentioned in the F.I.R. He states that in the court also he stated the same and has also told the Investigating Officer while his statement was being recorded about the said fact. He states that around 4-5 years back people used the platform of the said well for bath, washing clothes. He got suspicion about some bad event occurring with his brother on 28.2.2011. On 1.3.2011 at about 10-11 A.M. he suspected something wrong to have happened to his brother. On 27.2.2011, 28.2.2011 and 1.3.2011 prior to 10.00 A.M. he had not lodged any missing report regarding his brother. He states that he was searching for his brother and hence, he did not get the missing report lodged.

To a suggestion that his brother often used to be away from the house he denies the same. On 28.2.2011 he states to have gone to the house of accused Kaladhar Chaubey to ask about his brother. Kaladhar Chaubey told him that after having tea his brother had gone back. He states that he did not inquire about his brother from the persons near the place of occurrence. He was searching his brother. He did not ask anybody about his brother. He did not search his brother in the orchard, well and bushes. On 1.3.2011 at about 10.30-11.00 A.M. Shri Niwas Singh told him that on 27.2.2011 when he was returning from brick kiln then he saw Kaladhar Chaubey throwing some heavy thing in the well and after seeing him the accused Kaladhar Chaubey went towards his house. On 01.3.2011 he informed at the police station that the dead body of his brother Santosh@Pillu is in the well situated in the village Chahin. The said fact has been mentioned in the application. He states that except for the said application given by him at the police station no other information was given by him at the police station prior. A suggestion has been given to him that the witness Shri Niwas Singh is a regular visitor of his house and used to take money from him to which he denies. To a further suggestion that Shri Niwas Singh consumes ganja and liquor he denies the same. He further states that he had gone to the house of Kaladhar Chaubey on 27.2.2011 and 28.2.2011. To a suggestion that he is stating a wrong fact that on 27.2.2011 the accused Kaladhar Chaubey came to his house in the evening and took his brother he denies the same. Further to a suggestion that he and his family are involved in selling and slaughtering of cow, buffalo and bullock, he denies the same. Further he denies the suggestion that the accused Kaladhar Chaubey used to resent the same. He states that he went to the police station alone for getting the report lodged. The report was written by him at the house. Dhananjay and Avanindra did not go with him to police station for lodging of the F.I.R. On 1.3.2011 he met with Shri Niwas Singh near the house of Raj Kumar and Ram Adhar. The place where he met him is situated on the pitched road. He states that Shri Niwas Singh comes directly on the chak road from his house. House of witness is not situated in between. He states that Shri Niwas Singh does not consume ganja and liquor. He states that Shri Niwas Singh

does not accompany him regularly. He used to met Shri Niwas Singh in marriages etc. and as such he knows him. Shri Niwas Singh does not come to his house, he is of different caste. He states that he does not sell bullocks, buffalos for slaughtering. He is involved in the business of milching. His father also did not use to sell bullocks and buffalos to butchers. He states that his brother Indrapal did not go with him for lodging of the F.I.R.. To a suggestion that as he was involved in giving cows, buffalos and bullocks to butchers which was resented by the accused Kaladhar Chaubey and as such in annoyance the said case has been got registered against him, to which he denies. He further denied the suggestion that he is giving false statement knowingly.

17. Shri Niwas Singh P.W.-2 is a resident of village Udhhorampur, Police Station Cholapur, District Varanasi. He states that he knows Avanindra Singh, who has a brick kiln. Rakesh Singh is a clerk in the brick kiln of Avanindra Singh. He knows Rakesh Singh also. He is his friend. He met Rakesh Singh in Ajgara bazar in the evening at about 5-5.30 P.M. Both had informal talks between them. He reached the brick kiln at about 8.00 P.M. and had his food there only on 27.2.2011. He left the brick kiln at about 11.00 P.M. He states that while on his way, he saw Kaladhar Chaubey near the well and saw him throwing some heavy thing in the well because of which sound came from it. He states that distance between the house of the accused and the well is about 75-100 meters. After hearing sound from the well he went to his house. He was coming to Ajgara on 1.3.2011 and about 100 meters away from Inter College, he met Indrajeet and his father who was along with 2-3 persons. He thus inquired their well being on which they stated that on 27th Kaladhar Chaubey had taken away his brother who had not returned yet back home and they are searching for him. He got suspicion and he told them that on 27th when he was returning back after having his food from brick kiln, at that time he saw Kaladhar Chaubey throwing some heavy item in the well from which sound of throwing had come. Then Indrajeet and his father and 2-3 other persons along with himself went to the well and they saw inside the well and found foul smell coming out from it. They could not see anything inside but foul smell was coming out from it. Later on he went to Ajgara to purchase medicines. After that he does not know as to what happened. The Circle Officer recorded his statement after 14-15 days and had come to his house on 14.3.2011 and interrogated him.

In his cross examination he states that kachcha road from which he was going, is situated at a distance of about 8 hands from the well. He then states it to be around 10-12 hands away. He states that one hand is about 1-1/2 feet. He does not know as to how many mango trees are there in the orchard as he has not counted them. There were bushes also. He did not count the mango trees at the time of occurrence. The distance of well from the brick kiln of Avanindra Singh is about 600-700 meters. On the other side of orchard there are houses of Zalim Singh and others.

He has not seen as to whether any straight road goes from the house of Zalim Singh toward Ajgara. He cannot tell as to whether any main road goes from the house of Zalim Singh to Ajgara and on the same way brick kiln of Avanindra Singh is situated. The brick kiln of Avanindra Singh is in village of Ajgara. He has not seen bamboo trees in the orchard. The house of Mohal Singh is situated at a distance of around 100 meters. He does not know as to whether any house there except for the

house of Mohal Singh. The house of Indrajeet, who is the informant, is situated at a distance of around 3-4 hundred meters from the well. The house of accused Kaladhar Chaubey is situated at a distance of around 200-300 meters from the house of Indrajeet. The road on which he was coming back walking merges on a pitched road and at that place there are some shops but he does not know as to whose shops are there. The road for walking merges with the main road and from there while going toward north there is a Harijan Basti but he does not know as to whose house is there.

He states that Udhorampur village is situated on the north side of village Ajgara and straight road joins them. If one goes from brick kiln to village Udhorampur through village Ajgara then distance will increase a lot. From the brick kiln of Avanindra Singh he cannot go to his village on bicycle from the 'merh' of the fields. He cannot tell as to whether a person can go on foot from the 'merh' of the fields. He states that he has not gone on foot from the said route. He states that if one travels from the brick kiln of Avanindra Singh and goes from the west towards orchard and then on the straight road and then towards north, Vishnu Bhagwan temple will come and later on on the east of temple, he will reach his village. He states that he did not use the route daily while coming back from the brick kiln.

He states that he has not seen Santosh @ Pillu before his death. He was a person of short height and healthy but not very healthy. He states that had Santosh @Pillu been alive, he could not throw him alone in the well. He further states that had Santosh @Pillu died he would have thrown him alone in the well. He had seen Kaladhar Chaubey throwing something in the well. He did not see the deceased being dragged near the well. He did not see as to what Kaladhar Chaubey threw in the well. He had heard the sound from the well from a distance of about 10 steps. The night was a moonlit night. He could not tell as to what was the time of moon rise but states that moon was visible. He states that he cannot tell as to whether the incident was of month of Phagun of 10th day of Krishna Paksha. He states that he did not see that moon was rising at that day at 3.11 A.M. To a suggestion that night in which he has seen the occurrence was a dark night and not a moon lit night, he denies the same. He states that he had told everything to the Investigating Officer. He states that he does not remember as to whether he had told the Investigating Officer that there was a distance of 10 steps from the well from where he had heard sound of throwing of something in the well. He states that if the Investigating Officer would have asked him he would have told him. He states that he did not tell the Investigating Officer that while going from village Ajgara Bazar to his village the route for traveling on foot is a kachcha road from orchard in village Chahin towards brick kiln of Avanindra Singh. He met Rakesh Singh on 27.2.2011 at about 5-6 P.M. in Ajgara Bazar. The investigating officer did not ask him as to what time he met Rakesh Singh. On 1.3.2011 at 10.30 A.M. he was going from his house to Ajgara Bazar wherein near village Chahin he met Indrajeet Rathore who was a person of his acquaintance who was accompanied by 2-3 other persons. He did not tell the Investigating officer about the name Prabhu Rathore being with them. In his presence Indrajeet Rathore did not give any information to Chauki Ajgara police station Cholapur about the writing of F.I.R. He did not give any such statement to the Investigating Officer that an information was given by Indrajeet Rathore in his presence to the police Chauki,

Ajgara. When he met Indrajeet Rathore on 1.3.2011 Dhananjay Yadav and Avanindra Singh were not with him. He has seen the orchard in day time also. He does not use a spectacle. He can see about 15-20 steps in the night.

He denies the suggestion that in the night of incident he was coming at that place. To a further suggestion that in the night of incident he did not hear any sound from the well, he denies. On 28.2.2011 he did not meet the accused Kaladhar Chaubey. On 28.2.2011 in the morning, afternoon he did not see as to what was there in the well. He further states that on 28.2.2011 in the morning, afternoon and evening he did not tell anyone that he heard the sound of throwing something in the well. He further states that on 27.2.2011 in the night he all of a sudden travelled on the kachche raste. The well was dry and there was no water in it. He states that if in a dried well any heavy thing is thrown then sound will come. He does not know as to how many days before the election of village Pradhan was held. His village and Hathiyar village situated on the borders. Village Ajgara is also a border village of his village. He does not know as to when the elections were held.

He knows the date of incident. To a suggestion that he has been tutored about the date of incident, he states it to be incorrect. He further states that since the date of election was not tutored to him he is unable to tell the same to which he denies. He does not know whether Santosh@Pillu used to consume liquor or not. Santosh @ Pillu did not consume liquor with him. As on date pradhan of village is Indrajeet Rathore. He does not consume liquor. He states that why Indrajeet Rathore will give money to him for liquor. To a suggestion that Indrajeet Rathore gives money to him for liquor daily he refuses. He states that all his property is in the name of his father. He does not know how much land he has. Cultivation is done from a Tractor. To a suggestion that he has sold his land he denies. To a further suggestion that he is managing his house on the expenses given by the first informant, he denies. He states that he has heard the name of Basantu Nut who is the father of Prabhu Nut who is the father of Indrajeet Rathore. He does not know that Basantu and Prabhu used to sell bullocks and buffalos etc. for slaughtering. He does not know that the accused Kaladhar Chaubey used to oppose the same. To a suggestion that in a conspiracy with the informant Indrajeet Rathore and after taking money from him he is falsely implicating Kaladhar Chaubey and giving a false evidence, he denies. Further he states that he does not know as to what Kaladhar Chaubey was wearing when he was standing near the well. To a suggestion that he states that it is incorrect to state that he did not see accused Kaladhar Chaubey at the well.

18. Indrapal P.W.-3 is the brother of the deceased. He is a witness of taking away of the deceased by the accused-appellant on 27.2.2011 at 7.00 P.M. and then they being last seen by him at 9.00 P.M. at the liquor shop at Ajgara consuming liquor. He in his examination-in-chief states that accused Kaladhar Chaubey took away his brother Santosh Rathore from his house at 7.00 P.M. He states that then they waited long for his brother to come back till 1.00-2.00 A.M. and then they went to the house of Kaladhar Chaubey and asked him about the whereabouts of his brother, to which he stated that he does not know. He states to have seen Kaladhar Chaubey and his brother at the country made liquor shop at 9.00 P.M. and they were consuming liquor

together. Kaladhar Chaubey then avoided answering to the query and in an irritated condition he states that he does not know as to where he has gone. About the motive he states that his brother and Kaladhar Chaubey had a dispute previously wherein Kaladhar Chaubey had accused his brother of molesting his wife. After asking Kaladhar Chaubey of whereabouts of his brother, they again started searching for him and proceeded towards police station to give an information. He, his brother Indrajeet, Dhananjay Yadav and his father Prabhu Rathore proceeded for police station and on the way near Chahin in Udhorampur, Shri Niwas Singh P.W.-2 met them who was known to his brother. He inquired about their well being on which he was informed about the disappearance of his brother Santosh to which he stated that on 27.2.2011at about 11.00 P.M. he saw Kaladhar Chaubey near the well in the Chak of Markandey Singh throwing some heavy thing inside after which a sound of throwing something was heard. On the said information all the persons went to the well and saw that the dead body of his brother Santosh is inside the well and foul smell is coming on which his brother came back to the house, wrote an application and then went to the police station Cholapur and gave it on which F.I.R. was registered.

Circle Officer had inquired him about the incident. The dead body of his brother was taken out from the well in the presence of Circle Officer and other police personnel. His statement under Section 161 Cr.P.C. was recorded after 16-17 days of the incident. In the course of examination he states that he did not go to the police station with his brother. He does not know as to how his brother went for getting the F.I.R. lodged as he was disturbed. When his brother came after getting the F.I.R. registered he was present at the house. He is unable to tell as to whether his father had also gone to the police station with his brother for getting the F.I.R. registered, because he was disturbed. He states that he is even disturbed today. When Shri Niwas Singh met him at that time they were not going to the police station along with any application. They were traveling on 2-3 motorcycles. Shri Niwas Singh met them near village Chahin. He was sitting on the motorcycle of his brother. His father was sitting on the motorcycle of Dhananjay Yadav. They were in total four persons. His brother had gone to the house and then got the report registered at 11-12 O'clock. At the time of the report being transcribed he was present there but was disturbed. They had come to the house at about 7.00 P.M. on the day of incident and at that time, Kaladhar Chaubey had taken his brother.

To a suggestion that he was not present at the house on 27.2.2011 at 7.00 P.M. he denies. He states that on 27.2.2011 he went to the country made liquor shop on a cycle. He had seen his brother and Kaladhar Chaubey from the road and had returned back to the house after about 30 minutes. He had seen both the persons going together and drinking liquor together. He reached his house at about 9.30 P.M. At that time his brother who is the first informant was present at the house. He did not talk to his brother and even did not meet him. His brother was awake at that time and he went to sleep. His brother also slept in the house. He woke up at about 2.00 A.M. and went to the house of Kaladhar Chaubey to ask about whereabouts of his brother. Santosh was his brother and used to sleep with him and as such he knew that he did not return. He states to supply milk which he used to purchase and then sell in Varanasi. He used to go to Varanasi from his house at 10.00 A.M. and used to return at about 4.00-5.00

P.M. He used to milch animals in the morning and evening at 7.00 A.M. and about 5.30 P.M. He used to return at about 6.00-7.00 P.M. to his house after milching animals. He had seen Kaladhar Chaubey and Santosh consuming liquor on 27.2.2011 at about 9.00 P.M. from a distance of 15-20 steps. Many other people were also consuming liquor there. About 7-8 people were consuming liquor. He states to have seen the two persons in the light of bulb which was lit by battery as there was no electricity and even moon light was not present. He had seen Kaladhar Chaubey and Santosh consuming liquor from the road. He got disturbed from 27.2.2011 from 2.00 A.M. He searched for his brother on the next morning also. He inquired about his brother from other people on 28.2.2011 in the morning at 7.00 A.M. and they came back. He had searched for his brother in the bushes near the well in village Chahin. On 1.3.2011 the F.I.R. was lodged and prior to it no missing report was lodged. He had gone to house of Kaladhar Chaubey alone at 2.00 A.M. He does not remember as to whether he had told his brother Indrajeet that he had seen his brother and Kaladhar Chaubey on 27.2.2011 consuming liquor. He states that his brother was consuming liquor at 9.00 P.M. on 27.2.2011 with Kaladhar Chaubey and not at 7.00 P.M.

He states that about one year back Kaladhar Chaubey had accused Santosh of teasing his wife at his door once. The allegation was leveled at 9.00 P.M. He had heard about the fact that of leveling of the said allegation. Prior to leveling of the allegation Kaladhar Chaubey and Santosh had some fight between them. No mar-pit took place but they abused each other. No report was registered. He states that on 28.2.2011 he did not search the well from where the dead body of his brother was recovered. He had searched the bushes around the well while searching his brother. House of Dhashrath Yadav, Mohala Yadav and Siri Harijan is situated at 50-60 meters from the well. There is a kachcha rasta on the south of the well which joins the main pucca road which is four meters away. The well from which the dead body was recovered was dry. On the south of the well the houses of workers of brick kiln are situated and on one corner about 60-70 meters away the house of Kaladhar Chaubey is situated. His house is at a distance of about 700-800 meters from the well. The dead body of his brother was taken out from the well in his presence at about 12.00 P.M. Circle Officer was not present at that time. Station House Officer was present. The liquor shop is about one kilometer away from the well. He had seen his brother at the liquor shop and after that his dead body was recovered. The accused and the deceased were consuming liquor on the same table. He saw them while going on cycle. He did not see as to where the deceased and the accused went after consuming liquor. He was in Varanasi on 27.2.2011 and as such is unable to tell as to whether his brother had taken food or not.

Prior to the incident the election of Village Pradhan took place. His brother Indrajeet was a candidate therein. To a suggestion that the accused Kaladhar Chaubey was canvassing and helping his brother in the elections, he denies. He states that Kaladhar Chaubey used to oppose his brother and did canvassing for someone else. He states that he had told the Circle Officer that the accused Kaladhar Chaubey had taken his brother in his presence, if same is not written in his statement he cannot tell the reason for it. To a suggestion that his brother Santosh was seen in a compromising position with the lady in the house and thereafter he murdered his brother and threw his dead body in the well

he denies. He further denies that Kaladhar Chaubey is being falsely implicated due to enmity. He states that the liquor shop used to close at about 9.00 P.M. He denies the suggestion that the accused Kaladhar Chaubey did not take his brother on 27.2.2011 at about 7.00 P.M. in his presence. He further denies the suggestion that he did not see his brother consuming liquor with the accused Kaladhar Chaubey on 27.2.2011. He states that he has neither friendship nor enmity with Kaladhar Chaubey. His brother Santosh was not habitual to liquor but used to consume it off and on. To a suggestion that the accused Kaladhar Chaubey is being falsely implicated and false statement is being given, he denies.

19. Arun Kumar Yadav P.W.-4 is a driver by profession and drives a Tata Sumo vehicle. He states that sometimes he used to send Kaladhar Chaubey for driving the vehicle. He met Kaladhar Chaubey on 28.2.2011 at about 12.00 P.M. He states that Kaladhar Chaubey had gone to him and had asked for Rs.500/- to which he asked as to why it is needed. At that time he was drunk. He had told him that last year Santosh had molested his wife to which he has done a very wrong thing. He was asked about it to which he started crying. Kaladhar Chaubey had even previously taken money from him many times but never used to return and used to make excuses for not returning. He went to his sasural at about 5.00 A.M. to drop his wife and children and returned at about 11.30 A.M. and saw that there was a commotion in the village and he was told that the dead body of Santosh has been recovered from the well. Then he realized that Kaladhar Chaubey was referring about something and it is he who has done the incident. His statement under Section 161 Cr.P.C. was recorded on 20.3.2011.

In his cross-examination he states that Kaladhar Chaubey came to his house on 28.2.2011. He was badly drunk and was not in a fit state of mind. He went to his sasural on 1.3.2011 at about 4.00 A.M. He and his family used to live in sasural. He used to drive Tata Sumo in Varanasi and lived in the house. He used to come and go to sasural. Kaladhar Chaubey was previously employed in C.I.S.F. He has four bighas of land in the village but does not know how much land Kaladhar Chaubey has. To a suggestion that Kaladhar Chaubey never drove his vehicle, he denies. To a suggestion that Kaladhar Chaubey has more property than him, he denies. Further in his cross-examination there is nothing much relevant stated therein. To a suggestion that he under pressure of his patidar and of the first informant is deposing falsely against Kaladhar Chaubey, he denies. He further denies the suggestion that he lives in his sasural in Chandauli.

20. Faujdar Yadav P.W.-5 is a witness of recovery of a '*gandasa*' stated to have been recovered on the pointing out of the accused-appellant Kaladhar Chaubey on 3.3.2011 in his presence and also the witness of recovery of blood stained mud. The said recovery memo of recovered articles has been proved by him and marked as Ex. Ka-2 to the records.

In his cross-examination he states that *gandasa* which was recovered, was blood stained and blood was present on both sides. He states that he was taken by the Investigating Officer while going to recover the *gandasa*. He states that the *lota* and steel glass were not sealed and the said two articles are easily available in the market. He states that no *lota* and glass were recovered from the bans koth at that time. He states that the said *gandasa* was got recovered from the orchard situated in Chahin which was taken out and given by

the accused. He further states that one *lota* and steel glass were also taken out and given by the accused from the bamboo shrubs which were stated to have been used for consuming liquor. To a suggestion that his signatures were obtained on blank papers at the police station and the recovery memo was prepared he denies. He states to have signed on one paper.

21. Basant Lal P.W.-6 was posted as Head Constable at police station Cholapur. He states to have transcribed the Chik F.I.R. of the present case on 1.3.2011 at 14.30 hours on an application which was given by Indrajeet. The Chik F.I.R. is marked as Ext. Ka-3 to the records. He states that G.D. No. 32 dated 01.3.2011 was transcribed at 14.30 hours regarding lodging of the F.I.R. of the present matter. The same is marked as Ext. Ka-4 to the records.

In his cross-examination he was asked about an over writing in the G.D. in the date which was written as '2' to which he states to have written by error. He states that he had immediately corrected the same from 02.3.2011 to 01.3.2011. He states that along with the first informant, Avanindra Singh and Dhananjay Singh had also come for getting the F.I.R. lodged. He had transcribed the Chik F.I.R. and then stated about it in the G.D. He took about 10-15 minutes in writing the same. He had informed superior officers about the incident through R.T. Set. On the day when the F.I.R. was registered no other application was given by the informant at the police station. He states that the Magistrate had signed the original F.I.R. and had put the date of 4.3.2011 on it. To a suggestion that the Chik F.I.R. was ante timed document, he denies. He further denies that no specific message through R.T. Set was flashed. He further denies that he is concealing intentionally the message flashed from R.T. Set.

22. Dr. K.R. R. Singh P.W.-7 conducted the post mortem examination of the deceased Santosh Nut@Pillu on 2.3.2011 at about 3.30 P.M. The post mortem examination report is marked as Ex. Ka-5 to the records. The details of the remains of human body and injuries are not being detailed herein as they have been quoted above. The doctor opined that the cause of death was coma, hemorrhagic shock as a result of head injury and injury to the neck.

He was cross-examined at length. He had given the time since death as 1-3/4 days which was 42 hours. He states that death could have occurred on 27.2.2011 at about 9.30 P.M. He further states that the death could even have occurred on 28.2.2011 at about 9.30 P.M. He states that if a dead body is thrown in a well of 40 feet deep, the bones may broke and other injuries may also come. He states that there is no post mortem injury on the body. Only drag injury is present on back. He states that he is unable to tell as to whether the injuries received by the deceased were from one weapon. Cut wound and lacerated wound can come from one weapon. Injury nos. 5 and 8 can be caused from sharp edged weapon. If the sharp edged weapon is used from its back then injury nos. 9, 10 and 11 can be caused. He states that minor injuries of the deceased could have been caused when he was in a sitting position. Injury nos. 7, 8, 9, 10 and 11 were minor injuries. To a suggestion that the death of the deceased could have been caused on 27.2.2011 at about 9.30 P.M. he denies.

23. Ramanand Kushwaha P.W.-8 is Circle Officer and Investigating Officer of the matter. He states in his examination-in-

chief that on 3.3.2011 on the pointing out of the accused in the presence of witness Ritesh Kumar Singh, he got the recovery done. He had then moved an application for getting the statement of accused under Section 164 Cr.P.C. recorded. He did the other formalities, interrogated the witnesses and then filed the charge-sheet bearing no. A45/11 dated 20.3.2011 against the accused-appellant. He had prepared site plan of the place from where the dead body was recovered and the place of recovery of weapon of assault which was marked as Ex. Ka-6 and 7 to the records. The memo of recovery of blood stained mud, *lota*, steel glass and *gandasa* done on the pointing out of the accused was marked as Ex. Ka-2 to the records. The charge-sheet was marked as Ex. Ka-8 to the records.

He states to have sent the blood stained mud, plain mud and blood stained clothes of the deceased to the Forensic Science Laboratory,Varanasi. In his cross-examination he states that no report of Forensic Science Laboratory, Varanasi is on record. He states that the date of arrest of Kaladhar Chaubey is not mentioned in the case diary. He states that on seeing the case diary though Kaladhar Chaubey was arrested on 1.3.2011 by Chauki Incharge but he does not know as to from where he was arrested and at what time he was arrested. He states that from the records and on seeing the arrest memo it is apparent that the accused was arrested from Ajgara Gumti but the date and time of arrest is not mentioned. He states that the G.D. of arrest is on the records. He received information about the arrest of Kaladhar Chaubey on 3.3.2011 but does not remember the time. He does not remember as to whether he had recorded the said information anywhere or not. He had interrogated Kaladhar Chaubey at the police station on 3.3.2011. The same is not mentioned in the G.D. Kaladhar Chaubey was taken from the police station on 3.3.2011 and the recoveries were effected. He does not remember the names of the persons accompanying him while going for recovery.

He states that he does not remember as to when he reached the orchard which is the place of occurrence and further states that it may be after 4.00 P.M. To a suggestion that the inquest was conducted at the police station in the presence of the informant he denies. He further denies that the dead body of the deceased was sealed at the police station. He states that in the inquest name of the accused has not been mentioned which was left out by inadvertence. The name of the accused being left out by inadvertence, is not mentioned in the statement of the person conducting inquest. He states that in the inquest the date and time of its start and end is not mentioned. To a suggestion that till the time the inquest was conducted, the name of the accused did not surfaced he denies. He states that he does not know as to whether Sub-Inspector Vinod Kumar Singh knew the name of the accused or during inquest the name was disclosed. He states to have sent blood stained mud collected by him and Sub-Inspector Vinod Kumar Singh to the Forensic Science Laboratory, Varanasi. He states that he does not remember as to whether the fingerprints on the *lota* and steel glass and the fingerprints of accused were collected or not. To a suggestion that after doing inquest in consultation with the first informant the F.I.R. has been registered, he denies. He states that recovery memo which is Ext. Ka-2, is not in his handwriting. The same is in the handwriting of Constable Moharir Ram Prakash Pandey which was dictated to him.

To a suggestion that Kaladhar Chaubey was called from his house and with the help of the first informant '*gandasa*' was planted and under the pressure of the first informant in a forged

manner recovery on the pointing out of the accused was shown, he denies. He further denies the suggestion that under pressure and help of the first informant false evidence has been created against the accused and he has been implicated in the present matter. He states to have reached the place of occurrence on 1.3.2011. The dead body was not taken out in his presence. He does not remember as to whether the dead body was in the well or not when he reached there. He reached the place of occurrence with the first informant. He does not remember as to whether he had seen the dead body in the well or not. To a suggestion that he has prepared a false statement of Shri Niwas Singh in the matter, he denies. He further denies the suggestion that under pressure and influence of the first informant during investigation, Shri Niwas Singh has been falsely introduced as a witness as he is a known person of the first informant. To a suggestion that the first informant, his family members and his friends have murdered Santosh and have thrown the dead body in the well, he denies. He further denies the suggestion that the accused Kaladhar Chaubey used to oppose the first informant as he was involved in the sale of animals for slaughtering and as such he has been implicated in the matter and false charge-sheet has been submitted, he denies the same.

24. Vinod Kumar Singh P.W.-9 was posted as Chauki Incharge at Ajgara on 1.3.2011. He states to have conducted the inquest on the dead body of the deceased Santosh@Tillu. In his examination-in-chief he states that he made 5 persons as Panch witnesses to the inquest who opined that the death of the deceased was from some sharp edged weapon. His opinion also matched with the opinion of Panch witnesses. The dead body was sealed after inquest and was sent for post mortem examination. The inquest is marked as Ex. Ka-9 to the records. He further proves the other documents prepared by him for getting the post mortem done which were marked as Ex. Ka- 10, 11 and 12 to the records.

In his cross-examination he states that he had started the inquest on 1.3.2011 at about 12.00 and concluded it at about 2.00 P.M. The said fact is not mentioned in the inquest which is correct. He had arrested the accused Kaladhar Chaubey along with other team members which was constituted by Circle Officer on 1.3.2011. He had arrested Kaladhar Chaubey from village Chahin but he does not remember the place and the time of arrest. He states that at the time when he had conducted the inquest, the copy of F.I.R. was not with him. The first informant had given information which was a written information. In the written information the name of the accused was mentioned. He states that the said information is on record and is Ex. Ka-1. He does not know when the same was given at the police station. The said information was not brought by him while going for inquest. When he had reached the well the dead body was in it. The well was dry.

He states to have written in the inquest that the dead body is lying in the well in Chahin on the basis of a written report Ex. Ka-9 given by the first informant. The F.I.R. was not with him when he started the inquest but had reached him before concluding it. He stated that outside the well there was drag mark up to a long distance which appears to have been tried to be removed. To a suggestion that he did not do the inquest at the place where the dead body was recovered, he denies. He further denies the suggestion that under the influence of

the first informant he is giving statement to falsely implicate the accused and get him punished.

25. Shyam Deo Yadav P.W.-10 was posted as a Constable at Police Station Cholapur, District Varanasi on 14.03.2011. He took the said recovered *Gandasa*, blood stained mud, plain mud and the blood stained clothes of the deceased along with a docket to the Forensic Science Lab, Police Line, Varanasi. He proves the said docket which is signed by the then Chief Judicial Magistrate and then Circle Officer and has his specimen signatures. The same is marked as Exb: Ka-9 to the records.

In his cross-examination, he states that the articles which were sent for chemical analysis were taken by him to the Court of the Chief Judicial Magistrate and on the same day his ravangi was noted in the GD at the police station. The said GD is not enclosed with the records. The articles were received by him from the police station after taking them out from the *malkhana* of the police station along with the sample seal. The sample seal is not on record. The articles which were sent for analysis were not opened and seen by the Chief Judicial Magistrate but were sealed separately and stitched by wrapping them in different clothes. The recovered articles were sealed separately in different clothes. Four bundles were taken by him for chemical analysis. The number of seals were the same as number of bundles of the articles. He does not remember the number of seals of the Chief Judicial Magistrate and the Circle Officer. He had deposited both the seals in the Forensic Science Lab, Varanasi. The docket Exb: Ka-9 was prepared by the Circle Officer in his presence. His signatures were got done on the docket by the Circle Officer before him. He had taken the docket and the articles to the Chief Judicial Magistrate. The Circle Officer had not gone. To a suggestion, he did not do as he has stated in his statement, he denies. To a further suggestion, that under the pressure of the Circle Officer he is not telling the correct thing in Court, he denies.

26. The accused in his statement under Section 313 Cr.P.C. has denied the prosecution case against him. He has further stated that the first informant and his family members were involved in the sell and purchase of cows and buffaloes for slaughtering. His father is a pujari and he used to oppose the act of the first informant and his family members and due to the said reason they have falsely implicated him. He states that he neither murdered Santosh nor concealed his dead body. He states that he was arrested on 01.03.2011 at 2 PM and was tortured at the police station and under the pressure of the first informant he has been falsely implicated.

27. Ram Pyare Pandey has been produced as D.W.-1. He is a purohit by profession. He states to have brought a *Mahavir Panchang* of the year 2010-11 which he has filed in Court. He states that as per the *Panchang* on 27.02.2011, it was *Krishna Paksh* and the *tithi* was *Dasami* and on 27-28.02.2011, the moon rise was at 3.11 AM. The same is mentioned at page 36 of the *Panchang*. He has filed the original *Panchang* which is Ex. Kha-1 to the records.

In his cross-examination, he states that on a dark night when the sky is clear and stars are present, a known person can be identified from 10 steps. He states that he knows Kaladhar Chaubey. He does not know Santosh @ Pillu who has been murdered. The distance from village Asgara to village Hatiyar is about one km.

He is living since birth in village Hatiyar. The accused and the deceased are also residents of village Hatiyar. He states that he does not know Santosh @ Pillu and cannot say as to whether he has been murdered or not. He has information that Kaladhar Chaubey is in jail. He does not know that Kaladhar Chaubey was working in B.S.F. and had run away from there. He does not know that there is a liquor shop in the market in Hatiyar. There are 2-4 shops in the market in Hatiyar. He states that he is giving statement on the basis of *Mahavir Panchang*. He has passed primary and has knowledge of Vedas. When he had passed class V, at that time Sanskrit was not taught up to class V. He states that on 27.02.2011 up to 5.48 was *Mool Nakshatra* and then was *Purvasadha* at 3.11 AM which was *Purvasadha* Nakshatra. He states that he was not present when the recovery of *Gandasa* was done. To a suggestion, that as he has not read Sanskrit and as such he cannot see the *panchang*, he denies the same.

28. The present case is a case of circumstantial evidence. The rules to be followed and things to be judged in a case of circumstantial evidence are trite.

29. There is no eye witness of the incident and the entire case of the prosecution rests on circumstantial evidence.

30. The case of **Queen-Empress Vs. Hosh Nak : 1941 All LJ 416** is worth referring at this juncture which is a locus classicus on the issue of circumstantial evidence. This is a very old decision which was printed in the Allahabad Law Journal after sixty years of its decision on the recommendation of Rt. Hon'ble Sir Tej Bahadur Sapru. In the case of **Hosh Nak** (supra), it has been held that to prove an offence by the circumstantial evidence four things are essential. They are:

(1) : That the circumstance from which the conclusion is drawn be fully established.

(2) : That all the facts should be consistent with the hypothesis.

(3) : That the circumstances should be of a conclusive nature and tendency.

(4) : That the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.

31. Then in the case of **Hanumant, son of Govind Nargundkar Vs. State of Madhya Pradesh : AIR 1952 SC 343** it has been held in para 10 by the Apex Court as under:

"10. .....It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused....."

32. Thereafter, in the case of **Khasbaba Maruti Sholke Vs. The State**

of Maharashtra : (1973) 2 SCC 449 it was held by the Apex Court as under:

"18. In order to base the conviction of an accused on circumstantial evidence the court must be certain that the circumstantial evidence is of such a character as is consistent only with the guilt of the accused. If, however, the circumstantial evidence admits of any other rational explanation, in such an event an element of doubt would creep in and the accused must necessarily have the benefit thereof. The circumstances relied upon should be of a conclusive character and should exclude every hypothesis other than that of the guilt of the accused. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances must show that within all reasonable probability the impugned act must have been done by the accused. If two inferences are possible from the circumstantial evidence, one pointing to the guilt of the accused, and the other, also plausible, that the commission of the crime was the act of some one else, the circumstantial evidence would not warrant the conviction of the accused....."

33. The circumstantial evidence must be so complete as to exclude every hypothesis other than that of guilt of the accused.

34. In the celebrated case of **Sharad Birdhichand Sarda Vs. State of Maharashtra : (1984) 4 SCC 116** the Apex Court has described five principles of circumstantial evidence as the pillars on circumstantial evidence. The five principles have been narrated in para 153 which is extracted herein :

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should' and not "may be' established. There is not only a grammatical but a legal distinction between "may be proved' and "must be or should be proved" as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra : [(1973) 2 SCC 793; para 19, p. 807]*** where the following observations were made : "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable and any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as to leave by reasonable grounds for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Further in paragraph 154 of the said judgment it was held as under:

"154. These five golden principles, if we may say so, constitute the

panchsheel of the proof of a case based on circumstantial evidence".

35. The cardinal principle of criminal jurisprudence is that the prosecution has to stand on its own legs and it should prove its case beyond reasonable doubt. Doubt must be of a reasonable man and reasonableness of doubt must be commensurate with the nature of the offence to be investigated.

36. Before appreciating the evidence on record it is necessary to point out Section 27 of the Indian Evidence Act, 1872 which reads as under:

"27: How much of information received from accused may be proved:

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

37. It is clear from the reading of Section 27 of the Evidence Act that this Section is based on doctrine of confirmation by subsequent facts. That doctrine is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered, it is a guarantee that the confession made was true. But only that portion of the information can be proved which relates distinctly or strictly to the facts discovered.

38. In the case of **Ram Kishan Mithan Lal Sharma Vs. State of Bombay : AIR 1955 SC 104,** it is held by the Apex Court that Section 27 of the Evidence Act is an exception to the rules enacted in Sections 25 and 26 of the Act which provide that no confession made to a police officer shall be proved against a person accused of an offence and that no confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Where, however, any fact is discovered in consequence of information received from a person accused of any offence in the custody of a police officer, that part of the information as relates distinctly to the fact thereby discovered can be proved whether it amounts to a confession or not.

39. In the case of **Pulukari Kottaiah Vs. King Emperor : AIR 1947 PC 67** it has been held as follows : "the condition necessary to bring S. 27 into operation is that the discovery of a fact must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved".

40. The Section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence, but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.

41. In the case of **Delhi Administration Vs. Balkrishan : AIR 1972 SC 3** the Apex Court has held that Section 27 of the Evidence Act is by way of a proviso to Sections 25 and 26 and a statement by way of confession made in police custody which distinctly relates to the fact discovered is admissible is evidence against the accused.

42. It cannot be lost sight of that Section 27 of the Evidence Act has frequently been misused by the police against an accused. Court should, therefore, be cautious and vigilant about the application of the above provision. The protection afforded by the provisions under Sections 25 and 26 of the Evidence Act is sought to be overcome by the police by taking resort to the provisions of Section 27 of the Evidence Act. The validity of Section 27 of the Evidence Act has been upheld by the Apex Court.

43. The recovery of the dead body on the pointing out of the appellant has been relied upon by the prosecution as one of the evidences against him.

44. No doubt, mere recovery in pursuance of Section 27 of the Evidence Act is not a clinching proof for holding an accused guilty. However, there is no doubt that it is good piece of evidence which may be relied upon as a link in the chain of circumstances in the present case for holding the guilt.

45. It is a well settled principle of law that a conviction cannot be founded on circumstantial evidence alone unless it cannot be explained on any hypothesis other than that of the guilt of the accused.

46. It is well settled that in a case which rests on circumstantial evidence, law postulates two fold requirements:-

(i) Every link in the chain of the circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt.

(ii) All the circumstances must be consistent pointing only towards the guilt of the accused.

47. In the case of **Sharad Birdhichand Sarda (supra)** has enunciated the aforesaid principle as under:-

"The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the Accused and inconsistent with his innocence".

48. It is well settled that in a case based on circumstantial evidence the Courts ought to have a conscientious approach and conviction ought to be recorded only in case in which all the links of the chain are complete and pointing to the guilt of the accused. Each link unless connected together form a chain may suggest suspicion but the same in itself cannot take place of proof and will not be sufficient to convict the accused.

49. In cases where the evidence is purely circumstantial in nature, the circumstances from which the conclusion of guilt is sought to be drawn must be fully established beyond any reasonable doubt and such circumstances must be consistent and must form a complete chain unerringly point to the guilt of the accused and the chain of circumstances must be established by the prosecution. Referring to several earlier decisions the Apex Court in the case

of **Geejaganda Somaiah v. State of Karnataka : (2007) 9 SCC 315** in para 15 held as follows:-

"15. Sir Alfred Wills in his admirable book Wills' *Circumstantial Evidence* (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."

The same principle has been reiterated in a catena of later judgments.

50. The law regarding regarding evidence of last seen has been reiterated by the Apex Court in the case of **Shailendra Rajdev Pasvan Vs. State of Gujarat : AIR 2020 SC 180 [2019 SCC Online SC 1616]** which is quoted herein:

"14. Another important aspect to be considered in a case resting on circumstantial evidence is the lapse of time between the point when the accused and deceased were seen together and when the deceased is found dead. It ought to be so minimal so as to exclude the possibility of any intervening event involving the death at the hands of some other person. In the case of Bodh Raj Alias Bodha v/s State of Jammu and Kashmir, (2002) 8 SCC 45, Rambraksh v/s State of Chhattisgarh, (2016) 12 SCC 251, Anjan Kumar Sharma v/s State of Assam, (2017) (6) SCALE 556 following principle of law, in this regard, has been enunciated:-

"The last seen theory comes into play where the time gap between the point of time when the Accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the Accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the Accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that Accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases"."

51. The circumstances as being relied by the prosecution to prove the guilt of the accused/appellant are as follows:-

a) The taking away of the deceased Santosh @ Pillu on 27.02.2011 at 7 PM from his house.

b) The accused / appellant being last seen in the company of the deceased on 27.02.2011 at 9 PM at the liquor outlet at Ajgara Gumti and consuming liquor together.

c) Shri Niwas Singh P.W.-2 saw the accused / appellant throwing some heavy thing in a well on 27.02.2011 at about 11 PM and on seeing him ran away. This information was told by him on 01.03.2011 to the first informant Indrajeet P.W.-1.

d) The recovery of blood stained *Gandasa* which is stated to have been used as the weapon of assault, a *lota* and a small steel glass on the pointing out of the appellant on 03.03.2011 stated to have been used for consuming alcohol and the recovery of the dead body on the pointing out of the accused.

e) The statement of Arun Kumar Yadav P.W.-4 in the nature of an extra-judicial confession of the accused to him.

52. In so far as the fact regarding the taking away of the deceased on 27.02.2011 at 7 PM and the time since death as noted by the doctor in the postmortem examination report being 1-3/4 days but subsequently, the doctor who was examined as P.W.-7 being Dr. K.R.R. Singh, stating in his cross-examination that the death of the deceased could also have occurred on 28.02.2011 at 9:30 PM would lead to a conclusion that from the time of the deceased being taken away, the probable time of his death could be about 26 hours thereafter. The evidence regarding the accused being in the continuous company of the deceased is not on record.

53. The evidence of Shri Niwas Singh stating about witnessing the deceased throwing some heavy thing in the well on 27.02.2011 at about 11 PM and then the accused ran away after seeing him which was told by him to the first informant on 01.03.20111 is a conduct not befitting of prudent man. The silence of Shri Niwas Singh for about 02 days in disclosing the fact of the accused throwing something heavy in the well to which he was a witness and had heard the sound of something falling in the well leaves much to be commented upon. The conduct of the accused, if the version of Shri Niwas Singh is taken taken to be true, that the accused was throwing something heavy in the well and then started running away on seeing him, would necessarily attract the curiosity of a prudent person in normal circumstances to further explore the situation. The same was not done by him and he remained ignorant and silent about it for 02 days. His testimony is thus not safe to be believed.

54. In so far as the recovery of the dead body on the pointing out of the accused / appellant, the recovery of the blood stained *Gandasa* and also of a *lota* and a steel glass on the pointing out of the accused / appellant is concerned, it is necessary to first deal with the arrest of the accused and the said recoveries under Section 27 of the Indian Evidence Act, 1872, would then have relevance. The police officer who arrested the accused / appellant is Vinod Kumar Singh P.W.-9. He states in his cross-examination to have arrested him on 01.03.2011 but states that he does not remember as to from which place and at what time he was arrested. Subsequently, Ramanand Kushwaha P.W.-8 who was the then Circle Officer and the Investigating Officer of the matter was examined at length and meticulously, in so far as it related to the arrest of the accused / appellant is concerned. He states in his cross-examination that the accused / appellant was arrested on 01.03.2011 by the Chowki in-charge but he does not from where and when he was arrested. He places a document being the arrest memo of the accused on record which is paper No. 7 Ka/3 and states that the date and time of arrest is not mentioned therein.

He states that he received information about the arrest of the accused on 03.03.2011 and then he interrogated him on the same day but did not make any entry in the GD about the same. He then states

about the accused giving his disclosure about the weapon of assault and other articles and the place of throwing of the dead body. The accused in his statement under Section 313 Cr.P.C. has specifically stated that he was called at the police station on 01.03.2011, was tortured at the police station and has been falsely implicated in the present matter. From the evidence and documents on record, the fact about the arrest of the accused on 01.03.2011 is undisputed. It is further not disputed that the accused was kept at the police station up to 03.03.2011 after which the recoveries under Section 27 of the Indian Evidence Act were affected. The detention of the accused for 02 days at the police station is contrary to law. The possibility as such of recoveries being planted and then the same being shown as recoveries under Section 27 of the Indian Evidence Act, cannot be ruled out.

55. There is nothing on record to show that after the accused being arrested on 01.03.2011 which is admitted position he was produced before the nearest Magistrate as per the legislative requirement within 24 hours. Even further, the recovery of the *Gandasa* which is said to be blood stained and is said to have been sent to the forensic lab for examination along with blood stained and plain mud and the blood stained clothes of the deceased does not get corroborated for its use as the report of the forensic expert which is on record states blood present on it is disintegrated and as such the use of said weapon for murder is not corroborated. Further, the evidence as relied by the prosecution of the accused giving some statement in the form of extra-judicial confession given by the accused-appellant to Arun Kumar Yadav P.W.-4 is concerned, the same is vague and a conclusion is being tried to be taken out from it wherein it is said that the accused had stated him that he has done a big mistake after stating about the deceased molesting his wife. The said witness states that the accused came to him on 28.02.2011 and his statement under Section 161 Cr.P.C. was recorded by the Investigating Officer on 20.03.2011. His silence, if what he has said to be taken true, of about 21 days in not disclosing about the accused coming to him and repenting for his acts is also not reliable.

56. The dead body was found to have not got any postmortem injuries. The doctor conducting the postmortem examination while being cross examined has stated that, if the dead body is thrown in a well then the bones may get broken or injuries of different type would be found but there is no postmortem injury found on the dead body.

57. Ram Pyare Pandey D.W.-1 has while filing *panchang* of the year of incident stated that the day of the incident was Krishna Paksh and the *tithi* was *Dasami*. In his cross-examination, he has stated that the night will be dark and a known person could be identified from 10 steps only.

58. Shri Niwas Singh P.W.-2 has in his cross-examination stated that he did not see the deceased being dragged near the well. He has stated that the night was moon-lit and the moon had risen.

The three facts stated by him are totally a lie and do not get borne out from the records.

59. Vimal Kumar Singh P.W.-9 in his cross-examination has stated that he had seen some drag marks outside the well which were tried to be erased.

60. Further, D.W.-1 while placing reliance on the *panchang* of the year of the

incident has conclusively stated that the day of the incident was Krishna Paksh and the *tithi* was *Dasami* which was a dark night.

61. Even from this fact, it is clear that Shri Niwas Singh P.W.-2 has consistently been stating lies throughout and even as such he is a witness not to be believed. The circumstances as being relied by the prosecution are concocted circumstances. The same cannot be trusted and relied.

62. The trial judge though had been cognizant of the fact that the present case is a case of circumstantial evidence and not a case of direct evidence has failed to specifically mention in the judgment as to what are the circumstances which the prosecution is relying in the matter and has failed to mention as to how the chain of circumstances get completed by linking each and every link to come to an irresistible conclusion about the guilt of the accused and has convicted him.

63. This Court comes to a conclusion, that the circumstances as relied by the prosecution are concoction and it is unsafe to rely upon the evidence led by the prosecution for the same. Thus the conviction of the appellant by the trial court is not sustainable in the eyes of law. The trial court committed an error in recording the conviction and sentence of the appellant. Hence, the impugned judgment and order dated 28.11.2013 passed by the trial court is liable to be set aside and is accordingly, set aside.

64. The present appeal is **allowed**.

65. The appellant- Kaladhar Chaubey is in jail. He is directed to be released forthwith unless wanted in any other case.

66. Keeping in view the provision of Section 437-A of The Code of Criminal Procedure, 1973 the accused-appellant Kaladhar Chaubey is directed to furnish a personal bond in terms of Form No. 45 prescribed in The Code of Criminal Procedure, 1973 of a sum of Rs. 25,000/- with two reliable sureties in the like amount before the court concerned 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 the instant judgment or for grant of leave, the aforesaid appellant on receipt of notice thereof shall appear before the Apex Court.

67. The lower court record along with a copy of this judgment be sent back immediately to the trial court concerned for compliance and necessary action.

68. The party shall file computer generated copy of such judgment downloaded from the official website of High Court Allahabad before the concerned Court/Authority/Official.

69. The computer generated copy of such judgment shall be self-attested by the counsel of the party concerned.

70. 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)01ILR A150
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2020

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Revision Defective No. 617 of 2020

Ashwani Yadav(Husband) ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Rajendra Prasad

Counsel for the Opposite Parties:
A.G.A., Sri Om Prakash Yadav

A. Criminal Law - Code of Criminal Procedure,1973-Section 401/397 & 125-challenge to-maintenance allowance-prima facie the revisionist is ignoring to pay allowance to her wife and children-he has sufficient earning- wife has no source of income-she is living separately along with her child due to continuous harassment and demand of dowry-Learned trial court rightly awarded the maintenance allowance after appreciating each and every fact. (Para 1 to 20)

B. The provisions of section 125, Cr.P.C. is to provide for a social justice falling within the swim of Articles 15(3) and 39 of the Constitution of India, which have been enacted to protect the weaker section of the society like women and children. It is in the form of secular safeguard irrespective of personal law of the parties. The object to compel a man to perform moral obligations towards the society in respect of maintaining his wife, children and old parents so that they may not face destitution and become the liability of the society or may be forced to adopt a life of vagrancy, immorality and crime for their subsistence or go astray. (Para 9)

The revision is dismissed. (E-5)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

<u>विलम्ब क्षमा प्रार्थना पत्र पर आदेश-</u>

1. कोविड-19 महामारी के कारण उत्पन्न असाधारण परिस्थितियाँ तथा विलम्ब क्षमा प्रार्थना पत्र में उल्लेखित विलम्ब के कारण, वर्तमान पुनरीक्षण याचिका के प्रस्तुत करने में हुए 113 दिनों के विलम्ब को क्षमा करने के लिये पर्याप्त है। अतः उक्त प्रार्थना पत्र स्वीकार किया जाता है और विलम्ब क्षमा किया जाता है। इसके साथ ही स्टैम्प रिपोर्टर द्वारा अन्य सुचित त्रुटियाँ, जो सिर्फ तकनीकी प्रकृति की है, को भी वर्तमान परिस्थितियों के कारण नज़रअंदाज किया जाता है तथा कार्यालय को इस आपराधिक पुनरीक्षण याचिका का नियमित क्रमांक संख्या आवंटित करने के लिए निर्देशित किया जाता है। पक्षकारों के अधिवक्ताओं की सहमति से यह याचिका आक्षेपित आदेश का विवरण- रूप से निर्णीत की जा रही है।

<u>पुनरीक्षण पर आदेश</u>

<u>आक्षेपित आदेश का विवरण-</u>

2. वर्तमान पुनरीक्षण याचिका में, विपक्षीगण सं0 2 व 3 द्वारा पुनरीक्षणकर्ता के विरुद्ध धारा 125 दं0प्र0सं0 के अंतर्गत दाखिल की गयी याचिका (मुकदमा नं0 718-2019, सी एन आर सं0- यू पी जे 02-002815-2019, जे ओ कोड- यू पी 06073 श्रीमती ज्योति यादव आदि बनाम अश्वनी यादव) में अपर प्रधान न्यायाधीश, पारिवारिक न्यायालय, झाँसी द्वारा, प्रार्थना पत्र "6 बी' में पारित आदेश दिनांक 27.01.2020 को आक्षेपित किया गया है, जिसके द्वारा पुनरीक्षणकर्ता को आदेशित किया गया है की वो विपक्षी सं0 1, जो उसकी पत्नी है, तथा विपक्षी सं0 2, जो उसकी पुत्री है, को बतौर अंतरिम भरण-पोषण क्रमशः ₹ 2500 व ₹ 1000 प्रत्येक माह की 27 तारीख तक अदा करे।

<u>संक्षेप में प्रकरण के तथ्य-</u>

3. विपक्षी सँ॰ 2 व 3 (ज़रिये विपक्षी सँ॰ 2) ने, उपरोक्त वर्णित मुक़दमा की याचिका में यह कथन किया कि विपक्षी सँ॰ 2 का विवाह हिन्दू विवाह रीति के अनुसार 29.09.2015 को पुनरीक्षणकर्ता के साथ वकुकाम, झाँसीं में सम्पन्न हुआ था, जिसमें उसके माता व पिता ने क़रीब ₹ 15,00,000 खर्च किये थे साथ ही साथ मोटर साइकिल, ज़ेवरात , सामान, नक़द रुपये आदि, जिसकी एक सूची याचिका के संग अनुसंगलग्न करी गयी है, भी दिया था। विपक्षी सँ॰ 3 का जन्म पुनरीक्षणकर्ता व विपक्षी सँ॰ 2 के संसर्ग से 10.12.2015 को हुआ। याचिका में यह भी कथन किया कि विपक्षी सँ॰2 ने हमेशा अपने स्त्रीधर्म का पालन किया, परन्तु उसके ससुरालीजन शादी में दिये गये दहेज़ से संतुष्ट नहीं थे व हमेशा उस पर मायके से कार लाने के लिये दवाब बनाते थे और इंकार करने पर उसका पति व ससुरालीजन उससे मारपीट करते थे। उसके मायके वालों ने बहुत बार समझाने का प्रयास किया, परन्तु उनके बर्ताव में कोई अन्तर नहीं आया। उसका पति इनके बहकावे में आकर रोज़ाना शराब पी कर उसके साथ बदसलूकी और मारपीट करता था । इसी के क्रम में एक राय होकर ससुरालीजन ने 28.06.2019 को क़रीब दो बजे, उसे व उसकी पुत्री को सिर्फ़ पहने हुए कपड़ों के साथ ससुराल से निकाल दिया और ऐसी हालत में वो अपनी पुत्री के साथ मायके आ गयी। 13.07.2019 को ससुरालीजन ने पंचायत बैठाई परन्तु वहाँ भी वो अपनी माँग पर अड़े रहे, जिससे पंचायत बेनतीजा रही। 16.07.2019 को ससुरालीजन व उसका पति उसके मायके आये और पंचायत में कार की माँग पूरी न करने पर भा0दं0सं0 व 3/4 दहेज विरोध सं0 के अन्तर्गत दर्ज भी कराई।

4. याचिक में आगे अभिलिखित किया कि वो अपनी बेटी के साथ मायके में ही रहने पर मजबूर है, जबकि उसका पति पर्याप्त साधन होते हुए भी, कि वो भैंसों की डेरी चलाता है तथा संविदा पर ठेकेदारी कर के क़रीब ₹ 60000 मासिक कमाने के बाद भी उसको व उसकी बेटी को न तो कोई भत्ता दे रहा है न ही कोई खोज ख़बर ही ले रहा है। विपक्षी सँ॰ 2 अपने और बेटी के रहन सहन व उसकी पढ़ाई लिखाई के लिये खर्च की पूर्ति उधार ले कर कर रही है। इसलिये याचिका के माध्यम से अपने लिए ₹ 15000 व अपनी बेटी के लिये ₹ 10000 (कुल ₹ 25000) मासिक भत्ता दिलाने की प्रार्थना की है।

5. विपक्षी सँ॰ 2 ने उक्त याचिका के साथ अन्तरिम भरण पोषण भत्ता दिलाये जाने के लिए, एक प्रार्थना पत्र भी दाखिल किया जिसमें उपरोक्त तथ्यों की पुनरावृत्ति अभिलिखित करके, अपने लिये ₹ 15000 व अपनी बेटी के लिये ₹ 10000 (कुल ₹ 25000) मासिक अन्तरिम भरण पोषण भत्ता दिलाये जाने का निवेदन किया।

6. पुनरीक्षणकर्ता ने अन्तरिम भरण पोषण भत्ता दिलाये जाने के लिए प्रार्थना पत्र पर अपनी आपत्ति दाखिल की, जिसमें यह कथन किया कि प्रार्थना पत्र ख़ारिज करने योग्य है क्योंकि वो झूठ व मनगढ़ंत आधारों पर प्रस्तुत करा गया है। पुनरीक्षणकर्ता पढ़ने में कमजोर रहा, इसलिये विपक्षी सं॰ 2 जो एक पढ़ी लिखी महिला है से शादी करी और वो आगे भी पढ़ सके इसके लिये उसका समर्थन किया और उसने विवाह के बाद भी अपने सीमित आय से उसको बी.बी.ए.व बी.एड की परीक्षा दिलवाई। उसने ट्यूशन भी पढ़ाना शुरू कर दिया था और अब

भी मायके में पढ़ाती है जिससे वो मासिक ₹ 20000 कमा रही है। अपने माँ व बाप के बहकावे में आकर उसने अपनी मर्ज़ी से घर छोड़कर अपने मायके 22.4.2019 को चली गयी थी, क्योंकि वो कम पढ़े लिखे पति के साथ और नहीं रहना चाहती थी, क्योंकि साथ रहने से उसको शर्म और हीनभावना महसूस होती थी, इसी कारण से वो दिन प्रतिदिन उससे लड़ाई-झगड़ा करती थी। पुनरीक्षणकर्ता ने मार पिटाई के आरोपों को ख़ारिज किया है।

7. यह भी जबाब में लिखा कि वो कृषि का कार्य करता है व खेतिहर मज़दूर है, जिससे इसकी सीमित आय है, जिससे उसके माता पिता व बहन का खर्चा बमुश्किल चलता है। जबकि विपक्षी सं॰ 2 उच्च शिक्षा प्राप्त महिला है, जो प्राइवेट स्कूल में शिक्षण कार्य करती है व अपने माता पिता के घर में ट्यूशन कर क़रीब ₹ 30000 माह आय प्राप्त कर रही है। वो उसको अपने साथ रखना चाहता है इसके लिये उसने धारा 9 हिंदू विवाह अधिनियम के अन्तर्गत वाद दायर किया हुआ है। अंत में अंतरिम भरण पोषण के प्रार्थनापत्र को खारिज करने की प्रार्थना की।

8. अवर न्यायालय ने उभयपक्षों को सुनकर व पत्रावली का अवलोकन कर आक्षेपित आदेश पारित किया और अभिनिर्धारित किया कि *"दोनों पक्षों ने एक दूसरे पर गम्भीर आरोप एवं प्रत्यारोप लगाए हैं, जिसकी सत्यता उभयपक्षों के साक्ष्य आने के उपरान्त ही सुनिश्चित हो सकेगी जिसमें की अभी विलम्ब है। ऐसी स्थिति में प्रार्थिनी संख्या 1 ज्योति यादव तथा प्रार्थिनी संख्या 2* कु0 राधा को दौरान मुकदमा अंतरिम भरण पोषण दिलाये जाने पर विचार किया जा सकता है।" तथा "यद्यपि दोनों ही पक्षों ने एक दूसरे की आय के संबंध में कोई साक्ष्य प्रस्तुत नहीं किया है। फिर भी प्रत्येक पति एवं पिता का यह नैतिक व विधिक दायित्व है कि वह अपनी पत्नी एवं बच्चे का भरण-पोषण करें।" तथा प्रार्थनापत्र 6बी आंशिक रुप से स्वीकार करते हुए पुनरीक्षणकर्ता को उसकी पत्नी व पुत्री को ₹ 2500 व ₹ 1500 क्रमशः मासिक भत्ता देने के लिए निर्देशित किया।

<u>पुनरीक्षणकर्ता का कथन-</u>

9. राजेन्द्र प्रसाद, पुनरीक्षणकर्ता के विद्वान अधिवक्ता ने निवेदन किया कि आक्षेपित आदेश न्याय विरुद्ध, मनमाना, विधि की निगाहों में न टिकने वाला तथा न्यायिक विवेकाधिकार का उपयोग किये बिना पारित आदेश है। अवर न्यायालय ने आय के साक्ष्य के बिना ही अंतिरिम भरण पोषण के भत्ता का निर्धारण किया है जो अनुचित है। आगे यह भी कथन किया कि आक्षेपित आदेश धारा 125 (5) दं0प्र0सं0 के प्रावधान के विरुद्ध है, जिसके अनुसार *"कोई पत्नी अपने पति से इस धारा के अधीन, भरण-पोषण का भत्ता और कार्यवाही के खर्चे, के जैसी भी स्थिति हो प्राप्त करने की हकदार न होगी। यदि वह जारता की दशा में रह रही है, अथवा यदि, वह पर्याप्त कारण के बिना अपने पति के साथ रहने से इंकार करती है। अथवा यदि, वे पारस्परिक सम्मति से पृथक रह रहे है।"* क्यों कि पुनरीक्षणकर्ता की पत्नी अपनी इच्छा से मायके में रह रही है और उसने दाम्पत्य अधिकारों की प्रत्यास्थापन का वाद दाखिल किया है। अतः आक्षेपित आदेश विधि विरुद्ध है और यह पुनरीक्षण याचिका स्वीकार करने योग्य है।

<u>प्रतिपक्षी का कथन-</u>

10. ओम प्रकाश यादव विपक्षी सं0 2 व 3 के विद्वान अधिवक्ता ने उपरोक्त निवेदन का विरोध किया और कहा कि आक्षेपित आदेश न्यायोचित है। अंतरिम भरण पोषण का निर्देश देते समय न्यायालय को समय प्रथम द्रष्टव्य मात्र

यह देखना है कि पक्षों के मध्य विवाह हुआ है तथा पति अपने पत्नी व बच्चे का भरण पोषण करने से पर्याप्त साधन होते हुए भी इंकार कर रहा है, जो वर्तमान प्रकरण में अविवादित है। धारा 125 दं0प्र0सं0 का उद्देश्य उन महिलाओं और बच्चों को त्वरित उपचार प्रदान करना है जो स्वयं का भरण पोषण करने में असमर्थ हैं और संकट में है। अभी अवर न्यायालय द्वारा याचिका पर गुण दोष पर अंतिम निर्णय लेना शेष है। अतः वर्तमान पुनरीक्षण याचिका निरस्त करने योग्य है। सरकार की ओर से शासकीय अधिवक्ता ने धारा 125 दं0प्र0सं0 के विधिक पक्ष का उल्लेख किया कि यह एक कल्याणकारी विधान है। अतः आक्षेपित आदेश में कोई विधिक त्रुटि नहीं है।

11. मैंने उभयपक्ष को सुना तथा पत्रावली का अवलोकन किया। वर्तमान पुनरीक्षण याचिका के निस्तारण करने के लिये सर्वप्रथम भरण-पोषण व पुनरीक्षण की विधि को उल्लेखित करना आवश्यक है।

भरण-पोषण की विधि-

12. धारा 125 दं0प्र0सं0 के अन्तर्गत पत्नी, संतान और माता पिता के भरण पोषण का प्रावधान **'सामाजिक न्याय की संकल्पना'** पर आधारित एक **'कल्याणकारी धर्मनिर्पेक्ष विधान'** है, जो भारतीय संविधान के **'अनुच्छेद 15(3), 21 व 39'** के प्रावधानों व अधिकारों को प्रबलित भी करता है तथा जिसका उद्देश्य निराश्रित पत्नी, असहाय बच्चों व लाचार माता पिता जो अपना भरण पोषण करने में असमर्थ, उपेक्षित या वंचित हैं, उनकों पति, पिता या पुत्र (जैसी स्थिति हो) को उनको उचित मासिक भत्ते देने का निर्देश दिया जाना है। इस प्रावधान में उक्त कार्रवाई के दौरान अंतरिम भरण पोषण और कार्यवाई के खर्चे का उचित मासिक भत्ता संदाय करने का निर्देश, निर्धारित समय सीमा के अन्दर, जारी भी किया जा सकता है।

13. सक्षम न्यायालय द्वारा उपरोक्त प्रावधान के अंतर्गत निर्देश देने की कार्यवाही **'सामाजिक न्याय'** की प्राप्ति के उद्देश्य के लिए की जानी चाहिए न कि **'विरोधात्मक (एडवरसरिएल)'** दृष्टिकोण से। सक्षम न्यायालय को ऐसे प्रकरण में संवेदनशील होना चाहिये, जिससे प्रार्थी को घोर अन्याय से बचाया जा सके।

पुनरीक्षण की विधि-

14. पुनरीक्षण, उच्च न्यायालय के पर्यवेक्षी क्षेत्राधिकार से संबंधित है। पुनरीक्षण की शक्तियों का प्रयोग, उच्च न्यायालय द्वारा किसी अवर दंड न्यायालय के समक्ष की किसी कार्यवाही के अभिलेख को, किसी अभिलिखित या पारित किए गए निष्कर्ष, दंडादेश या आदेश की शुद्धता, वैधता या औचित्य के बारे में और ऐसे अवर न्यायालय की किन्ही कार्यवाहियों की नियमितता के बारे में अपना समाधान करने के प्रयोजन से, मंगा सकता है और उसकी परीक्षा कर सकता है।

15. पुनरीक्षण का क्षेत्राधिकार बहुत सीमित है, इसका उपयोग उन परिस्थितियों में किया जा सकता है, जहाँ आक्षेपित निर्णय पूर्ण रुप से गलत हो या जहां विधि के प्रावधानों का अनुपालन बिलकुल नहीं किया गया हो या आदेश के कारणों का आधार साक्ष्यहीन हो या तथ्यात्मक साक्ष्य को नजर अंदाज किया गया हो या न्यायिक विवेक का मनमाने या विकार रुप से प्रयोग किया गया हो। इस प्रावधान का उद्देश्य, किसी मूलभूत दोष या अधिकार क्षेत्र या विधि की भूल या विकार का सुधार करना है जो कार्यवाहियों में उत्तपन्न हो गयी हो। पुनरीक्षण की शक्तियों का प्रयोग किसी अपील, जांच,

विचारण या अन्य कार्यवाही में पारित किसी अंतर्वर्ती आदेश के बाबत नहीं किया सकता है। यह भी ज्ञातव्य रहे कि पुनरीक्षण संबंधी अधिकार का प्रयोग सदैव अपवादात्मक परिस्थिति में ही किया जाना चाहिए, जहाँ यह प्रतीत हो कि अधीनस्थ न्यायालय ने मामले में घोर अन्याय किया हो।

विचारार्थ विवाधक

16. उपरोक्त वर्णित विधि व वर्तमान प्रकरण के तथ्य, परिस्थितियों व उभयपक्षों के निवेदन से वर्तमान पुनरीक्षण याचिका, में निम्न विचारार्थ विवाधक उत्पन्न होता है- "क्या वर्तमान प्रकरण के तथ्य व परिस्थितियों में अवर न्यायालय द्वारा, धारा 125 दं0प्र0सं0 के अन्तर्गत अंतरिम भरण पोषण के संदाय का निर्देश न्यायसंगत है और क्या पुनरीक्षण की शक्तियों का उपयोग करने का कोई मामला बनता है?"

विश्लेषण-

17. भारतीय समाज में विवाह का बहुत महत्वपूर्ण स्थान है। हर माता पिता का स्वप्न होता है, कि उसकी पुत्री का विवाह एक अच्छे वर से हो। विवाह के बाद वो पुत्री अपना घर छोड़कर ससुराल चली जाती है और यह सोचती कि उसको वहाँ अपने मायके से ज्यादा प्यार मिलेगा, परन्तु जब कभी ऐसा नहीं होता है और उस पर जुल्म होता है तो न केवल उस बेटी के सपने टूटते हैं वरन् उसके माँ बाप को भी गहरा सदमा पहुँचता है। ऐसी घटनाओं से उस महिला पर न केवल मानसिक परन्तु आर्थिक असर भी होता है। क्योंकि वर्तमान प्रकरण में विवाह हिन्दू रीति से हुआ है, इसलिए यह कहना उचित है कि इस परम्परा में वैवाहिक संस्कार एक धर्मिक अनुष्ठान है, जिसमें बेटी के माता पिता अपनी बेटी को उसके होने वाले पति को सौंपते हैं, और यह विश्वास रखते वो उनकी बेटी व उससे होनी वाली संतान का हमेशा ध्यान रखेगा और उन्हे अपने जैसी हैसियत व जीवन स्तर प्रदान करेगा। इसका तात्पर्य यह है कि विवाहापरान्त पति को अपनी पत्नी व संतान को एक सम्मान पूर्वक व उचित स्तर का जीवन व्यतीत करने के लिये अपनी हैसियत के अनुसार उनका भरण पोषण करना न केवल उसकी विधिक, नैतिक व सामाजिक जिम्मेदारी वरन् विवाह संस्कार में लिये गये वचनों के प्रति वचनबद्धता भी है। इसी जिम्मेदारी व वचनबद्धता को कानूनी जामा पहनाकर, धारा 125 दं0प्र0सं0 में उल्लेखित किया गया है। जैसा पूर्व में कहा गया है कि धारा 125 दं0प्र0सं0 के अन्तर्गत पत्नी, संतान और माता पिता के भरण पोषण का प्रावधान 'सामाजिक न्याय' की संकल्पना पर आधारित एक 'कल्याणकारी धर्मनिर्पेक्ष विधान' है, जो भारतीय संविधान के अनुच्छेद 15(3), 21 व 39 के प्रावधानों व अधिकारों को प्रबलित भी करता है।

18. वर्तमान प्रकरण में यह अविवादित है, कि विपक्षी संख्या 2 ज्योति यादव का विवाह पुनरीक्षणकर्ता से हुआ है तथा विपक्षी संख्या 3 कु. राधा उनके संसर्ग से हुई है तथा वर्तमान में ये विपक्षीगण अपने मायके में रह रहे है तथा पुनरीक्षणकर्ता उनके भरण-पोषण की जिम्मेदारी वहन नहीं कर रहा है और उसके कथानुसार उसकी पत्नी व पुत्री न ही अंतरिम और न ही अंतिम रुप में भरण पोषण भत्ते के अधिकारी है । उसका कथन है कि उसकी पत्नी अपनी बेटी के साथ मायके में अपनी इच्छा से रह रही है और वहाँ ट्यूशन करके अच्छा कमा रही है। वो अभी भी उनको अपने पास रखना चाहता है, इसलिए उसने दाम्पत्य अधिकारों की प्रत्यास्थापन का वाद दाखिल कर रखा है। भरण पोषण न देने का एक कारण अपनी आर्थिक स्थिति अच्छी न होना भी बताया है।

19. यहाँ यह कहना आवश्यक है कि वर्तमान प्रकरण केवल अंतरिम भरण पोषण भत्ते के निर्देश से संबंधित है, गुण दोष पर अंतिम निर्णय होना अभी शेष है। अतः इस स्तर पर यह निर्धारित करना है कि अंतरिम भरण पोषण भत्ते के निर्देश देते समय सक्षम न्यायालय को क्या आधार ध्यान में रखने चाहिए। यह विवादित है कि पति का अपनी पत्नी व संतान का उचित भरण पोषण करना, उसका कानूनी, नैतिक, सामाजिक और वैवाहिक कर्तव्य है, जिसका निर्वहन वर्तमान प्रकरण में नहीं किया जा रहा है। अंतरिम भरण पोषण का निर्देश देते समय न्यायालय को प्रथम द्रष्टव्य संतुष्ट होना है कि पति अपनी पत्नी व संतान का भरण पोषण करने की उपेक्षा कर रहा है। वर्तमान प्रकरण में यह अविवादित है कि पुनरीक्षणकर्ता अपनी पत्नी व बेटी की जो मायके में रह रही है, उनके भरण पोषण की उपेक्षा कर रहा है। आय के निर्धारण का निर्णय अभी नहीं लिया जा सकता है क्योंकि यह एक विवादित विवाधक है जो पक्षों के साक्ष्य आने के बाद ही गुण दोष पर निर्धारित किया जा सकता है। अतः विपक्षी 2 व 3 पुनरीक्षणकर्ता से अंतरिम भरण पोषण भत्ते के अधिकारी है और ऐसा निर्देश दे कर अवर न्यायालय ने कोई वैधानिक त्रुटि नहीं करी है।

20. अवर न्यायालय द्वारा अंतरिम भत्ते की कुल राशि मात्र ₹ 3500 मासिक है, जो वर्तमान समय में साधारण जीवनयापन की दृष्टि से भी बहुत कम है। अतः अंतरिम भरण पोषण भत्ते के निर्देश के लिये प्रथम द्रष्टव्य यह मानना उचित है कि पुनरीक्षणकर्ता अपनी पत्नी व संतान का भरण पोषण करने की उपेक्षा कर रहा है, अतः वो अंतरिम भरण पोषण भत्ते के अधिकारी हैं। केवल इस कारण से कि पुनरीक्षणकर्ता द्वारा दाम्पत्य अधिकारों की प्रत्यास्थापन का वाद दाखिल किया गया है तथा जिस पर गुण दोष पर विचार करना अभी शेष है, यह प्रकरण धारा 125(5) दं0प्र0सं0 के अन्तर्गत आ जायेगा और अपेक्षित आदेश विधि विरुद्ध हो जायेगा, ऐसा निवेदन विधि के किसी भी मापदंड से बलहीन है, अतः पूर्ण रुप से अस्वीकार किया जाता है। पुनरीक्षणकर्ता की ओर से और कोई निवेदन नहीं किया गया है।

निष्कर्ष-

21. उपरोक्त विश्लेषण का निष्कर्ष है कि अवर न्यायालय ने प्रकरण के तथ्य व परिस्थितियों में जो अंतरिम भरण पोषण भत्ते का निर्देश दिया है, वो न्यायसंगत है तथा पुनरीक्षणकर्ता वर्तमान प्रकरण में ऐसा कोई भी तथ्यात्मक या विधिक त्रुटि प्रदर्शित करने में विफल रहा, जिससे यह प्रतीत हो कि उसके साथ घोर अन्याय हुआ हो तथा अवर न्यायालय ने न्यायिक विवेक का मनमाने या विकार रुप से प्रयोग किया हो जिससे पुनरीक्षण की शक्तियों का उपयोग करने का कोई मामला बनता हो। तदानुसार उपरोक्त विवाधक निर्धारित किया जाता है और वर्तमान पुनरीक्षण याचिका बलहीन होने के कारण निरस्त की जाती है।

(2021)011LR A156

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 15.12.2020

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Revision No. 907 of 2019

Govind ...Revisionist

Versus

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

Counsel for the Revisionist:
Sri A.K. Mishra, Sri Sati Shanker Tripathi

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 401/397,227 - Indian Penal Code,1860-Section 306-application-rejection-last scene evidence-revisionist and co-accused, both had evil eyes on deceased's wife-she threatened them to complaint against them-revisionist lodged false report against the deceased-accused challenged the deceased manhood by saying that they would eventually seek out his wife and implicate him in frivoulous cases-Later he found dead-accused died as a result of drowning-revisionists abetted him to commit suicide-the submission of revisionists that no charge was made out has no substance-accused can be discharged only when the charge is groundless.(Para 1 to 14)

B. It is well settled that at the stage fo charge the court is not required to consider pros and cons of the case. Marshalling and appreciation of evidence is not in the domain of the court at that point of time. What is required from the court is to sift and weigh the materials for the limited purpose whether or not a prima facie case for framing a charge against the accused has been made out.(Para 8 to 13)

The revision is dismissed. (E-5)

List of Cases Cited:

1. Rajesh Vs St. of Har., SLP(Cri.) No. 8667 of 2016 SC

2. Gangula Mohan Reddy Vs St. of A.P.,(2019) 1 SCC 750

3. St. of Ori. Vs Debendra Nath Padhi (2005) 1 SCC 568

4. P. Vijayan Vs St. of Ker. & ors. (2010) 2 SCC 1398

5. Soma Chakravarty Vs St. (2007) AIR SC 2149

6. Sajjan Kumar Vs CBI, JT (2010) 10 SC 413

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

1. This criminal revision has been filed by the revisionist against the order dated 27.11.2018 passed by IXth Addl. Sessions Judge, Mathura as well as consequential order dated 29.11.2018 by which learned trial judge rejected the discharge application of the revisionist bearing paper no. 16 Kha dated 7.9.2018 filed under section 227 Cr.P.C. vide order dated 27.11.2018 and without providing any breathing time to the revisionist framed the charges against him on 29.11.2018 in S.T. No. 66 of 2018 (State Vs. Govind Soni and Others) under section 306 I.P.C. Police Station Mahavan, District Mathura arising out of Case Crime No. 182 of 2015 pending in the court of IXth Addl. Sessions Judge, Mathura.

2. Brief facts of this case as per First Information Report is that the first informant's nephew namely, Nirmal Kumar, was a teacher at Purva Madhyamik School, Kinarayee and living with his family at Ashok Vihar Colony, Mathura. Whereas the revisionist, Govind Soni, who happened to be deceased's brother-in-law and co-accused, Brijesh Dixit, both have evil eyes on deceased's wife, Smt. Bhagwati, and also coerced her to see with their wrong intention. It is asserted that when Bhagwati threatened them to complaint against them, the revisionist lodged a false report at Police Station Sadar Bazar. And thereafter, the revisionist and co-accused, Brijesh Dixit have been continuously harassing and teasing the deceased, Nirmal Kumar, as they both knew that deceased, Nirmal Kumar, is a patient of high blood pressure and they also said that they were eventually seek out his wife and will keep on him impleading in frivolous cases. When deceased tried to confront the accused persons they challenge his manhood and said that he should kill himself or commit suicide. On

12.6.2015, one Sujeet Kumar saw the revisionist and co-accused chatting with Nirmal Kumar. Later on Sujeet Kumar received a whatsapp message about recovery of a dead body, at Gokul Dam and which is later on identified as dead body of deceased, Nirmal Kumar. Then Sujeet Kumar informed to the first informant (uncle of deceased) and the first informant identified the dead body of of Nirmal Kumar and lodged a report on same day at 9.45 P.M. against the revisionist and co-accused, Brijesh Dixit. Post mortem of the dead body of deceased was conducted and as per postmortem report of deceased, the deceased has died due to asphyxia as a result of drowning.

3. After lodging the First Information Report, the Investigating Officer conducted the *Panchayatnama* on 13.6.2015. During investigation on 19.6.2015, the investigating officer has recorded statement of Sukhbir and Jay Prakash. These independent witnesses have stated in their statements that deceased was mentally disturbed person and his treatment was going on in Agra. They further stated that deceased has left the place of Jay Prakash, who is the brother of deceased, and went somewhere in the morning and when he did not return, he tried to trace him. Investigating Officer of this case also recorded the statement of deceased's wife namely, Bhagwati, in which she has clearly stated that revisionist has evil eye on her and he mentally tortured her and she further stated that revisionist instigated her husband / deceased to commit suicide. It is further stated that only for torturing and harassing her husband / deceased, the revisionist has lodged a false N.C.R. No. 42 of 2015 under sections 323, 504 I.P.C. against the deceased. After conducting the investigation, the investigating officer submitted chargesheet against the revisionist, Govind Soni, and Brijesh under section 306 I.P.C. on 23.8.2015.

4. On the aforesaid chargesheet, the learned Magistrate has taken cognizance of the offence over the chargesheet. Thereafter, the case was committed to the Court of Sessions where it is registered as Sessions Trial No. 66 of 2018 (State Vs. Govind Soni and Another) under section 306 I.P.C.

5. After committal of the case, on 7.9.2018 the revisionist filed a discharge application under section 227 Cr.P.C. On 7.9.2018 on the ground that there was no evidence against him collected by the investigating officer during the course of investigation, which constitutes the offence under section 306 I.P.C. against the revisionist. Thereafter, learned trial court rejected the discharge application of the revisionist after hearing both the parties and fixed a date for framing of charge. Thereafter, on 19.11.2018, learned Sessions Court framed charge against both the accused under section 306 I.P.C. Being aggrieved with the said order of Sessions Court, this criminal revision has been filed by the revisionist.

6. Revisionist has challenged the order dated 27.11.2018 on the following grounds. Learned trial court has completely failed to record any reason that prima facie offence is made out or not against the revisionist and without applying its judicial mind, erroneously rejected discharge application of the revisionist. Solely on flimsy ground only evidence collected during investigation by the I.O. against the accused / applicant is that on 15.6.2015, nephew of the first informant namely, Sujeet Kumar, had simply seen the

revisionist, Govind Soni, and co-accused, Brijesh Dixit, chatting with the deceased. Thus, only circumstances last seen evidence is available but there is absolutely no evidence to show that accused has incited the deceased to commit suicide or make his life so miserable that there was no option left to deceased except to end his life. Simply alleged that accused / applicant has evil eye and questioned upon deceased's manhood and induced him to kill himself. As no requisite mensrea to add the commission of offence of abatement of suicide. It is also further submitted that postmortem report of deceased clearly reveals that cause of death of deceased is aphexia, as a result of drowning, which shows that deceased died either accidental or suicidal death or it could be possible by murder or homicide. There is no successive evidence that deceased has committed suicide. It is also submitted that deceased was a patient of depression for long time and his treatment was going on in different hospitals. It is quite possible that deceased committed suicide due to his pathetic condition. Further submitted that there is no question arose that deceased commits suicide due to abatement by the revisionist and learned trial court without appreciating the evidence available on record, wrongly rejected the discharge application of the revisionist. Learned counsel for the revisionist has relied upon the following judgments of Hon'ble Supreme Court.

i. Rajesh Vs. State of Haryana, SLP (Crl.) No. 8667 of 2016, SC.

ii. Gangula Mohan Reddy Vs. State of Andhra Pradesh, 201 (1) SCC 750

7. Learned A.G.A. supported the order of learned trial court and stated that impugned order is legal and factually correct and there is no occasion for this court to interfere under revisional jurisdiction.

8. I have heard learned counsel for the revisionist and the learned A.G.A. and also perused the record.

9. A larger Bench of the Apex Court in the case of ***State of Orissa vs. Debendra Nath Padhi (2005) 1 SCC 568,*** has settled the legal position in regard to the relevancy of defence evidence at the stage of charge. In that case, the Apex Court has held as follows:

"16. All the decisions, when they hold that there can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The decisions proceed on the basis of settled legal position that the material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter aspect relating to the accused though has not been specifically stated, yet it is implicit in the decisions. It seems to have not been specifically so stated as it was taken to be well settled proposition. This aspect, however, has been adverted to in State Anti-Corruption Bureau, Hyderabad and Another v. P. Suryaprakasam [1999 SCC (Crl.) 373] where considering the scope of Sections 239 and 240 of the Code it was held that at the time of framing of charge, what the trial court is required to, and can consider are only the police report referred to under Section 173 of the Code and the documents sent with it. The only right the accused has at that stage is of being heard

and nothing beyond that (emphasis supplied).....

18. ..... It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

24. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's case holding that the trial court has powers to consider even materials which accused may produce at the stage of section 227 of the Code has not been correctly decided."

10. The Hon'ble Supreme Court in the judgment passed in the matter of ***"P. Vijayan vs. State of Kerala and Ors. reported in 2010 (2) SCC 1398 "*** held that :-

"10. Before considering the merits of the claim of both the parties, it is useful to refer Section 227 of the Code of Criminal Procedure, 1973, which reads as under:-

"227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

(12) The scope of Section 227 of the Code was considered by this Court in the case of State of Bihar vs. Ramesh Singh, wherein this Court observed as follows:-

"4. ... Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence

then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial"

This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of the trial Judge in order to frame a charge against the accused.

11. In a recent decision, in ***Soma Chakravarty vs. State, AIR 2007 SC 2149*** this Court has held that :-

"The settled legal position is that if on the basis of material on record the court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true.... Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial. (Para 11)

Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the Court must come to a prima facie finding that there exist some materials therefor. Suspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge."

12. Apart from the aforesaid cases, in the case of ***Sajjan Kumar vs. Central Bureau of Investigation, JT 2010(10) SC 413,*** the Apex Court has formulated the following guidelines with regard to the question as to how a matter for framing a charge against the accused is to be dealt with:

"(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a

roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

13. The aforesaid decisions have almost settled the legal position that at the stage of charge the court is not required to consider pros and cons of the case and to hold an enquiry to find out truth. Marshaling and appreciation of evidence is not in the domain of the court at that point of time. What is required from the court is to sift and weigh the materials for the limited purpose of finding out whether or not a prima facie case for framing a charge against the accused has been made out. Even in a case of grave or strong suspicion charge can be framed. The court has to consider broad probabilities of the case, total effect of the evidence and the documents produced including basic infirmities, if any. If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, but the court should not weigh the evidence as if it were holding trial. Accused can be discharged only when the charge is groundless. In my opinion, the learned Sessions Judge has taken into account all the relevant materials and passed the impugned order keeping in view the parameters laid down by the Apex Court in the aforesaid cases. Therefore, the submission of the counsel for the revisionist that no charge was made out has no substance.

14. I shall now apply the principles enunciated above in the present case in order to find out whether or not the court below was justified in dismissing the discharge application filed under Section 227 Cr.P.C.

15. For the reasons discussed above, **the revision has no merit and is accordingly dismissed.** Interim order, if any, is vacated.

16. A copy of this order be communicated to the lower court for necessary compliance.

(2021)01ILR A163
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE DINESH PATHAK, J.

Criminal Revision No. 1962 of 2020

Manoj Kumar Patel ...Revisionist
Versus
State of U.P. & Ors.. ...Opposite Parties

Counsel for the Revisionist:
Sri Amarnath Tripathi

Counsel for the Opposite Parties:
A.G.A., Sri Yogesh Kumar Vaish, Sri Yogendra Singh

A. Criminal Law - Code of Criminal Procedure,1973-Section 401/397, & Indian Penal Code,1860-Sections 307,352, 427, 326-A-maintainability of –trial court refused to accept/admit required documents on record u/s 311-victim/revisionist challenged the said order which was interlocutory-revision u/s 397(1) is maintainable only against those orders which termintes the proceeding of the main case once for all-other orders passed during the pendency of trial are interlocutory orders-revision against interlocutory order are barred u/s 397(2) Cr.P.C.-instant revision is preferred against the order, which is interlocutory in nature-the same is not maintainable in the eyes of law.(Para 1 to 31)

B. The decision of application u/s 311 Cr.P.C. do not decide anything finally or results into the culminating the main proceeding of the case. Order impugned can not be construed as an order which is a matter of movement or as an intermediate or quasi final order as discussed in the case of Amarnath and Madhu Limay, so as to maintain the revision against the order. (Para 10 to 30)

The revision is dismissed. (E-5)

List of Cases Cited:

1. Sethuraman Vs Rajamanickam, (2009) 5 SCC 153

2. Goli Satyanarayan Reddy Vs G. Mahesh & anr.(Crl. R.C. No. 175/2018)

3. Amar Nath Vs St. of Har. (1977) AIR SC 2185

4. Madhu Limaye Vs St. of Mah.(1977) 4 SCC 551

5. Prabhu Chavala Vs St. of Raj.(2016) 16 SCC 30

6. Kuppuswami Rao Vs King Kania (1949) AIR F.C.I.

7. Mohanlal Maganlal Thakar Vs St. of Guj. (1968) AIR SC 733

8. Parmeshwari Devi Vs St. (1977) 1 SCC 169

9. Asian Resurfacing of Road Agency Pvt. Ltd. & anr. Vs CBI (2018) 16 SCC 299: (2020) 1 SCC Cri 686: 2018 SCC OnLine SC 310 Pg. 316

10. Asif Hussain Vs St. of U.P. (2007) 57 ACC 1036

11. Girish Kumar Suneja Vs CBI, (2017) 14 SCC 809

(Delivered by Hon'ble Dinesh Pathak,, J.)

1. Heard Sri Amarnath, learned counsel for the Revisionist, Sri Yogendra Singh, learned Advocate, holding brief of Shri Yogesh Kumar Vaish, learned counsel for the opposite party Nos. 2 to 5, Sri Nitin Kesarwani, learned A.G.A. for the State on admission and perused the record on board.

2. Instant Revision has been preferred by Manoj Kumar Patel (victim) challenging the order dated 27.10.2020 passed by Additional District and Sessions Judge/

Special Judge (E.C. Act), Varanasi, rejecting the application No. 79-Kha, dated 21.10.2020, u/s 311 Cr.P.C. filed by revisionist(herein) in Sessions Trial No. 118 of 2016 (C.N.R. No. UPVR01-000691-2016) (State Vs. Vansraaj Patel and Ors.) arising out of case crime No. 22 of 2016, under Section 307, 352, 727, 326-A of I.P.C., Police Station- Cholapur, District-Varanasi.

3. Factual matrix of the case shows that the informant and his cousin (son of his mother's sister) Manoj Kumar(revisionist herein) were working in the Madan Textile. On 07.01.2016, duo, after completion of their work, were going to the house of Manoj, situated in Benipur Khurd by their respective motorcycle. At about, 08:45 p.m., while they reached in the village Benikhurd near the house of Molaee, four persons namely Vansraaj Patel, Vijay Patel, Ramesh Patel and Mahendra, who were inimically with the Manoj, had stopped the motorcycle of Manoj and pored kerosene oil over him, with intention to kill and set him ablaze. Seeing the screams of Manoj, informant had raised alarm. While he had been chased by Vansraaj and Ramesh, he ran away after leaving his motorcycle. In the mean-time, co-villagers had gathered there and aforesaid four accused fled away from the scene. With the help of villagers fire of Manoj as well as his motorcycle was extinguished. During process of extinguishing, Prakash Patel and Golu Patel were also injured. With the help of the villagers Manoj was taken to the Kabirchaurra Hospital through ambulance from where he was referred to B.H.U. and due to paucity of place he has been admitted in Adarsh Hospital, Sundarpur.

4. In this backdrop, Chedi Patel (first informant) had lodged F.I.R. dated 07.01.2016 (Exhibit K-3), registered as Case Crime No. 22 of 2016, under Section 307, 352 and 427 I.P.C.

5. After investigation, Investigating Officer had submitted charge-sheet dated 31.01.2016. Vide order dated 29.03.2016, learned Trial Court, had framed charges against all the four accused persons, as mentioned in the F.I.R., under Section 307/34, 352 and 402 I.P.C.. As the matter proceeded, at hearing stage Manoj Patel(victim), revisionist herein, has moved an application dated 21.10.2020 (Application No. 79 Kha), under Section 311 Cr.P.C., beseeching acceptance/admission of medico-legal report, prescriptions, discharge-sheet of the injured and for marking of exhibit on the statement of victim recorded under Section 164 Cr.P.C. and also for putting a question to the accused under Section 313 Cr.P.C. with respect to written report (Ex. K-1)

6. Aforesaid application No. 79-Kha dated 21.10.2020, was rejected by the impugned order dated 27.10.2020, which is under challenged in the instant revision.

7. After hearing the matter at length, learned counsel for the opposite party Nos.2 to 5 has raised preliminary objection with regard to the maintainability of the present revision in view of the express bar engrafted under sub-Section 2 of Section 397 of Code of Criminal Procedure, 1973, (In brevity Cr.P.C.) to entertain a revision u/s 397(1) Cr.P.C. against an interlocutory order passed during the pendency of trial of the case. He has submitted that impugned order dtd. 27.10.2020 passed by the Trial Court refusing the acceptance/admission of required documents on record as mentioned in the Application No. 79 Kha, dated 21.10.2020, under Section 311 of Cr.P.C. is an interlocutory order and the instant

revision petition, which has been preferred challenging the impugned order by which aforesaid application filed by the present revisionist has been rejected, is not maintainable in the eye of law, therefore, same may be dismissed in limine. In support of his contention, learned counsel for the opposite party Nos. 2 to 5 has placed reliance on the judgement of Hon'ble Apex Court in **Sethuraman Vs. Rajamanickam, reported in 2009 (5) SCC 153.** He has also cited the case decided by Hon'ble The Andhra Pradesh High Court in **Goli Satyanarayan Reddy Vs G. Mahesh & Anr.,** Crl.R.C. No. 175/2018, decided on 30.12.2019.

8. Learned A.G.A. for the State has also supported the submissions advanced by learned counsel for the contesting respondents and submitted that revision u/s 379(1) Cr.P.C. is maintainable only against those orders which terminates the proceeding of the main case once for all and other orders which are passed during the pendency of the trial are interlocutory orders and revision against said orders are barred u/s 379(2) Cr.P.C. Instant revision is preferred against the order, which is interlocutory in nature, comes within the teeth of the provision as embodied under sub-Section 2 of Section 397 Cr.P.C., therefore, the same is not maintainable in the eyes of law.

9. Per contra, learned counsel for the revisionist has vehemently opposed the preliminary objection raised by learned counsel for the opposite party Nos. 2 to 5 qua maintainability of the instant revision which has been filed against the interlocutory order, under Section 397(2) Cr.P.C. It is submitted that rejecting the application under Section 311 Cr.P.C. amounts to final disposal/termination of the interim proceeding which was initiated during the pendency of the trial on the basis of said application No. 79-kha dated 21.10.2020. Therefore, sanctity of the aforesaid impugned order could be examined by this Hon'ble High Court in exercising it's revisional power under Section 397/401 Cr.P.C.

10. It is further submitted that in exercising its power under the revisional jurisdiction Hon'ble High Court can also exercise it's inherent power to examine the legality and validity of the impugned order. That apart, learned counsel for the revisionist has tried to construed the nature of the impunged order as intermediate order. He contended that in the case of **Amar Nath Vs. State of Harayana, reported in A.I.R. 1977 S.C. 2185,** Hon'ble Apex Court has held that an order which substantially affect the right of the parties cannot be said to be an interlocutory order so as to attract the bar u/s 379(2) Cr.P.C. and those orders relating to rights or liabilities of the parties are to be termed as intermediate order and revision against the said orders is maintainable. It is further contended that it is right of the victim to maintain the admissibility of his statement u/s 164 Cr.P.C. by getting mark of exhibit over it and produce the medical record to prove inflicting injuries, therefore, order under challenged is to be construed as an intermediate order against which revision petition is maintainable u/s 379(1) Cr.P.C. It is further contended that law laid down in the case of **Amar Nath** (Supra) was subsequently approved by Hon'ble Apex Court in case of **Madhy Limaye Vs. State of Maharashtra.** In support of his contention, learned counsel for the revisionist has cited the full Bench decision of Apex Court in the case of **Madhu Limaye Vs. State of Maharashtra,**

reported in 1977 (4) SCC 551. He has also placed reliance on another full Bench decision of Hon'ble Supreme Court in **Prabhu Chavala Vs. State of Rajasthan, reported in (2016) 16 SCC 30.**

11. I have carefully considered the rival submissions made by learned counsel for the parties and perused the record on board on the preliminary objection qua maintainability of the present revision, being barred under sub-Section 2 of Section 397 Cr.P.C., filed challenging the impugned order which is said to be an interlocutory order in rejecting the application No. 79-Kha, dated 21.10.2020 filed under Section 311 of Cr.P.C. for taking the some of the documents on record relating to the medical treatment of the victim and for mark of Exhibit on the statement of victim recorded under Section 164 Cr.P.C. and also for putting a question under Section 313 to the accused with respect to the written report . In the case of **Madhu Limaye** (supra), Hon'ble Supreme Court has discussed in detail with respect to the scope of the revision, under Section 397(1) of Cr.P.C. and inherent power of Hon'ble High Court under Section 482 Cr.P.C. qua interlocutory order, intermediate order and the final order. It is pertenant to mention here that in the old Cr.PC of 1898, there was no provision of bar in filing the revision against the interlocutory order. Subsequently, seeing the flooded filing of revisions against all the orders including the interlocutory order with intention to protract the litigation, Legislation has embarked the bar under sub-Section 2 of Section 397 of Cr.P.C. to curb the unnecessary filing of revisions against each and every order passed by the trial court so that the expeditious disposal of cases could be ensured. Provision given under Section 397 of Cr.P.C. is reproduced as under:-

"The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself' or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity or any proceedings of such inferior court, and may, when calling for such record, direct that the execution of' any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation:- *All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Sessions Judge for the purpose of this subsection and of section 398.*

(2) The power of revision conferred by sub-section (I) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the of the them."

12. In the case of **Madhu Limaye** (supra), Hon'ble Supreme Court has approved the law laid down in the case of **Amar Nath** (Supra), in which it has been pointed out that the purpose of putting a bar on the revisional power in relation to an interlocutory order passed in an appeal, inquiry, trial or other proceeding, is to

bring about expeditious disposal of case final.

13. Further, Hon'ble Supreme Court has enunciated and reiterated the view, with some modulation, taken in the case of **Amar Nath** (Supra), wherein two points were decided i.e. (i) where a revision to the High Court against the order of subordinate Court is expressly barred under Section 397(2) of Cr.P.C., the inherent power contained under Section 482 would not be available to defeat the aforesaid bar (ii) Impugned order of the Magistrate, however, was not an interlocutory order. Second point, with respect to the nature of impugned order being interlocutory order, was accepted by Hon'ble Supreme Court but first point, with respect to the exercise of inherent power in the matters where bar as contained under Section 397(2) Cr.P.C. came into the play, has been accepted with some modulation.

14. It is accepted by Hon'ble Supreme Court that on plain reading of Section 482 Cr.P.C., however, it would follow that noting in the Cr.P.C., which would include sub-Section (2) of Section 397 Cr.P.C. also, shall be deemed to limit or affect the inherent power of the High Court. It is enunciated by Hon'ble Supreme Court that if it is said that bar under Section 397(2) of Cr.P.C. is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of revisional powers. Applying harmonious interpretation, Hon'ble Supreme Court has opined that bar provided in sub-Section 2 of Section 397 Cr.P.C. operates only in exercise of revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order and in the eventuality of orders other than interlocutory order, inherent power will come into the play, there being no other provision of Cr.P.C. for the redressal of grievances of the aggrieved party. Impugned order, in case, bring about the situation which is abuse of process of Court or for the purpose of securing the end of justice and interference by High Court is absolutely necessary, then provisions as contained under Section 397(2) can not limit or affect the exercise of inherent power of High Court.

15. In this view of matter, by introducing the bar under sub-Section 2 of Section 397 Cr.P.C., legislation is intended to curb the protracted litigation and try to ensure early disposal of the cases.

16. Plain reading of Section 397 Cr.P.C. explicit the scope and applicablity of revisional power that aggrieved party can question the correctness, legality or propriety of any finding, sentence or order, recorded or passed and, to the regularity of any proceeding of inferior Court. It is significant to note that power conferred under sub-Section 1 of Section 397 Cr.P.C. shall not be exercised in relation to any interlocutory order passed in appeal, enquiry, trial or other proceeding as embodied under sub-Section 2 of Section 397 Cr.P.C. Legislation has made the provision of bar under Section 397(2) of Cr.P.C. to the revisional jurisdiction of the High Court and the Sessions Judge in entertaining a revision against an interlocutory order. Therefore, considering the intention of legislation and historical background in which bar has been imposed u/s 397(2) Cr.P.C. to entertain revision u/s 397(1) Cr.P.C. against an interlocutory order, interpretation of any particular order passed during the pendency of the trial to decide or ascertain as to whether it is a final

order or interlocutory order or intermediate order for the purpose of maintaining a revision under Section 397(1) Cr.P.C. must be in consonance with the intention of legislation. In introducing the bar under Section 397(2) Cr.P.C. qua maintainability of revision against the interlocutory order, legislation was intended to expedite the trial. It is noteworthy that interpretation of any statute or any provision must always be made keeping in mind the object of the litigation and no effort should be made in derogation to the legislative intent.

17. As per the provisions enshrined under Section 397 (1) Cr.P.C., revision is maintainable against all those orders who are final in nature and the same cannot be assailed in any appellate jurisdiction. Appeal, in case, is provided against the order proposed to be assailed then preferring an appeal is the adequate remedy available under the procedure (Cr.P.C.) to the aggrieved persons. Addressing on the point of limited access of the revisional jurisdiction, Hon'ble Supreme Court enunciated in the case of **Madhu Limaye** (Supra) that on such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Section XXIX of Cr.P.C.. This does not seem to be the intention of legislation when it retained the revisional power of High Court in terms of identical to one in the old Cr.P.C. 1898.

18. Hon'ble Supreme Court has considered the dictum of **S. Kuppuswami Rao Vs. King Kania, reported in AIR 1949 F.C. I,** wherein it is stated that if their decision, whichever may it is given, will, if it stands, finally disposed off the matter in dispute, I think that for the purpose of there, it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory. Hon'ble Supreme Court has held that it is to be noticed that the test laid down therein was that if the objection of the accused succeeded, the proceeding could have end but not vice versa. The order can be said to be a final order only if, in either event, the action will be determined. It is further explicated that the real intention of legislature was not to equate the expression "interlocutory order" as invariably being converse of the words "final order". There may be an order passed during the course of proceeding, which may not be final as per the Judgment rendered by Hon'ble Supreme Court in the case of **S. Kuppuswami** (supra), but, yet it may not be an interlocutory order pure or simple. Same kind of order may fall in between two. By applying a rule of harmonious constructions, Apex Court held that bar in sub-Section 2 of Section 397 Cr.P.C. may not be attracted on such kind of intermediate orders. They may not be final order for the purpose of Article 134 of the Constitution of India, yet, it would not be correct to characterize them as merely interlocutory order within the meaning of Section 397(2) Cr.P.C.

19. In this view of the matter, Hon'ble Supreme Court in the case of **Madhu Limaye** (Supra) has approved the concept of intermediate orders, which are neither the final order nor the interlocutory order as held in the case of **Amar Nath** (Supra). It is further enunciated that it is neither advisible nor possible to make a catalouge of orders to demonstrate which kind of order would be merely, purely or simply interlocutory orders and which kind of order would be final and then to prepare an

exhaustive list of those types of orders which will fall in between the two.

20. In the case of **Mohanlal Maganlal Thakar Vs. State of Gujarat, reported in AIR 1968 SC 733,** wherein, after enquiry, an order was passed directing to file a complaint, against the appellant Mohanlal Maganlal Thakar which was affirmed by the High Court. The matter came to Hon'ble Supreme Court on the grant of certificate under Article 134(1)(C) of the Constitution of India. The majority view of Hon'ble three judges has held that aforesaid order for filing of a complaint is a final order within the meaning of said constitutional provision. Minority view of two Judges had given the dissenting judgment holding it as an interlocutory order. Enunciating the interlocutory order, Hon'ble Supreme Court has held in the case of **Parmeshwari Devi Vs. State, reported in (1977) 1 SCC 169,** that an order made in a criminal proceeding against a person who is not a party to the enquiry or trial and which adversely affected him is not an interlocutory order within the meaning of Section 397(2) of Cr.P.C.

21. In a recent Judgment of **ASIAN RESURFACING OF ROAD AGENCY PRIVATE LIMITED AND ANOTHER VS. CENTRAL BEAURU OF INVESTIGATION,** reported in (2018) 16 SCC, 299, Constitution Bench of Hon'ble Supreme Court has considered the dictum of **Madhu Limaye** (Supra) and other cases qua bar of filing revision against the interlocutory order under sub-Section 2 of Section 397 of Cr.P.C. and held that dictum of **Madhu Limaye**(Supra) hold the filed and has not been in any manner diluted. Relevant para No. 19,20,21 of the said judgment is reproduced below:

19. It is not necessary to refer to all the decisions cited at the Bar. Suffice it to say that a Bench of three Judges in Madhu Limaye [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] held that the legislature has sought to check delay in final disposal of proceedings in criminal cases by way of a bar to revisional jurisdiction against an interlocutory order under sub-section (2) of Section 397 CrPC. At the same time, inherent power of the High Court is not limited or affected by any other provision. It could not mean that limitation on exercise of revisional power is to be set at naught. Inherent power could be used for securing ends of justice or to check abuse of the process of the court. This power has to be exercised very sparingly against a proceeding initiated illegally or vexatiously or without jurisdiction. The label of the petition is immaterial. This Court modified the view taken in Amar Nath v. State of Haryana [Amar Nath v. State of Haryana, (1977) 4 SCC 137 : 1977 SCC (Cri) 585] and also deviated from the test for interlocutory order laid down in S. Kuppuswami Rao [S. Kuppuswami Rao v. R., 1947 SCC OnLine FC 13 : (1947) 9 FCR 180] . We may quote the following observations in this regard: (Madhu Limaye case [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] , SCC pp. 554-56 & 558, paras 6, 10 & 13)

"6. The point which falls for determination in this appeal is squarely covered by a decision of this Court, to which one of us (Untwalia, J.) was a party in Amar Nath v. State of Haryana [Amar Nath v. State of Haryana, (1977) 4 SCC 137 : 1977 SCC (Cri) 585] . But on a careful consideration of the matter and on hearing the learned counsel for the parties in this appeal we thought it advisable to

enunciate and reiterate the view taken by two learned Judges of this Court inAmar Nath case [Amar Nath v. State of Haryana, (1977) 4 SCC 137 : 1977 SCC (Cri) 585] but in a somewhat modified and modulated form.

***

10. As pointed out in Amar Nath case [Amar Nath v. State of Haryana, (1977) 4 SCC 137 : 1977 SCC (Cri) 585] the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding, is to bring about expeditious disposal of the cases finally. More often than not, the revisional power of the High Court was resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The legislature in its wisdom decided to check this delay by introducing sub-section (2) in Section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code. On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include sub-section (2) of Section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court". But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. Take for example a case where a prosecution is launched under the Prevention of Corruption Act without a sanction, then the trial of the accused will be without jurisdiction and even after his acquittal a second trial, after proper sanction will not be barred on the doctrine of autrefois acquit. Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order, does it stand to reason to say that inherent power of the High Court cannot be exercised for stopping the criminal proceeding as early as possible, instead of harassing the accused up to the end? The answer is obvious that the bar will not operate to prevent the abuse of the process

of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.

13. ... But in our judgment such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by Section 397(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the intention of the legislature when it retained the revisional power of the High Court in terms identical to the one in the 1898 Code. In what cases then the High Court will examine the legality or the propriety of an order or the legality of any proceeding of an inferior criminal court? Is it circumscribed to examine only such proceeding which is brought for its examination after the final determination and wherein no appeal lies? Such cases will be very few and far between. ... There may be an order passed during the course of a proceeding which may not be final in the sense noticed in Kuppuswami case [S. Kuppuswami Rao v. R., 1947 SCC OnLine FC 13 : (1947) 9 FCR 180] , but, yet it may not be an interlocutory order -- pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, we think that the bar in sub-section (2) of Section 397 is not meant to be attracted to such kinds of intermediate orders. ..."

(emphasis supplied)

This extract is taken from Asian Resurfacing of Road Agency (P) Ltd. v. CBI, (2018) 16 SCC 299 : (2020) 1 SCC (Cri) 686 : 2018 SCC OnLine SC 310 at page 316

20. Referring to the judgment in Mohanlal Maganlal Thakkar v. State of Gujarat [Mohanlal Maganlal Thakkar v. State of Gujarat, (1968) 2 SCR 685 : AIR 1968 SC 733 : 1968 Cri LJ 876] , it was held that the test adopted therein that if reversal of the impugned order results in conclusion of proceedings, such order may not be interlocutory but final order. It was observed: (Madhu Limaye case [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] , SCC p. 560, para 15)

"15. ... In the majority decision four tests were culled out from some English decisions. They are found enumerated at p. 688. One of the tests is "if the order in question is reversed would the action have to go on?" Applying that test to the facts of the instant case it would be noticed that if the plea of the appellant succeeds and the order of the Sessions Judge is reversed, the criminal proceeding as initiated and instituted against him cannot go on. If, however, he loses on the merits of the preliminary point the proceeding will go on. Applying the test of Kuppuswami case [S. Kuppuswami Rao v. R., 1947 SCC OnLine FC 13 : (1947) 9 FCR 180] such an order will not be a final order. But applying the fourth test noted at SCR p. 688 in Mohanlal case [Mohanlal Maganlal Thakkar v. State of Gujarat, (1968) 2 SCR 685 : AIR 1968 SC 733 : 1968 Cri LJ 876] it would be a final order. The real point of distinction, however, is to

be found at SCR p. 693 in the judgment of Shelat, J. The passage runs thus: (Mohanlal case [Mohanlal Maganlal Thakkar v. State of Gujarat, (1968) 2 SCR 685 : AIR 1968 SC 733 : 1968 Cri LJ 876] , AIR p. 738, para 11)

"As observed in Ramesh v. Gendalal Motilal Patni [Ramesh v. Gendalal Motilal Patni, (1966) 3 SCR 198 : AIR 1966 SC 1445] the finality of that order was not to be judged by co-relating that order with the controversy in the complaint viz. whether the appellant had committed the offence charged against him therein. The fact that that controversy still remained alive is irrelevant.'"

This extract is taken from Asian Resurfacing of Road Agency (P) Ltd. v. CBI, (2018) 16 SCC 299 : (2020) 1 SCC (Cri) 686 : 2018 SCC OnLine SC 310 at page 316

21. The principles laid down in Madhu Limaye [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] still hold the field and have not been in any manner diluted by the decision of four Judges in V.C. Shukla v. State [V.C. Shukla v. State, 1980 Supp SCC 92 : 1980 SCC (Cri) 695] or by the recent three-Judge Bench decision in Girish KumarSuneja v. CBI [Girish Kumar Suneja v. CBI, (2017) 14 SCC 809 : (2018) 1 SCC (Cri) 202] . Though in V.C. Shukla [V.C. Shukla v. State, 1980 Supp SCC 92 : 1980 SCC (Cri) 695] , order framing charge was held to be interlocutory order, judgment in Madhu Limaye [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] taking a contrary view was distinguished in the context of the statute considered therein. The view in S. Kuppuswami Rao [S. Kuppuswami Rao v. R., 1947 SCC OnLine FC 13 : (1947) 9 FCR 180] , was held to have been endorsed in Mohanlal Maganlal Thakkar [Mohanlal Maganlal Thakkar v. State of Gujarat, (1968) 2 SCR 685 : AIR 1968 SC 733 : 1968 Cri LJ 876] though factually in Madhu Limaye [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] , the said view was explained differently, as already noted. Thus, in spite of the fact that V.C. Shukla [V.C. Shukla v. State, 1980 Supp SCC 92 : 1980 SCC (Cri) 695] is a judgment by Bench of four Judges, it cannot be held that the principle of Madhu Limaye [Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] does not hold the field. As regards Girish Kumar Suneja [Girish Kumar Suneja v. CBI, (2017) 14 SCC 809 : (2018) 1 SCC (Cri) 202] , which is by a Bench of three Judges, the issue considered was whether the order of this Court directing that no court other than this Court will stay investigation/trial in Manohar Lal Sharma v. Union of India [Manohar Lal Sharma v. Union of India, (2014) 9 SCC 516] (Coal Block allocation cases) violated right or remedies of the affected parties against an order framing charge. It was observed that the order framing charge being interlocutory order, the same could not be interfered with under Section 397(2) nor under Section 482 CrPC. [Manohar Lal Sharma case, (2014) 9 SCC 516, paras 24, 25 and 27] It was further held that stay of proceedings could not be granted in the PC Act cases even under Section 482 CrPC. [Manohar Lal Sharma case, (2014) 9 SCC 516, para 32] It was further observed that though power under Article 227 is extremely vast, the same cannot be exercised at the drop of a hat as held in Shalini Shyam Shetty v. Rajendra Shankar Patil [Shalini Shyam Shetty v. Rajendra Shankar Patil, (2010) 8 SCC 329 : (2010) 3 SCC (Civ) 338] as under: (Girish Kumar case [Girish Kumar Suneja v. CBI, (2017) 14 SCC 809 : (2018) 1 SCC (Cri) 202] , SCC p. 835, para 37)

"37. ... "49. ... (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.' (Shalini Shyam case [Shalini Shyam Shetty v. Rajendra Shankar Patil, (2010) 8 SCC 329 : (2010) 3 SCC (Civ) 338] , SCC p. 349, para 49)"

22. Learned counsel for the revisionist has placed reliance on the Full Bench judgement of Hon'ble Supreme Court in the case of **Prabhu Chavla Vs. State of Rajsthan** (Supra), wherein relevant scope of the revisional jurisdiction under Section 397 and inherent power of Hon'ble High Court, under Section 482 Cr.P.C. has been discussed and held that there is no total ban on the exercise of inherent power where abuse of process of Court or other extraordinary situation warrants exercises of inherent jurisdiction and availability of alternative remedy of a criminal revision under Section 397, by itself cannot be a good ground to dismiss an application filed under Section 482 Cr.P.C. Learned counsel for the revisionist has placed reliance on para 6 of the aforesaid judgement, wherein it is held that we venture to add a further reason in support . Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory order, a contrary view would limit the availability of inherent power under Section 482 Cr.P.C. only to petty interlocutory orders. A situation only unwarranted and undesirable. Aforesaid para no.6 as relied upon by counsel for the revisionist is not helpful in the present matter in holding the maintainability of the revision against the order impunged which is held to be interlocutory order by Hon'ble Supreme Court in the case of **Setthuraman**(Supra). In para no.4 of the case of **Setthuraman**(Supra), Hon'ble Apex Court has held as under:-

"4. Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application under Section 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397(2) Cr.P.C. The Trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondents/accused and the only defence that was raised, what that his singed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e. one on the application under Section 91 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for recalling the witness, were the orders of interlocutory nature, in which case, under Section 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impunged judgment is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed."

23. Aforesaid observations made by the Hon'ble Supreme Court left no room for discussion to decide the nature of the order passed under Section 311 Cr.P.C. that order

passed under the aforesaid section is an interlocutory order.

24. In the aforesaid case accused had moved an application under Section 91 Cr.P.C. and under Section 311 Cr.P.C. seeking direction to produce the Bank Pass-book, Income-tax account etc. and also for recalling the witnesses for cross-examination. Hon'ble Supreme Court has held that order rejecting the application under Section 91 of Cr.P.c. and under Section 311 Cr.P.C., where the orders of interlocutory nature which cannot be assailed in revision in view of the bar as embodied under sub-Section 2 of Section 397 Cr.P.C.

25. In a recent judgment of this Hon'ble Allahabad High Court, (Lucknow Bench), decided on 12.12.2009 in Criminal Revision No. 1640 of 2019 (Anil Kumar Vs. State of U.P.), co-ordinate Bench of this Hon'ble High Court, after consideration the case of **Sethuram**(Supra) has held that rejection order under Section 311Cr.P.C. is an interlocutory order, hence, the revision is not maintainable u/s 397(1) Cr.P.C. In deciding the issue of maintainability of revision against the rejection order passed under Section 311 Cr.P.C, Hon'ble Court has also considered the decision of Division Bench of Allahabad High Court in the case of **Asif Hussain Vs. State of U.P., reported in 2007 (57) ACC, 1036.**

26. Further, in the case of **Girish Kumar Suneja Vs. C.B.I.** reported in (2017) 14 SCC 809, three-Judges Bench judgment, Hon'ble Supreme Court has discussed in detail the scope of revision under Section 397 Cr.P.C. in the context of intermediate and interlocutory order. In the aforesaid judgment, Hon'ble Supreme Court has considered the dictum of **Amarnath**(supra) and **Madhu Limay**(supra), relevant para 15 to 18 and 20 to 23 of the aforesaid judgments is reproduced as under:-

"15. While the text of sub-section (1) of Section 397 confer very wide powers on the court in the exercise of its revision jurisdiction, this power is equally ***severely curtailed*** *by sub-section (2) thereof. There is a complete prohibition in a court exercising its revision jurisdiction in respect of interlocutory orders. Therefore, what is the nature of orders in respect of which a court can exercise its revision jurisdiction?*

16. There are three categories of orders that a court can pass -final, intermediate and interlocutory. There is no doubt that in respect of a final order, a court can exercise its revision jurisdiction-that is in respect of a final order of acuqittal or conviction. There is equally no doubt that in respect of an interlocutory order, the court cannot exercise its revision jurisdiction. As far as an intermediate order is concerned, the court can exercise its revision jurisdiction since it is not an interlocutory order.

17.The concept of an intermediate order first found mention in Amar Nath Vs. State of Haryana in which case the interpretation and impact of Section 397(2) of the Cr.P.C. came up for consideration. This decision is important for two reasons. Firstly it gives the historical reason for the enactment of Section 39792) of the Cr.P.C. and secondly considering that historical backgourd, it gives a jurstification for a restrictive meaning to Section 482 of the Cr.P.C.

18. As far as the historical background is concerned, it was pointed out that the Criminal Procedure Code of 1898 and the 1955 Amendment gave wide

powers to the High Court to interfere with orders passed in criminal cases by the subordinate courts. These wide powers were restricted by the High Court and this Court, as matter of prudecne and not as a matter of law, to an order that "suffered from any error of law or any legal infirmity causing injustice or prejudice to the accused or was manifestly foolish or perverse." (Amar Nath case (1977) 4 SCC 137 = 1077 SCC (Cri) 585). this led to the courts being flooded with cases challenging all kinds of orders and thereby delaying prosecution of a case to the detriment of an accused person.

20. As noted in Amar Nath (1977) 4 SCC 137 = 1077 SCC (Cri) 585) the purpose of introducing Section 397(2) Cr.P.C. was to curb delays in the decision of criminal cases and thereby to benefit the accused by giving him or her a fair and expeditious trial. Unfortunately, this legislative intendment is sought to be turned topsy turvy by the appellants.

21. The concept of an intermediate order was further elucidated in Madhu Limaye Vs. State of Maharashtra (1977) 4 SCC 551 : 1978 SCC (Cri) 10) by contradistinguishing a final order and an interlocutory order. This decision lays down the principle that an intermediate order is one which is interlocutory in nature but when reversed, it has the effect of terminating the proceedings and thereby resulting come to mind - an order taking cognizance of an offence and summoning an accused and an order for framing charges. Prima facie these orders are interlocutory in nautre, but when an order taking cognizance and summoning an accused is reversed, it has the effect of terminating the proceedings against that person resulting in a final order in his or her favour. Similarly, an order for framing of charges if reserved has the effect of discharing the accused person and resulting in a final order in his or her favour. Therefore, an intermediate order is one which if passed in a certain way, the proceedings would terminate but if passed in another way, the proceedings would continue.

22. The view expressed in Amar Nath ((1977) 4 SCC 137) and Madhu Limaye ((1977) 4 SCC 551) was followed in K.K. Patel Vs. State of Gujarat ((2000) 6 SCC 195: 2001 SCC (Cri) 200) wherein a revision petition was filed challenging the taking of cognizance and issuance of a process. It was said: (K.K. Patel case ((2000) 6 SCC (Cri) 200), SCC p. 201, para. 11)

"11..... It is now well-high settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage (vide Amar Nath Vs. State of Haryana ((1977) 4 SCC 137), Madhu Limaye Vs. State of Maharashtra ((1977) 4 SCC 551), V.C. Shukla Vs. State (1980 Supp SCC 92 : 1980 SCC (Cri) 695) and Rajendra Kumar (Sitaram Pande Vs. Uttam ((1999) 3 SCC 134 : 1999 SCC (Cri) 393). The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceeding, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the appellants proceedings would have been terminated. Hence, as per the said standard, the order was revisable." (Emphasis supplied)

23. We may note that in different cases, different expressions are used for the same category of orders - sometimes it is called an intermediate order, sometimes a quasi-final order and sometimes it is called

an order that is a matter of moment. Our preference is for the expression 'intermediate order' since that brings out the nature of the order more explicitly."

27. Learned counsel for the opposite party nos. 2 to 5 has also placed reliance on judgment dated 13.12.1999 in **Goli Satyanarayan Reddy**(Supra) which was decided by single Bench of Andhra Pradesh High Court holding that order passed in rejecting the application under Section 45 of Indian Evidence Act do not decide the case finally, therefore, it is an interlocutory order and revision against the said order is not maintainable under Section 397(2) Cr.P.C.. In the aforesaid case, Hon'ble Judge has considered the law expounded by the Hon'ble Supreme Court in the case of **Amarnaath**(supra), **Madhu Limay**(supra) and **Girish Kumar Sunija** (supra)

28. In the light of the discussion as made above, now it is clear from the judgment of **Girish Kumar Sunija**(Supra), that those orders which have the effect of terminating the proceeding of the main case once for all, though passed at interlocutory stage, are alone can be construed as intermediate order or quasi-final order. On this basis alone, one can reach the conclusion that particular order is interlocutory order or intermediate order or quasi-final order for the purpose of maintaining revision under Section 397(1) Cr.P.C. It is significant to note that it has been consistently held right from the case of **Amarnaath**(supra) in the year 1979 till **Girish Kumar Sunija**(supra) in the year 2017 that an order of summoning a witness is an interlocutory order which is not revisible. I am not in agreement with the submission made by learned counsel for the revisionist that every order passed, during the trial, touching the right and liability of the parties is an intermediate order and liable to be assailed under the revisional jurisdiction. Order passed for summoning witness or for producing the documents are only an step in furtherance of the trial proceeding which does not terminate anything final against any person. If the contention of counsel for the revisionist is accepted and every order passed during the trial of the case is construed as an intermediate order on the ground that it touches right or liability of the parties in relation to trial of the case, it would defeat the very purpose of bar as enshrined under sub-section 2 of Section 397 Cr.P.C. and would dilute the legislative intend.

29. After decision of Hon'ble Supreme Court in the case of **Setthuraman**(supra), there is no room left for discussion qua nature of rejection order passed in application under Section 311 Cr.P.C., which is held to be interlocutory order and assailing the said order in the revision petition is clearly barred under sub-Section 2 of Section 397 Cr.P.C. Dictum of **Madhu Limay** (Supra) and **Prabhu Chawla** (Supra) relied on by counsel for the revisionist are not come in his rescue to defeat the intention of legislation qua creating bar, in entertaining the revision petition assailing the interlocutory order which has been passed u/s 311 Cr.P.C. In **Setthuraman** (supra) case, Apex Court has clearly held in unequivocal term that an order passed under Section 311 Cr.P.C. to summon a witness or an order passed under Section 91 Cr.P.C. to call for the documents are pure and simple interlocutory order which do not decide anything final, as such revision petition is clearly barred under Section 397(2) Cr.P.C. Therefore, in the light of the aforesaid dictum, order in question cannot be construed as an order touching the right

and liability of the victim in relation to trial of the case and it is not going to decide anything final resulting into the culminating of proceeding of main case once for all.

30. After considering the law enunciated by Hon'ble Apex Court in several decision as discussed above, it can easily be concluded that decision of application under Section 311 Cr.P.C. do not decide anything finally or results into the culminating the main proceeding of the case. Order impunged cannot be construed as an order which is a matter of movement or as an intermediate or quasi final order as discussed in the case of **Amarnaath**(Supra) and **Madhu Limay** (Supra), so as to maintain the revision against the said order.

31. Hence, the instant revision petition is held to be barred and not maintainable in the eyes of the law under the provisions of sub-Section (2) of Section 379 of Cr.P.C.. Accordingly the present revision petition, filed against the order dated 27.10.2020 passed by Additional District and Sessions Judge/Special Judge (E.C. Act), Varanasi, in Sessions Trial No. 118/2016 (C.N.R. No.- UPVR01-000691-2016) (State of U.P. Vs. Vansraaj Patel and Others) arising out of case crime No.22 of 2016, under Section 307, 352, 327, 326-A of I.P.C., Police Station- Cholapur, District- Varanasi, is hereby **dismissed**.

32. Parties shall bear their own costs.

(2021)01ILR A177
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.12.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 2016 of 2020

Vikki @ Vikas (Minor) ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Anil Kumar Jaisawal, Sri J.B. Singh

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

A. Criminal Law - Code of Criminal Procedure,1973-Section 401/397 - Indian Penal Code, 1860-Sections 376-D, 120-B, 452, 506, 504, 323, 34 & Juvenile Justice(Care and Protection of Children) Act, 2015-Section 101 & Section 66A of I.T. Act and section 62/63 of Copyright Act-application- grant of bail to juvenile-delay of 8 days in lodging FIR -juvenile is entitled to the benefit of the provisions of the Act-revisionist was minor at the time of incident-the prosecution story does not support the medical report-Juvenile Justice Board declared him as minor determining his age 14 years 10 months -only gravity of offence is not relevant consideration for refusing grant of bail to juvenile as has been envisaged in Section 12 of the Act-the Board or the lower appellate court has not given any reason that his release would defeat the ends of justice in the event if he be released on bail.(Para 3 to 20)

B. Under Section 12 the prayer for bail may be rejected if there appear reasonable grounds for believing that the release of the juvenile is likely to bring him into the association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. It is important to note that gravity or seriousness of the offence, should not be taken as an obstacle or hindrance by the Legislature to refuse bail to a delinquent juvenile. (Para 14 to 19)

The revision is allowed. (E-5)

List of Cases Cited:

1. Kamal Vs St. of Har.,(2004) 13 SCC 526

2. Takht Singh Vs St. of M.P.,(2001) 10 SCC 463

3. Shiv Kumar @ Sadhu Vs St. of U.P.(2010) 68 ACC 616(LB)

4. Dataram Singh Vs St. of U.P. & anr.(2018) 3 SCC 222

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This revision is directed against the judgment and order dated 21.11.2019 passed by First Additional Sessions Judge, Baghpat dismissing Criminal Appeal No.51 of 2019 (Vikki Alias Vikas versus State of UP) filed under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the Act') and affirming the order dated 4.9.2019 passed by Juvenile Justice Board, Baghpat refusing the bail plea to the revisionist in Case Crime No.383 of 2017 under Section 376-D, 120-B, 452, 506, 504, 323, 34 IPC and Section 66A of I.T. Act and Section 62/63 of Copyright Act, P.S. Khekra, District Baghpat.

2. Heard Sri J.B. Singh, holding brief of Sri Anil Kumar Jaiswal, learned counsel for the revisionist as well as learned A.G.A. for the State and perused the record.

3. The prosecution case, as per the version of the FIR which was lodged by the mother of the victim, is that her daughter namely Km. Bharti was enticed away by co-accused Soni wife of Sunil, Sonam and Savita and thereafter revisionist Vikki alias Vikas committed rape with her and co-accused Sonu made the video clip of the same.

4. Learned counsel for the revisionist submits that the revisionist is innocent and he has been falsely implicated in the present case. He further submits that the alleged incident is said to have taken place on 3.10.2017 whereas the FIR was lodged on 11.10.2017 after a gap of 8 days but the victim has stated in her statement under Section 164 CrPC that the alleged incident took place on 16.11.2016. In fact, no such incident ever took place. The revisionist has been falsely implicated in the present case. As per medical report, the victim is major and she is aged about 21 years.

5. Learned counsel for the revisionist further submits that the revisionist is juvenile and there is no apprehension of reasoned ground for believing that the release of the revisionist is likely to bring him in association with any known criminals or expose him to mental, physical or psychological danger or his release would defeat the ends of justice. He further submits that except this the revisionist has no previous criminal history. The brother of the revisionist is giving his undertaking that after release of the revisionist on bail, he will keep him under his custody and look after him properly. Further, the revisionist undertakes that he will not tamper the evidence and he will always cooperate the trial proceedings. There was no report regarding any previous antecedents of family or background of the revisionist. There is no chance of revisionist's re-indulgence to bring him into association with known criminals.

6. Learned counsel for the revisionist further submits that it is not in dispute that the revisionist is a juvenile as he has already been declared juvenile by Juvenile Justice Board, Baghpat. The revisionist was a juvenile aged 14 years and 10 months on the date of occurrence. He is in jail since 12.10.2017 in connection with the present

crime and has already undergone and completed the period of the sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 18(1)(g) of the Act.

7. Learned counsel for the revisionist further submits that thereafter the revisionist applied for bail before the Juvenile Justice Board, Baghpat upon which a report from the District Probation Officer was called for. The bail application was rejected vide order dated 4.9.2019, being aggrieved, the revisionist preferred an appeal under Section 101 of the Act, which was also dismissed vide order dated 21.11.2019. Hence the present criminal revision has been filed before this Hon'ble Court mainly on the following amongst other grounds:

(i) That the bail application of the revisionist was rejected by the court below in a very cursory and arbitrary manner.

(ii) That the revisionist, who is juvenile, is wholly innocent and has been falsely implicated by the first informant in the present case.

(iii) That the courts below have not appreciated the report of the District Probation Officer in its right perspective.

(iv) That the impugned judgment and orders passed by the learned courts below are apparently illegal, contrary to law and based on erroneous assumption of facts and law.

(v) That there was absolutely no material on record to hold that the release of the Juvenile would likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice, yet the courts below have illegally, arbitrary and on surmises refused the bail of juvenile.

(vi) That the courts have erred in law in not considering the true import of Section 12 of the Act, 2015 and thus, the impugned orders passed by the courts below suffer from manifest error of law apparent on the face of record.

(vii) That the courts below have acted quite illegally and with material irregularity in not properly considering the case of juvenile in proper and correct perspective which makes the impugned orders passed by the courts below non est and bad in law.

(viii) That bare perusal of the impugned orders demonstrate that the same have been passed on flimsy grounds which have occasioned gross miscarriage of justice.

8. Several other submissions in order to demonstrate the falsity of the allegations made against the revisionist have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the revisionist that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

9. Learned counsel for the revisionist has pointed out that the revisionist has already undergone and completed the period of institutional incarceration. The maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by the

provisions of Section 18(1)(g) of the Act. In support of his contention, learned counsel for the revisionist has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

10. Learned counsel for the revisionist has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463,** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

11. In spite of service of notice upon opposite party no.2, no one has appeared on behalf of opposite party no.2 nor any counter affidavit has been till date. It appears that opposite party no.2 is not interested to file counter affidavit.

12. Learned AGA has opposed the revisionist's case with the submission that the release of the revisionist on bail would bring him into association of some known criminals, besides, exposing him to moral, physical and psychological danger. It is submitted that his release would defeat the ends of justice, considering that he is involved in a heinous offence.

13. This Court has carefully considered the rival submissions of the parties and perused the impugned orders. The juvenile is clearly below 15 years of age and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

14. A perusal of the said provision show that bail for a juvenile, particularly, one who is under the age of 15 years, is a matter of course and it is only in the event that his case falls under one or the other disentitling categories mentioned in the proviso to sub-Section (1) of Section 12 of the Act that bail may be refused. The merits of the case against a juvenile acquire some relevance under the last clause of the proviso to sub-section (1) of Section 12 that speaks about the ends of justice being defeated. The other two disentitling categories are quite independent and have to be evaluated with reference to the circumstances of the juvenile. Those circumstances are to be gathered from the Social Investigation Report, the police report and in whatever other manner relevant facts enter the record.

15. What is of prime importance in this case is that the juvenile, who is a young boy, has no criminal history. There is nothing said against the juvenile, appearing from the Social Investigation Report that may show him to be a desperado or misfit in the society. The two courts below have held the juvenile disentitled to bail on account of his case falling under each of the three exceptions enumerated in the proviso to sub section (1) of Section 12, for which no reason has been indicated. That finding, in both the orders impugned, is based on an ipse dixit, in one case of the judge and in the other of the Board. Even if it be assumed that the offence was committed in the manner alleged, it would be rather strained logic to hold that release of the juvenile on bail would lead to the ends of justice being defeated. Both the courts below have passed the impugned judgment and orders in cursory manner without placing due reliance on the report submitted by the

District Probation Officer as well as facts and circumstances of the case.

16. This Court in the case of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB)** was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

17. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22** and the view taken by the Apex Court in the cases of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra).,** this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail.

18. In the result, this revision **succeeds** and is **allowed**. The impugned judgment and order dated 21.11.2019 passed by First Additional Sessions Judge, Baghpat in Criminal Appeal No.51 of 2019 (Vikki Alias Vikas versus State of UP) and the order dated 4.9.2019 passed by Juvenile Justice Board, Baghpat in Case Crime No.383 of 2017 under Section 376-D, 120-B, 452, 506, 504, 323, 34 IPC and Section 66A of I.T. Act and Section 62/63 of Copyright Act, P.S. Khekra, District Baghpat, are hereby **set aside** and **reversed**. The bail application of the revisionist stands **allowed**.

19. Let the revisionist, Vikki Alias Vikas through his natural guardian/brother Prem Chand be released on bail forthwith in Case Crime No.383 of 2017 under Section 376-D, 120-B, 452, 506, 504, 323, 34 IPC and Section 66A of I.T. Act and Section 62/63 of Copyright Act, P.S. Khekra, District Baghpat upon his natural guardian furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Baghpat subject to the following conditions:

(i) That the natural guardian of the revisionist will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the natural guardian will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his natural guardian will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of February, 2021 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board concerned on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded

from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

20. However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

20. However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

(2021)01ILR A183
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2020

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Revision No. 2130 of 2019

Abhimanu Pandey ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Vimlendu Tripathi, Sri Prabhakar Dubey

Counsel for the Opposite Parties:
A.G.A., Sri Gaurav Chauhan, Sri Sriram Dhar Dubey

A. Criminal Law - Code of Criminal Procedure,1973-Section 401/397 ,125-application-maintenance-wife has no source of income-she is living separately due to continuous harassment and demand of dowry-Learned trial court rightly awarded the maintenance allowance after appreciating each and every fact.(Para 1 to 17)

B. Apex Court held that the revisional jurisdiction should normally be exercised in exceptional cases when there is a glaring defect in the proceedings or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of justice. (Para 10,11)

C. The provisions of section 125, Cr.P.C. is to provide for a social justice falling within the swim of Articles 15(3) and 39 of the Constitution of India, which have been enacted to protect the weaker section of the society like women and children. It is in the form of secular safeguard irrespective of personal law of the parties. The object to compel a man to perform moral obligations towards the society in respect of maintaining his wife,children and old parents so that they may not face destitution and become the liability of the society or may be forced to adopt a life of vagrancy, immorality and crime for their subsistence or go astray.(Para 9)

The revision is dismissed. (E-5)

List of Cases Cited:

1. Amur Chand Agrawal Vs Shanti Bose & anr. (1973) AIR SC 799

2. St. of Ori. Vs Nakula Sahu,(1979) AIR SC 663

3. Akalu Aheer Vs Ramdeo Ram (1973) AIR SC 2145

4. St. of Karnataka Vs Appu Balu Ingele,(1993) SC CCR 458

5. Pathumma & anr. Vs Muhammad,(1986) AIR SC 1436

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

1. This criminal revision has been filed by the revisionist against the order dated 14.5.2019 passed by learned Principal Judge, Family Court, Gorakhpur in Criminal Case No. 313 of 2017 (Smt. Priyanka Pandey Vs. Abhimanu Pandey) under section 125 Cr.P.C., whereby application of maintenance of respondent no. 2 has been allowed and the present revisionist has been directed to pay Rs. 19,000/- per month from the date of order to respondent no. 2 as her maintenance on 11th day of each month.

2. The facts and circumstances giving rise to this revision are that the revisionist and respondent no. 2, Smt. Priyanka Pandey, got married on 9.7.2008 according to Hindu Rites and Rituals and at the time of said marriage, father of respondent no. 2 has given Rs. 3,00,000/- in cash to the family of revisionist as dowry. After some time on 28.4.2012, a baby boy namely, Abhiraj, born out of the said wedlock. For certain reasons, relationship between husband and wife becomes strained and due to harassment and additional demand of dowry, revisionist as well as family member of revisionist left respondent no. 2 at her paternal house. So respondent no. 2 has filed an application under section 125 Cr.P.C. for her maintenance alleging that revisionist has refused to maintain her. Learned Family Court after taking evidence of both the sides, on 14.5.2019 passed an order in favour of respondent no. 2, awarding Rs. 19,000/- as maintenance to the respondent no. 2. Being aggrieved with the said order, this revision has been filed by the revisionist against respondent no. 2.

3. Learned counsel for the revisionist stated that marriage of revisionist and respondent no. 2 namely, Smt. Priyanka Pandey, was solemnized on 9.7.2018 according to Hindu rites and rituals in very simple manner and there were no demand of dowry by revisionist or his family members. After marriage, *bidai* of respondent no. 2 was held in 2010 and after a short period of living with respondent no. 2, the revisionist came to know that she is very outrageous, open minded and was not willing to co-ordinate with family members of revisionist. Revisionist tried his best to understand respondent no. 2 but she always refuses. On 28.4.2012 a baby boy namely, Abhiraj, born out of the said wedlock, who was suffered from *Cerebral Palsy (hereinafter referred as C.P. child).* Father of revisionist died in the year of 2013 and mother died in the year 2014. The revisionist, being eldest in the family was left by his parents with liability of his two sisters and one brother. Revisionist arranged marriage of his sister in which he spent about Rs. 24,00,000/- (Twenty Four Lacs) as well as he has taken a loan of Rs. 10,00,000/- (Ten Lacs) from a co-operative society for marriage of her sister, which is still being paid monthly from salary of revisionist by means of installments of Rs. 22,880/- per month. Revisionist is a Development Officer in LIC and his salary is approximately Rs. 58,000/- in hand per month. Revisionist is only earning member of his family and there are liability of his second sister namely, Km. Nisha Pandey, and his C.P. child son namely, Abhiraj, whose treatment is going on in Apolo Hospital, Delhi. Due to illness of his son, revisionist is facing huge medical expenditure. It is also submitted that on

2.9.2015, respondent no. 2 left her in-laws house and went back to her parental house with clothes and jewellery leaving behind her mentally challenged son. Revisionist tried his best to pacify his matrimonial dispute and also filed a case for restitution of husband and wife under section 5 of The Hindu Marriage Act in which respondent no. 2 willfully commit default and never appeared before the court. Respondent no. 2 also lodged a criminal case under section 498-A I.P.C. and 3 /4 of D.P. Act at Mahila Police Station, Gorakhpur in which the Investigating Officer filed final report in favour of the revisionist. Respondent no. 2 also filed a case against the revisionist under Domestic Violence Act before the District and Sessions Judge, Gorakhpur, which is still pending.

4. That respondent no. 2 filed an application under section 125 Cr.P.C. in which after receiving notice of maintenance, revisionist filed a written statement and also filed several evidence regarding the fact that respondent no. 2 has left the revisionist and his house without any reasonable excuse. Learned Family Court without considering any fact brought by the revisionist and without considering the material evidence regarding expenses of treatment of his physically challenged son as well as without considering the amount of loan passed impugned order of maintenance of Rs. 19,000/- per month in favour of respondent no. 2.

5. That learned Family Court did not consider this fact that revisionist has also absolute right over his income and by means of impugned order rights of dependents of the revisionist has been curtailed. Without discussing any material fact in this regard as well as without considering the emphasis of section 125 (4) Cr.P.C., learned Family Court has passed the impugned order. Learned Family Court passed the order only on the basis of surmises and conjectures and wrongly and illegally awarded maintenance of Rs. 19,000/- per month in favour of respondent no. 2 from the date of order without considering the financial burden of revisionist. On this allegation learned counsel prayed to allow this revision as well as to set aside the impugned order passed by the Family Court.

6. Learned counsel for the revisionist has raised issues that, (i) findings of facts recorded by the Family Court are contrary to the evidence on record and being perverse, the same are liable to be set aside and the maintenance fixed is excessive.

7. Learned counsel for the respondent no. 2 and learned A.G.A. opposed the prayer of the revisionist by submitting that after getting birth of a C.P. child, behaviour of family of revisionist become violent against respondent no. 2. Despite that she always tried to maintain her relation as well as to understand her husband but they did not understand and used to threat to divorce her. It is further submitted that respondent no. 2 is a very sober and calm lady but revisionist is very modern type so he always used to taunt her the he do not want to keep her in his house as his wife, and he will do second marriage. That revisionist is a Development Officer in LIC of India and as per his salary slip his salary is Rs. 63,000/- (Rs. Sixty Three Thousand) per month and including commission, his salary is above Rs. 1,00,000/- (one lakh) per month. Father of the revisionist was a government employee and brother of the revisionist is also a government bank employee, then statement of the respondent of taking loan is only for misguiding the

court. On the other hand, father of the respondent no. 2 is a 65 years old senior citizen and her mother is a house wife, her brother works in a private company for livelihood. Revisionist has forcefully kept son of respondent no. 2. Revisionist is a government employee, whose income is above one lakh rupees per month while respondent no. 2 is a helpless house wife and she has no source of income to fulfill her necessary requirements. It is lastly submitted that respondent no. 2 always wants to live with her husband but revisionist don't. Thus, order dated 14.5.2019 passed by learned family court does not warrant any interference, and revision is liable to be dismissed.

8. I have considered the rival submissions made by the learned counsel for the parties and the written submissions filed on behalf of the revisionist.

9. The provisions of Section 125, Cr.P.C. is to provide for a social justice falling within the swim of Articles 15 (3) and 39 of the Constitution of India, which have been enacted to protect the weaker section of the society like women and children. It is in the form of secular safeguard irrespective of personal law of the parties. The object is to compel a man to perform moral obligations towards the society in respect of maintaining his wife, children and old parents so that they may not face destitution and become the liability of the society or may be forced to adopt a life of vagrancy, immorality and crime for their subsistence or go astray. The proceedings are summary in nature and provide for a speedy remedy against starvation of a deserted wife, children or indigent parents. To enforce the substantial issues of civil law, the only remedy available is in Civil Court, therefore, findings recorded in proceedings under Section 125, Cr.P.C. are not final and parties are always at liberty to agitate their rights in Civil Court. Order under Section 125, Cr.P.C. does not finally determine the status, rights and obligations of the parties and it only provides for maintenance of indigent wives, children and parents.

10. The case requires to be considered not only bearing in mind the aforesaid proposition of law but also considering that the powers of Revisional Court against such an order are very limited for the reason that in revisional jurisdiction the Court satisfies itself as to the correctness, legality and propriety of any finding, sentence or order and as to the regularity of the proceedings of the inferior Criminal Court.

11. In ***Amur Chand Agrawal v. Shanti Bose and Anr., AIR 1973 SC 799,*** the Hon'ble Supreme Court has held that the revisional jurisdiction should normally be exercised in exceptional cases when there is a glaring defect in the proceedings or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of justice.

12. In ***State of Orissa v. Nakula Sahu, AIR 1979 SC 663,*** Hon'ble Supreme Court, placing reliance upon a large number of its judgments including ***Akalu Aheer v. Ramdeo Ram, AIR 1973 SC 2145,*** held that the power, being discretionary, has to be exercised judiciously and not arbitrarily or lightly. The Court held that "judicial discretion, as has often been said, means a discretion which is informed by tradition methodolised by analogy and discipline by system".

13. In ***State of Karnataka v. Appu Balu Ingele, AIR 1993 SC 1126=II (1992) CCR 458 (SC),*** Hon'ble Supreme Court held that in exercise of the revisional powers, it is not permissible for the Court to reappreciate the evidence. In ***Pathumma and Anr. v. Muhammad, AIR 1986 SC 1436,*** the Apex Court observed that High Court "committed an error in making a re-assessment of the evidence" as in its revisional jurisdiction it was "not justified in substituting its own view for that of the learned Magistrate on a question of fact".

14. If the instant case is examined in view of the aforesaid settled legal propositions, it is not permissible for the Court to reappreciate the evidence. More so, there is nothing on record to show that the findings of facts recorded by the Family Court are perverse, based on no evidence or have been arrived contrary to the evidence on record.

15. Maintenance under Section 125 includes expenses for food, clothing, residence, medical and other expenses relating to normal persuit of fife and it has certainly no bearing from starvation maintenance so that the person maintained is forced to lead an indignified life. However, Court must consider that awarding such amount should not render the person liable to maintain a pauper.

16. It is admitted fact that there is no source of income of her wife / respondent no. 2, so she is unable to maintain herself. She is living separately due to continuous harassment and demand of dowry. Learned trial court after appreciating each and every fact awarded the maintenance allowance of Rs. 19,000/- to the respondent no. 2. Judgment of the learned family court is well reasoned and well discussed. There is no illegality or irregularity in the assessment of the maintenance allowance so there is no interference warranted in the order dated 14.5.2019 passed by learned family court.

17. **Revision is devoid of merit and is accordingly dismissed.**

18. Interim order, if any, stands vacated.

19. A copy of this order be communicated to the lower court for necessary compliance.

(2021)01ILR A187
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

FAFO Defective No. 6 of 2020

Charanjeet Singh ...Appellant
Versus
Smt. Lakhviri & Ors. ...Respondents

Counsel for the Appellant:
Sri Namit Kumar Sharma, Sri Garun Pal Singh

Counsel for the Respondents:
Sri Amit Singh

Civil Law - Limitation Act (36 of 1963) – Section 5 - Condonation of delay - sufficient cause - delay must be sufficiently explained - parties should not resort to dilatory tactics and should not sleep over their rights (Para 3)

Appeal filed against award of a Claims Tribunal - delay of 3937 days in filing appeal - Explanation given for delay - that the judgment passed by Tribunal was never communicated to the owner- appellant &

only when he received recovery warrant issued against him he came to know about award - *Held* - owner-appellant contested the claim petition, filed written statement - in objection filed by owner in the recovery proceedings nowhere it was alleged that the owner-appellant was never informed about the award passed by the Tribunal by his counsel - Section 168 (2) provides that the Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award - hence bald statement in appeal that the owner-appellant was not aware of the award for about more than 10 years is not acceptable Court declined to condone the delay of more than 11 years in filing the appeal

Dismissed. (E-4)

List of Cases cited :-

1. Baljeet Singh (Dead) Thru L.R. & ors. Vs St. of U.P. & ors. (2019) 15 SCC 33

2. Mohd. Sahid & ors. Vs Raziya Khanam (Dead) Thru L.R. & ors. (2019) 11 SCC 384

3. Bhivchandra Shankar More Vs Balu Gangaram More & ors. (2019) 6 SCC 387

4. Ashok Kumar @ Ashok Kumar Vohra Vs Zonal Manager Zonal Office National Insurance Co. & 4 ors. FAFOD No. 1490 of 2017

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

Re: Civil Misc. Delay condonation Application No. 1 of 2020:-

1. Additional cause list has been revised. No one is present for the respondents.

2. Learned counsel for the appellant is present.

3. Perused the office report dated 9.10.2020, according to which, in respect of respondent nos. 1 to 5, 7 & 9 neither undelivered cover nor acknowledgement have returned after service and also no one has put in appearance and so far as respondent no.6 is concerned undelivered cover has returned with the remarks that she is dead. The respondent no.6 is also one of the claimants. Admittedly, the other claimants have received the notices. Notice in respect of other claimants is deemed to be sufficient in the light of the aforesaid office report and I proceed to hear the application.

4. The stamp reporter had reported delay of 3937 days in filing the present appeal.

5. Heard learned counsel for the applicant and perused the record.

6. Before proceeding further it would be appropriate to take note of paragraph of Section 5 of the Limitation Act, 1963, which is quoted as under:-

"5. Extension of prescribed period in certain cases:- *Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*

Explanation.-- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the

prescribed period may be sufficient cause within the meaning of this section."

(Emphasis supplied)

7. For the purpose of disposal of the delay condonation application it would also be beneficial to take note of few judgments of Hon'ble Supreme Court on this issue.

8. In **Baljeet Singh (Dead) Through Legal Representatives And Others vs. State of U.P. And Others** (2019) 15 SCC 33 in para 7 it was observed as under:-

"7. The matter requires examination from another aspect viz. laches and delay. It is a very recognised principle of jurisprudence that a right not exercised for a long time is non-existent. Even when there is no limitation period prescribed by any statute relating to certain proceedings, in such cases, courts have coined the doctrine of laches and delay as well as doctrine of acquiescence and non-suited the litigants who approached the court belatedly without any justifiable explanation for bringing the action after unreasonable delay. In those cases, where the period of limitation is prescribed within which the action is to be brought before the court, if the action is not brought within that prescribed period, the aggrieved party loses remedy and cannot enforce his legal right after the period of limitation is over, however, subject to the prayer for condonation of delay and if there is a justifiable explanation for bringing the action after the prescribed period of limitation is over and sufficient cause is shown, the court may condone the delay. Therefore, in a case where the period of limitation is prescribed and the action is not brought within the period of limitation and subsequently proceedings are initiated after the period of limitation along with the prayer for condonation of delay, in that case, the applicant has to make out a sufficient cause and justify the cause for delay with a proper explanation. It is not that in each and every case despite the sufficient cause is not shwon and the delay is not properly explained, the court may condone the delay. To make out a case for condonation of delay, the applicant has to make out a sufficient cause/ reason which prevented him in initiating the proceedings within the period of limitation. Otherwise, he will be accused of gross negligence. If the aggrieved party does not initiate the proceedings within the period of limitation without any sufficient cause, he can be denied the relief on the ground of unexplained laches and delay and on the presumption that such person has waived his right or acquiesced with the order. These principles are based on the principles relatable to sound public policy that if a person does not exercise his right for a long time then such right is non-existing." (emphasis supplied)

9. In **Mohd. Sahid And Others vs. Raziya Khanam (Dead) Through Legal Representatives And Others** (2019) 11 SCC 384, the rejection of delay condonation application for condoning the delay of 349 days in availing provisions of Order 9 Rule 13 CPC was upheld as reason given was not sufficient and satisfactory.

10. In **Bhivchandra Shankar More vs. Balu Gangaram More And Others** (2019) 6 SCC 387 in paras 15 and 16 it was observed as under:-

"15. It is a fairly well settled law that "sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of

bonafide could be imputable to the appellant. After referring to various judgments, in B. Madhuri, this Court held as under:-

"6. The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay."

16. Observing that the rules of limitation are not meant to destroy the rights of the parties, in N. Balakrishnan v. M. Krishnamurthy, this Court held as under:-

"11. Rules of limitation are not meant to destroy the rights 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. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The 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 put to litigation). Rules of limitation are not meant to destroy the rights 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.""

(emphasis supplied)

11. A reference may also be made to the judgment/order of this Court dated 10.10.2017 passed in First Appeal From Order Defective No. 1490 of 2017 **(Ashok Kumar Alias Ashok Kumar Vohra vs. Zonal Manager Zonal Office National Insurance Co. & 4 Others)** whereby delay condonation application was rejected. The extract of pragraph 2 of the said judgment is quoted as under:-

"2. This appeal under Section 173 of Motor Vehicles Act, 1988 has been filed with a delay of two years and 334 days. In the affidavit accompanying delay condonation application filed under Section 5 of Limitation Act, 1963 (hereinafter referred to as "Act, 1963") only explanation given is that concerned counsel has not given information but nothing has been placed on record to substantiate this defence."

(emphasis supplied)

12. In the above appeal also ground taken was that the learned counsel has not given the information. The Hon'ble Division Bench noted the related law in paragraphs 4, 5, 6, 7, 9, 10, 11, 12 and 13 of Ashok Kumar (**supra**) which are quoted as under:-

"4. The expression "sufficient cause" in Section 5 of Act, 1963 has been held to receive a liberal construction so as to advance substantial justice and

generally a delay in preferring appeal may be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay. In Collector, Land Acquisition Vs. Katiji, 1987(2) SCC 107, the Court said, that, when substantial justice and technical considerations are taken 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. The Court further said 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.

5. In P.K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276 the Court said:

"Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds."

6. The Rules of limitation are not meant to destroy rights of parties. They virtually take away the remedy. They are meant with the objective that parties should not resort to dilatory tactics and sleep over their rights. They must seek remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The statute relating to limitation determines a life span for such legal remedy for redress of the legal injury, one has suffered. Time is precious and the wasted time would never revisit. During efflux of time, newer causes would come 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. The statute providing limitation is 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 put to litigation). It is for this reason that when an action becomes barred by time, the Court should be slow to ignore delay for the reason that once limitation expires, other party matures his rights on the subject with attainment of finality. Though it cannot be doubted that refusal to condone delay would result in foreclosing the suiter from putting forth his cause but simultaneously the party on the other hand is also entitled to sit and feel carefree after a particular length of time, getting relieved from persistent and continued litigation.

7. There is no presumption that delay in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.

9. In Shakuntala Devi Jain Vs. Kuntal Kumari, AIR 1969 SC 575 a three

Judge Bench of the Court said, that, unless want of bona fide 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.

10. The Privy Council in Brij Indar Singh Vs. Kanshi Ram ILR (1918) 45 Cal 94 observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. This principle still holds good inasmuch as the aforesaid decision of Privy Council as repeatedly been referred to, and, recently in State of Nagaland Vs. Lipok AO and others, AIR 2005 SC 2191.

11. In Vedabai @ Vaijayanatabai Baburao Vs. Shantaram Baburao Patil and others, JT 2001(5) SC 608 the Court said that under Section 5 of Act, 1963 it should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

12. In Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project and Anr. (2008) 17 SCC 448, in para 17 of the judgment, the Court said :

"...The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights."

13. In Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157, in para 18 of the judgment, the Court said as under:

"What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest." " (Emphasis supplied)

13. Since, the law is well settled that delay must be sufficiently explained and

shall not be a dilatory tactic, I am not inclined to refer to other judgments and I proceed to consider the delay condonation application in the present appeal filed for condoning delay of 3937 days in filing the appeal on merits.

14. Paragraphs 7, 8 and 9 of the affidavit filed in support of the delay condonation application are quoted as under:-

" 7. That on 22.12.2008, Learned Tribunal has illegally and arbitrarily allowed the claim petition and awarded compensation of Rs. 3,25,000/- in favour of the claimants/ Respondent No.3 to 10 and given right to recovery to the Insurance Company to the amount of compensation from the Appellant. The aforesaid judgment passed by the Learned Tribunal was never communicated by counsel of the appellant to him therefore he is not aware about the judgment and the right to recovery given to the Insurance Company.

8. That in compliance of aforesaid award dated 22.12.2008, Respondent Insurance Company has deposited the awarded amount along with interest as Rs. 4,25,302/- before Learned Tribunal and thereafter, in the year 2015, after the lapse of more than 6 years of passing the judgment and award initiated recovery proceeding and filed R.M. 68/2015 (The Oriental Insurance Company Limited vs. Charanjeet Singh) against the Appellant for recovery of Rs. 4,25,302/- on which the notices were also issued to the Appellant by the Court below but the same has not been served upon the Appellant. A Photostat copy of the Application u/s 174 M.V. Act registered as R.M. 68/2015 (The Oriental Insurance Company Limited vs. Charanjeet Singh) is being filed herewith and marked as Annexure No.-3 to this affidavit.

9. That surprisingly, in the month of September 2019, Appellant received Recovery Warrant issued against him by the Court Below thereafter, he enquired the matter with his local counsel at Mathura only then he has came into knowledge about the passing of order dated 22.12.2008 and the recovery right given to the Insurance Company against him thereafter, without any further delay, he immediately on 19.09.2019 filed his Objection i.e. Paper No.9-Ga against the recovery proceeding in R.M. 68/2015 but the Learned Tribunal has illegally, arbitrarily and contrary to evidence and material available on record rejected the Objection i.e. Paper No. 9-Ga filed by the Appellant on 04.11.2019. For kind perusal of this Hon'ble Court, a xerox copy of the objection dated 19.09.2019 i.e. Paper No. 9-Ga filed by the Appellant and true and certified copy of entire order sheet of the R.M. 68/2015 (The Oriental Insurance Company Limited vs. Charanjeet Singh) are being filed herewith and marked as Annexure No.- 4 & 5 to this affidavit respectively."(emphasis supplied)

15. Placing reliance on paragraphs 7, 8 and 9 of the affidavit filed in support of the delay condonation application it was submitted that the award was passed on 22.12.2008 awarding compensation of Rs. 3,25,000/- in favour of the claimants and giving right of recovery to the Insurance Company to recover the amount of compensation from the appellant. The said judgment passed by the learned Tribunal was never communicated by counsel of the appellant to owner- appellant and, therefore, he was not aware about the judgment and right of recovery given to the Insurance Company. It is further submitted that recovery proceedings were initiated in the year 2015 and when the owner-appellant received information about the

recovery proceedings, he immediately filed his objection i.e. Paper No. 9-Ga against the recovery proceedings in R.M. 68 of 2015 on 19.9.2019. In such view of the matter, it is submitted that there is no deliberate delay on the part of the appellant.

16. On perusal, first of all I find that the annexure no.3 to the affidavit filed in support of the delay condonation application at page 81 clearly indicates that in paragraph 3 of the affidavit it has been mentioned that the entire award amount of Rs. 4,25,302/- was deposited vide Cheque No. 5083, Bank of Baroda, Mathura dated 13.04.2009. At the top, the case number is shown as R.M. ..... of 2009 and is duly signed by the Divisional Manager. However, it prima facie, appears from the order-sheet of the recovery proceedings in the present case that the same was filed on 14.8.2015 for the reasons best known to the officers/ officials of the Insurance Company. Insofar as recovery proceedings are concerned, fact remains that the owner-appellant had contested the claim petition and in the written statement filed by him it was not pleaded that the Driver was holding valid license. A finding on the issue that the driver was not holding the valid license was recorded on the basis of the report submitted by the Insurance Company being **paper no. 71-Ga/1-4** and thereafter, the judgment was passed giving right of recovery to the Insurance Company to recover the amount from the owner-appellant herein. A bald statement in this regard that the owner-appellant was never informed about the passing of the award by the counsel for a period of more than 10 years is not acceptable in the case. The appellant-herein is a transporter by profession/ business and the vehicle involved was a water tanker.

17. Even in the application paper no. 9-Ga filed in the recovery proceedings it has nowhere been alleged that the owner-appellant was never informed about the award passed by the Tribunal by his counsel and was not aware of the same till the receipt of the recovery certificate.

18. The contention that the owner-appellant was not aware of the award for about more than 10 years is not acceptable also in view of the provisions of Section 168 (2) of the Motor Vehicles Act, 1988 which clearly provides that "(2) The claim Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award."

19. In such view of the matter, I am not inclined to condone the delay of more than 11 years in filing the present appeal.

20. Therefore, the delay condonation application has no merit and the explanation given in this regard is not sufficient. The same is, accordingly, rejected and consequently, the appeal also stands dismissed.

21. The statutory amount deposited before this Court shall be remitted to the Tribunal concerned for adjustment that is to be recovered from the appellant herein.

Re: First Appeal From Order Defective:-

1. Since the delay condonation application has been rejected by me by order of date, consequently, present appeal also stands dismissed.

(2021)01ILR A195
APPELLATE JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 03.12.2020

BEFORE
THE HON'BLE ATTAU RAHMAN MASOODI, J.

First Appeal From Order No.- 60 of 2018

I.C.I.C. Bank Ltd. & Ors. ...Appellants
Versus
Krishna Kumar Gujrati ...Respondent

Counsel for the Appellants:
Sri Prashant Kumar

Counsel for the Respondent:
Sri K.K. Gujrati (In person)

Service Law - Termination of Service - Specific Relief Act (47 of 1963),- Sections 14, 41(e) - Contract of Service - Contract of service which essentially is personal contract, is not enforceable under provisions of S. 14 r.w. Ss. 41(e),(h) - where the employer is a statutory body but the relationship is purely governed by contract with no element of statutory governance, the contract of personal service will not be specifically enforceable - for the termination of such a contract, the remedy for damages alone would lie before the competent civil court - Code Of Civil Procedure, 1908 - Order VII Rule 11, Rejection of plaint where suit barred by any law - plaintiff assailed both the order of transfer from Lucknow to Hyderabad as well as the order of termination from service - *Held* - employee who freely accepts the employment inclusive of a clause contemplating transfer of services from one place to another, looses his right to question such a cause - suit was legally non-maintainable as the relief sought was to declare termination of service as illegal but the remedy for damages was not prayed in the plaint (Para 19, 20, 21)

Allowed. (E-4)

List of Cases cited :-

1.Executive Committee of Vaish Degree College Vs Laxmi Narain & ors. , (1976) 2 SCC 58

2.Nandganj Sihori Sugar Co. Ltd. Vs Badri Nath Dixit & ors. (1991) 3 SCC 54

3.Integrated Rural Development Agency Vs Ram Pyare Pandey (1995) Supp. 2 SCC 494

4. M/s Pearlite Liner Pvt. Ltd. Vs Manorama Sirsi (2004) 3 SCC 172

5.S.B.I. Vs S.N. Goyal (2008) 8 SCC 92

6.Nandganj Sihori Sugar Co. Ltd. Vs Badri Nath Dixit & ors., (1991) 3 SCC 54

7.Integrated Rural Development Agency Vs Ram Pyare Pandey (1995) Supp. 2 SCC 494

8. Federal Bank Ltd. Vs Sagar Thomas & ors., (2003) 10 SCC 733

9.Indian Airlines Corporation Vs Sukhdeo Rai (1971) 2 SCC 192

10. ICICI Bank Vs Lakshmi Narayan 2008 (3) LNN 320 Manu/TN/0056/2003

11.Krishna Kumar Gujrati Vs ICICI Bank Writ Petition No. 964 (SB) of 2011 dt 26.5.2011

12.T. Avrivandandam Vs T.V. Satyapal (1977) 4 SCC 467

13.Dhartipakar Madan Lal Agarwal Vs Rajiv Gandhi AIR 1987 SC 157

14. Saleem Bhai Vs St. of Mah. (2003) 1 SCC 557

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

1. The checkered history which this case carries over a period of last about ten years may be briefly stated as under.

2. The sole respondent-plaintiff who was an employee of ICICI Bank Limited, while holding the post of Chief Manager, Band-I, was transferred from Lucknow to Hyderabad vide order dated 10.5.2011. This order was issued from the regional office (north) of the Bank at Delhi and served upon the respondent-plaintiff at Lucknow.

3. The respondent-plaintiff feeling aggrieved against the order of transfer approached this Court by filing Writ Petition No. 964 of 2011 but on the strength of a preliminary objection that the ICICI Bank was not a State within the meanings of Article 12 of the Constitution of India, therefore, challenge to the transfer order within the scope of writ jurisdiction failed and while dismissing the writ petition on 26.5.2011, this Court left it open for the respondent-plaintiff to raise his grievance before the appropriate forum.

4. The respondent-plaintiff chose to institute a suit i.e. R.S. No. 166/2011 against the order of transfer passed by the appellant-defendant on 10.5.2011 before the Civil Judge, Senior Division, Mohanlalganj, Lucknow. The suit was subsequently transferred from the court of Civil Judge, Senior Division, Mohanlalganj, Lucknow to the court of Civil Judge, Senior Division, Lucknow where it was renumbered as Regular Suit No. 971 of 2011. Later on, the appellant/employer proceeded to terminate the services of the respondent by order dated 7.6.2011 giving him two months' salary in lieu of notice. This part of the cause was also incorporated in the plaint by filing an amendment application which was allowed. The record reveals that an application under Order VII Rule 11 CPC was filed by the appellant Bank whereby the very maintainability of the suit in the light of Section 14 read with Section 41(e) and (h) of the Specific Relief Act was questioned. The application was allowed and the suit was dismissed by judgement/decree dated 2.12.2016.

5. The judgement/decree rendered by the court of Civil Judge, Senior Division, Lucknow in Regular Suit No. 971 of 2011 on 2.12.2016 came to be challenged in the first appeal under Section 96 CPC before the District Judge, Lucknow where it was registered as Regular Civil Appeal No. 17 of 2017. The first appeal so filed by the respondent-plaintiff was allowed and the proceedings were remitted back to the trial court for adjudication of the suit on merit.

6. This judgement passed by the first appellate court remitting the matter back to the trial court on 17.8.2017 was assailed before this Court in FAFO No. 306 of 2017. The FAFO filed by the Bank was allowed on 19.9.2017 remanding the matter back to the first appellate court for deciding the Regular Civil Appeal in consonance with the mandate of Order XLI Rule 31 CPC. The first appellate court below keeping in view the judgement rendered by this Court on 19.9.2017 has finally decided the first appeal by means of the impugned judgement dated 22.11.2017, whereby, the

matter is remitted back to the trial court again for decision of the civil suit on merit.

7. The present FAFO under Section 104 read with Order XLIII Rule 1(u) CPC has questioned the remand order inter alia on the ground that the suit instituted by the respondent-plaintiff is barred by law.

8. In the context of challenge as above, It may be noted that the amended plaint prayed for the relief as under:

(i) That a decree be passed in favour of the plaintiff declaring the transfer order dated 10.5.2011 transferring the plaintiff from Lucknow to Hyderabad and the impugned order dated 7.6.2011 terminating the services of the plaintiff be declared as non est and illegal and the plaintiff be declared to be deemed in service w.e.f 1.6.2011;

(ii) That a decree of permanent injunction be passed in favour of plaintiff restraining the defendants from transferring the plaintiff from Lucknow and proceeding in furtherance of the impugned order dated 7.6.2011;

(ii-a) A decree of recovery of the unpaid salary for the months June 2011 to the completed month of September 2011 less the amount paid as two months basic salary towards notice period besides the pendente lite salary and future salary with all the promotional and annual increments and other benefits on being declared to be deemed in service by this Hon'ble Court."

9. Heard Sri N.K. Seth, learned Senior Counsel assisted by Sri Prashant Kumar, Advocate and the respondent-plaintiff who appeared in person at length.

10. Sri N.K. Seth would contend that the relief sought in the plaint essentially seeks to enforce a right emerging out of a personal contract which is clearly unenforceable under the provisions of Section 14 read with Section 41(e) and (h) of the Specific Relief Act, hence the suit was rightly dismissed. The submission in nutshell is that a contract of service which essentially is personal contract, is not enforceable under the provisions of Specific Relief Act and for the termination of such a contract, the remedy for damages alone would lie before the competent civil court. The position of law, according to learned counsel, is well settled by the apex court in the following cases:

Sl	**Particulars**	**Citation**
1.	Executive Committee of Vaish Degree College v. Laxmi Narain & others	(1976) 2 SCC 58
2.	Nandganj Sihori Sugar Co. Ltd. v. Badri Nath Dixit & others	(1991) 3 SCC 54
3.	Integrated Rural Development Agency v. Ram Pyare Pandey	(1995) Supp. 2 SCC 494
4.	M/s Pearlite Liner Pvt. Ltd. v. Manorama Sirsi	(2004) 3 SCC 172
5.	State Bank of India v. S.N. Goyal	(2008) 8 SCC 92

11. The second submission urged by learned counsel for the appellant is that the ICICI Bank being a private body has already been held not to be a State within the meaning of Article 12 of the

Constitution of India, therefore, the respondent-plaintiff is not entitled to the protection of three exceptions propounded by the apex court in the case of State Bank of India v. S.N. Goyal. To impress upon the Court that ICICI Bank is not a State within the scope of Article-12 of the Constitution of India, the following decisions were cited:

Sl	Particulars	Citation
1.	Nandganj Sihori Sugar Co. Ltd. v. Badri Nath Dixit & others	(1991) 3 SCC 54
2.	Integrated Rural Development Agency v. Ram Pyare Pandey	(1995) Supp. 2 SCC 494
3.	Federal Bank Ltd. v. Sagar Thomas & others	(2003) 10 SCC 733
4.	Indian Airlines Corporation v. Sukhdeo Rai	(1971) 2 SCC 192
5.	ICICI Bank v. Lakshmi Narayan	2008 (3) LNN 320 Manu/TN/0056/2003
6.	Krishna Kumar Gujrati v. ICICI Bank	Decided on 26.5.2011 [Writ Petition No. 964 (SB) of 2011] Allahabad High Court

12. The third submission which revolves the same point is that the application filed under Order VII Rule 11 CPC has wrongly been rejected by the appellate court below once the suit was legally non-maintainable for the relief sought therein.

13. In support of this submission, the following case laws have been cited:

Sl	Particulars	Citation
1.	T. Avrivandandam v. T.V. Satyapal	(1977) 4 SCC 467
2.	Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi	AIR 1987 SC 157
3.	Saleem Bhai v. State of Maharastra	(2003) 1 SCC 557

14. The respondent-plaintiff who appears in person has ably argued his case by referring to a large number of cases needless to mention but in substance the argument put forth may be noted as under.

15. The respondent-plaintiff has made a serious effort to impress upon the Court that he being a regular employee in the Bank ought to have been understood differently by the trial court as compared to those who are appointed for a fixed period, therefore, the appellate court below has rightly appreciated the fine distinction in the nature of employment calling for remedial protection. According to the respondent-plaintiff, an employee who is not protected within the three-fold

exceptions carved out by the apex court in Goyal's case (supra) is nevertheless entitled to maintain a suit for revival of the contract of employment once his appointment is regular but not for a fixed period.

16. The respondent-plaintiff argued vehemently that this material distinction alters the very essence of express contract termination whereof by a juristic person, in violation of the principles of natural justice, would entitle him for reinstatement in service. The action against a regular employee taken in violation of the principles of natural justice, it is strongly contended, deserves protection within the ambit of Article 21 of the Constitution of India, therefore, the relief sought in the suit is maintainable for decision of the suit on merit.

17. For the sake of clarity it may be relevant to extract the relevant passage of ***S.N. Goyal's*** judgement on the aspect of personal contract. Para-11 is thus extracted below:

"11. Where the relationship of master and servant is purely contractual, it is well settled that a contract of personal service is not specifically enforceable, having regard to the bar contained in section 14 of the Specific Relief Act, 1963. Even if the termination of the contract of employment (by dismissal or otherwise) is found to be illegal or in breach, the remedy of the employee is only to seek damages and not specific performance. Courts will neither declare such termination to be a nullity nor declare that the contract of employment subsists nor grant the consequential relief of reinstatement. The three well recognized exceptions to this rule are:

(i) where a civil servant is removed from service in contravention of the provisions of Article 311 of the Constitution of India (or any law made under Article 309);

(ii) where a workman having the protection of Industrial Disputes Act, 1947 is wrongly terminated from service; and

(iii) where an employee of a statutory body is terminated from service in breach or violation of any mandatory provision of a statute or statutory rules.

There is thus a clear distinction between public employment governed by statutory rules and private employment governed purely by contract. The test for deciding the nature of relief damages or reinstatement with consequential reliefs is whether the employment is governed purely by contract or by a statute or statutory rules. Even where the employer is a statutory body, where the relationship is purely governed by contract with no element of statutory governance, the contract of personal service will not be specifically enforceable. Conversely, where the employer is a non-statutory body, but the employment is governed by a statute or statutory rules, a declaration that the termination is null and void and that the employee should be reinstated can be granted by courts. (Vide : Dr. S. Dutt vs. University of Delhi AIR 1958 SC 1050; Executive Committee of UP State Warehousing Corporation Ltd. Vs. Chandra Kiran Tyagi 1970 (2) SCR 250; Sirsi Municipality vs. Cecelia Kom Francies Tellis 1973 (3) SCR 348; Executive Committee of Vaish Degree College vs. Lakshmi Narain 1976 (2) SCR 1006; Smt. J. Tiwari vs. Smt. Jawala Devi Vidya Mandir AIR 1981 SC 122; and Dipak Kumar Biswas vs. Director of Public Instruction AIR 1987 SC 1422)."

18. Interestingly, the resting of authority to transfer an employee from one place to another or his termination from service by the appellant-employer is not in dispute. It is only when the authority is exercised by way of disciplinary action, the rule of opportunity becomes significant. The essence of master and servant relationship is that of personal contract in both the situations and it is immaterial whether the employment is regular or for a fixed period.

19. As is evident from the relief clause extracted hereinabove, the respondent-plaintiff has assailed both the orders passed by the appellant-defendant viz the order of transfer from Lucknow to Hyderabad passed on **10.5.2011** as well as the order of termination from service issued on **7.6.2011.** This Court may note that as per the express service contract, the respondent-plaintiff was holding a transferable post, therefore, the transfer order passed by the employer was not a cause classified under any of the disciplinary measures defined in the rules applicable to the employees of the ICICI Bank.

20. The disciplinary action comprises of three types of measures viz cautionary action, deterrent action and **capital action.** The order of transfer from Lucknow to Hyderabad is not covered under any of the three measures mentioned above. Even if the action of transfer is arbitrary or mala fide, whether an employee of the Bank would have a remedy against the transfer of his services from one place to another, a question does arise. The answer as per the plain reading of the rules is in negative.

21. An employee who freely accepts the employment inclusive of a clause contemplating transfer of services from one place to another, looses his right to question such a cause. There was equally no impediment pleaded in the plaint subject to which the employer was bound to exercise the power of transfer. Therefore, respondent-plaintiff did not have a cause of action at all, insofar as the order of transfer passed on 10.5.2011 is concerned. In the circumstances of the case, the objection under Order VII Rule 11 CPC raised on the strength of the express bar envisaged under Section 14 read with Section 41 (e) and (h) of the Specific Relief Act coupled with the lack of cause of action, was rightly allowed. An employee whether regular or for a fixed period can not be subjected to servitude against his will and it is for this reason that the relief for reinstatement consequent upon the termination of master and servant relationship would not lie. The remedy for damages available, if any, was not prayed in the plaint.

22. It is also relevant to note that termination from service is a measure classified as **capital action.** Any order passed by the disciplinary authority by way of a disciplinary action is amenable to appeal within the period of limitation. The hierarchy of authorities before which the appeal lies is specified in the rules. The appellate authority is under a bounden duty to decide such appeals by a detailed and speaking order. Finality is attached to the reasoning recorded by the appellate authority.

23. In the present case, the termination of employment by order dated 7.6.2011 was not taken up in appeal on any grounds whatsoever, therefore, the infringement of procedure or the action amounting to punishment in the given set of circumstances was never raised. The

respondent-plaintiff at his own risk had chosen to challenge the order of transfer from Lucknow to Hyderabad by filing a civil suit for which neither there was a cause nor a remedy. A whistle-blower employee was as helpless as any other employee on transfer of his services and had no right to challenge such an order on the ground of mala fides or otherwise. The authority to transfer the employees from one place to another by a competent authority was absolute. It is for this reason that the appellant-defendant decided to dispense with the services of the respondent-plaintiff on payment of two months' salary in lieu of notice. The action taken, according to the Bank, is not punitive. Even if the order of termination from service was punitive, the respondent-plaintiff never questioned the same on any ground before the appellate authority. According to the appellant Bank, the matter understood as capital action, unless taken up in appeal by the respondent, the entitlement for damages on any ground whatsoever, perished by the self inflicted injury of the respondent-plaintiff.

24. Insofar as the termination of master and servant relationship is concerned, undoubtedly the power was vested in the appellant Bank and so long as the same was questioned through a notice or appeal, a cause for claiming damages would be doubtful. The amendment application even if allowed by the trial court prior to the disposal of application under Order VII Rule 11 was inconsequential and the objection as to the maintainability of suit raised by the appellant Bank was rightly dealt with by the learned trial court.

25. The appellate court below while dealing with the three-fold question has firstly misdirected itself to frame the points of determination and secondly the distinction drawn on the aspect of regular employee and contractual employee is superfluous. The nature of contract in either of the situations remains one and the same. The cause of action was bound to be considered in the light of the master and servant relationship and the conditions of service which the first appellate court has failed to appreciate. To opine that ICICI Bank was a State within the meaning of Article 12 of the Constitution of India is clearly in the teeth of judgements rendered by the apex court as well as by this Court. Maintainability of the application filed under Order VII Rule 11 CPC rightly concluded by the trial court has erroneously been set naught by the first appellate court below. Thus, the judgement rendered by the first appellate court impugned herein being erroneous deserves to be set aside and the judgement/decree passed by the trial court dismissing the suit calls for revival.

26. Even if it is assumed that the action of termination from service was punitive and resorted to without following the principles of natural justice, this by itself was a relevant consideration for the award of damages which the respondent has failed to claim but revival of service contract on that account and his reinstatement with all consequential benefits as prayed for in the plaint is misconceived. The trial court had rightly appreciated the position of law but for the reasons put on record, the first appellate court clearly fell in error to upset the trial court judgement. In my considered opinion, the impugned judgement passed by the first appellate court below deserves to be set aside and is accordingly set aside. The

judgement passed by the trial court is upheld.

27. The operative part of this judgement was pronounced in the open court for the reasons to follow, hence the benefit of limitation would be available to the parties up to the date when this judgement stands uploaded on the official website of the High Court.

28. The FAFO stands allowed. Parties to bear their own cost.

(2021)01ILR A202
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2020

BEFORE

THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

FAFO No.- 363 of 2018

National Insurance Company Ltd.
...Appellant/Claimant
Versus
Smt. Urmila Devi & Ors.
...Respondents/Opposite Parties

Counsel for the Appellant:
Sri Sudhanshu Behari Lal Gour

Counsel for the Respondents:
Sri Varinder Singh, Sri Vidya Kant Shukla

Civil Law - Motor Vehicles Act (59 of 1988)- Section 166 - Compensation - Determination - age of the deceased 59 years - Income of deceased Rs.8,000/- *Held* - 1/3rd has to be deducted for personal expenses which would be Rs.2,666/- (rounded figure) to which addition of 10% would be required instead of 20% for future prospects - amount of love and affection Rs.70,000/- with future addition at 10% per year - Interest at the rate of 7% modified to 7.5% (Para 7, 8)

Partly allowed. (E-4)

List of Cases cited :-

1. National Insurance Company Ltd. Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 1050

2. National Insurance Co. Ltd. Vs Mannat Johat & ors. 2019 (2) TAC 705 (SC)

(Delivered by Hon'ble Kaushal Jayendra Thaker, J.)

1. Heard Sri Sudhanshu Behari Lal Gour, learned counsel for the appellant and Sri Vidya Kant Shukla, learned counsel for the respondent-claimants.

2. Facts giving rise to this appeal is that on 9.4.2016 Basant Kumar Dixit riding on his motorcycle bearing registration no. U.P.78/DD/5182 was going to Kanpur from M/s Jai Ambe Brick Field, Sarlekhpur, Ghatampur for realisation of the amount and as soon as he reached near closed shop before Raipur bridge, the driver of Truck No. U.P. 22/T/5888 came rashly and negligently without blowing horn and dashed the motorcycle badly on account of which he fell down on the road and driver of the truck proceeded ahead crushing him as consequence of which the deceased succumbed to his injuries on the spot.

3. The claimants approached the Motor Accident Claims Tribunal/Additional District Judge, Court No.7, Kanpur Nagar (hereinafter referred to as 'Tribunal' by way of filing M.A.C.P. No.410 of 2016 claiming compensation of Rs. 20,00,000/- with 12% annual interest.

4. The Tribunal by way of impugned judgment and award dated 3.11.2017 awarded a sum of Rs.7,24,496/- as compensation with annual interest at the rate of 7% from the date of filing claim petition till date of payment. Being dissatisfied, the appellant-Insurance Company filed present appeal challenging the said award.

5. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The Insurance Company has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

6. I have perused the Judgment and award impugned herein.

7. This appeal requires to be allowed as learned counsel Sri Vidya Kant Shukla, learned counsel appearing for the claimants could not dispute the fact that the addition for future prospects should not be 20% but it should be 10% as submitted by counsel for the Insurance Company. The age of the deceased was 59 years is admitted position of fact. Income of the deceased has been considered to be Rs.8,000/- to which 1/3rd has to be deducted for personal expenses which would be Rs.2,666/- (rounded figure) to which addition of 10% would be required instead of 20% as per the Judgment of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** The rest of the award shall remain undisturbed as I am unable to accept the submission of Sri Gour that as far as Pranay Sethi (**supra**), the amount of love and affection would have been Rs.70,000/-. The Judgment of Pranay Sethi (supra) has considered future addition at 10% per yer. The accident occurred in the year 2016, hence, the amount is not disturbed.

8. The interest at the rate of 7% is modified to 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johat and others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under:

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

9. The appeal is partly allowed. Amount has to be recalculated. Refund of excess amount has to be made to the Insurance company by account payee cheque, however, the amount at the rate of interest is more, the Insurance Company shall deposit the same.

10. With the aforesaid observations, present appeal is partly allowed.

11. Record and proceedings be sent to the Tribunal.

(2021)01ILR A204
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2020

BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.

FAFO Defective No.- 459 of 2020

National Insurance Company Ltd.
...Appellant
Versus
Smt. Seema Devi & Ors. ...Respondents

Counsel for the Appellant:
Komal Mehrotra

Counsel for the Respondents:

A. Interpretation of Statute - Golden Rule of Interpretation - Purposive Interpretation - Plain words have to be accepted as such but where the intention of the legislature is not clear - it is the Court's duty to discern the intention in the context of the background in which a particular Section is enacted - Courts have to give the statute a purposeful or a functional interpretation - provisions of Act have to be read so as to achieve and promote the aims and object of the Act - construction which would defeat the rights of the havenots and the underdog and which would lead to injustice should be avoided (Para 13)

B. Interpretation of Statute - when a provision is directory - provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory - if the procedural violation does not seriously cause prejudice to the adversary party - courts must lean towards doing substantial justice rather than relying upon procedural and technical violation - litigation is a journey towards truth & court is required to thrash out the underlying truth in every dispute (Para 18, 19)

C. Civil Law - Employee's Compensation Act, 1923 - Interpretation - this Act is a piece of social security and welfare legislation - dominant purpose is to protect the workman - Act has been enacted with a object to provide payment by certain classes of employers to their employees of compensation for injury by the accident - provisions of the Act should not be interpreted too narrowly so as to debar the workman from compensation - In case of doubt the interpretation in favour of the worker should be preferred (Para 11, 12, 14)

D. Civil Law - Employees Compensation Act (8 of 1923)- Section 10 - Claim petition - Maintainability - Statutory notice of the accident in writing without delay to the employer - Directory - Held - Act being a beneficial piece of legislation enacted for the benefit of the have-nots and Commissioner having been given power to entertain the claim petition & decide the same even in absence of notice u/s 10 of the Act - the statutory requirement of giving notice of accident u/s 10 of the Act is merely 'directory' and not 'mandatory' - claim petition would be maintainable even if no notice of accident is given to the Insurance company u/s 10 & even without any prayer for waiver of the statutory notice (Para 21, 29)

E. Civil Law - Employees Compensation Act (8 of 1923)-

Section 21(1)(b) - Claim petition - Venue of proceeding - Territorial jurisdiction - claim petition may be filed by the claimant where the claimant ordinarily resides - expression `*ordinarly resides'* - means where the person claiming compensation normally resides at the time of filing the claim petition - Not necessary that it should be filed where accident takes place - Claim petition cannot be rejected on ground of territorial jurisdiction alone, where claims are preferred under beneficial piece of legislation - as the Insurance Company has branch office everywhere and therefore, no prejudice is caused to the company (Para 26, 27)

Vehicle insured at district Siwan - accident took place in district Siwan (Bihar) - claimants landless labourers shifted to District Gorakhpur & residing there - Insurance Company has its regional office at Gorakhpur - *Held* - once the insurance Company has branch offices at different places, therefore, no substantial injury or injustice would cause to the insurance-Company (Para 28)

Dismissed. (E-4)

List of Cases cited :-

1. Sir Chunilal Mehta Sons Ltd. Vs Century Spinning and Manufacturing Company Ltd. AIR 1962 SC 1314

2. Bharat Singh Vs Management of New Delhi Tuberculosis Centre, New Delhi & ors. 1986 (2) SCC 614

3. National Insurance Comp. Ltd. Vs Rais & anr. 2016 (2) AICC 1502 (DB)

4. P. T. Rajan Vs T.P.M. Sahir (2003) 8 SCC 498

5. Sugandhi (dead) by Lrs. & anr. Vs P. Rajkumar Rep. By his Power Agent Imam Oli 2020 SCC Online SC 870

6. Mantoo Sarkar Vs Oriental Insurance Co. Ltd. & ors. (2009) 2 SCC 244

7. Malati Sardar Vs National Insurance Company Ltd. & ors. (2016) 3 SCC 43

8. Morgina Begum Vs Md. Hanuman Plantation Ltd (2007) 11 SCC 616

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

1. Heard learned counsel for the appellant.

2. Present appeal has been filed challenging the award dated 16.7.2020 passed by Commissioner / Deputy Labour Commissioner, Gorakhpur in E.C. Case No. 79 of 2015.

3. Challenging the impugned award submission is that in view of the provision of Section 21 (1) (b) of the Employee's Compensation Act, 1923 (hereinafter referred to as the Act) learned Commissioner at Gorakhpur did not have the jurisdiction to decide claim petition inasmuch as the claimants are resident of district Siwan and the accident had also taken place in district Siwan. The vehicle was also insured by the branch office of the appellant-Company at district Siwan in the State of Bihar. It was further submitted that even in her statement the claimant no. 1 had stated that she has come from district Siwan and therefore, the claimants are not resident of Gorakhpur. Submission,

therefore, is that the amendment is totally without jurisdiction.

4. It was further submitted that no notice under Section 10 of the Act was given to the Insurance Company and as such the claim petition was not maintainable. He has drawn attention to the substantial questions of law framed in the present appeal, which are quoted as under:-

"A. Whether the finding recorded by the Commissioner Employee compensation while deciding preliminary issue is illegal, erroneous and misappraisal of the records?

B. Whether the present claim petition was not maintainable as the learned Commissioner lacked jurisdiction in view of Section 21 of the Act?

C. Whether analogy derived by the Commissioner Employees Compensation Act while deciding preliminary issue is perverse and based on no reasoning?

D. Whether in the absence of notice under section 10 of the Employees Compensation Act the claim petition is maintainable without any prayer for waiver of the statutory notice?"

5. Submission, therefore, is that the claim petition itself was not maintainable in absence of notice under Section 10 of the Act without there being any prayer for waiver of the same and that in any case in view of Section 21 (1)(b) of the Act the Tribunal at Gorakhpur was *coram non judice.* Submission is that the impugned award is, therefore, without jurisdiction.

6. I have considered the submissions and have perused the record.

7. Before proceeding further it would be relevant to note Section 10 and Section 21 (1) (b) of the Employee's Compensation Act, 1923, which are quoted as under:-

"**10. Notice and claim.-** (1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years] of the occurrence of the accident or, in case of death, within two years] from the date of death:]

Provided that, where the accident is the contracting of a disease in respect of which the provisions of sub- section (2) of section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease:

Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the workman to absent himself from work, the period of two years shall be counted from the day the workman gives notice of the disablement to his employer:

Provided further that if a workman who, having been employed in an employment for a continuous period, specified under sub- section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:]

Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim]--

(a) if the claim is preferred] in respect of the death of a workman resulting

from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or

(b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed] had knowledge of the accident from any other source at or about the time when it occurred:

Provided further, that the Commissioner may entertain] and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred], in due time as provided in this sub- section, if he is satisfied that the failure so to give the notice or prefer] the claim, as the case may be, was due to sufficient cause.

(2) Every such notice shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date on which the accident happened, and shall be served on the employer or upon any one of] several employers, or upon any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed.

(3) The State Government may require that any prescribed class of employers shall maintain at their premises at which workmen are employed a notice-book, in the prescribed form, which shall be readily accessible at all reasonable times to any injured workman employed on the premises and to any person acting bona fide on his behalf.

(4) A notice under this section may be served by delivering it at, or sending it by registered post addressed to, the residence or any office or place of business of the person on whom it is to be served, or, where a notice- book is maintained, by entry in the notice- book.]

(emphasis supplied)

21. Venue of proceedings and transfer - (1) Where any matter under this Act is to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder, be done by or before the Commissioner for the area in which-

(a) the accident took place which resulted in the injury; or

(b) the [employee] or in case of his death, the dependant claiming the compensation ordinarily resides; or

(c) .....

(1A) .....

(2) .....

(3) .....

(4) .....

(5) ....."

(emphasis supplied)

8. Now insofar as the submission that the claim petition was not maintainable in absence of notice under Section 10 of the Act, in Section 10(1)(b) a proviso has been added, whereby the Commissioner is empowered to entertain a claim petition and decide any claim to compensation in any case notwithstanding that the notice has not been give, or the claim has not been preferred, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient

cause. Therefore, in such view of the matter, this Court is of the opinion that in a case of beneficial legislation the requirement of the notice cannot be inferred in strict sense so as to hold a claim not maintainable in absence of notice under Section 10 of the Act. Clearly, the Commissioner is empowered to entertain and decide the claim to compensation.

9. Insofar as the applicability of provision of Section 21 (1)(b) of the Act is concerned, again the provision has to be interpreted in the manner so as to serve the purpose and object of this beneficial piece of legislation.

10. Therefore, although, I am of the opinion that the substantial questions of law as framed in the present memo of appeal do not arise for consideration, however, in view of the arguments raised by learned counsel for the appellant and in view of the observations made and as held by Hon'ble Supreme Court in the case of **Sir Chunilal vs. Mehta Sons Ltd. vs. Century Spinning and Manufacturing Company Ltd. AIR 1962 SC 1314**, I proceed to decide the question nos. B and D as framed in the memo of appeal in view of the fact that such questions are repeatedly raised before this Court by the Insurance Company in appeals filed before this Court. Relevant paragraph 6 of **Sir Chunilal (supra)** is quoted as under:-

"6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by. the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law." (emphasis supplied)

11. It is the golden rule of interpretation that the provisions of any Act have to be read so as to achieve the aims and object of the Act. The Employee's Compensation Act, 1923 has been enacted with a object that this is an Act to provide that payment by certain classes of employers to their employees of compensation for injury by the accident.

12. It is needless to point out that it is too well settled that this Act is a piece of social security and welfare legislation and its dominant purpose is to protect the workman and, therefore, the provisions of the Act should not be interpreted too narrowly so as to debar the workman from compensation which the legislature thought they ought to have.

13. A reference may be made to a judgment of Hon'ble Apex Court in the case of **Bharat Singh vs. Management of New Delhi Tuberculosis Centre, New Delhi and others 1986 (2) SCC 614**, paragraph 11 whereof are quoted as under:-

"11. In interpretation of statutes, Courts have steered clear of the rigid stand

of looking into the words of the Section alone but have attempted to make the object of the enactment effective and to render its benefits unto the person in whose favour it is made. The legislators are entrusted with the task of only making laws. Interpretation has to come from the Courts. Section 17-B on its terms does not say that it would bind awards passed before the date when it came into force. The respondents' contention is that a Section which imposes an obligation for the first time, cannot be made retrospective. Such sections should always be considered prospective. In our view, if this submission is accepted, we will be defeating the very purpose for which this Section has been enacted. It is here that the Court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the Court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the Courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the havenots should receive liberal construction. It is always the duty of the Court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the havenots and the underdog and which would lead to injustice should always be avoided. This Section was intended to benefit the workmen in certain cases. It would be doing injustice to the Section if we were to say that it would not apply to awards passed a day or two before it came into force."

(emphasis supplied)

14. In **Bharat Singh (supra)** Hon'ble Apex Court has taken the view that welfare legislation should be given a purposive interpretation safeguarding the rights of the have-nots rather than giving a literal construction. In case of doubt the interpretation in favour of the worker should be preferred.

15. A reference may also be made to judgment of Hon'ble Division Bench of this Court in the case of **National Insurance Company Ltd. vs. Rais and another 2016 (2) AICC 1502 (DB)**. Paragraphs 19 and 20 whereof are quoted as under:-

"19. In the written statement on behalf of the appellant a plea has been raised that application of the respondent no.1 is barred by Section 10 of the Workmen's Compensation Act, 1923 for want of statutory notice. A Workman, who is injured in accident, is duty bound to give a notice of it informing in writing without delay to the employer. The object of giving such notice appears to enable the employer to verify the accident and its nexus with the course of his employment, however, no claim for compensation will be rejected in case of accident resulted in the death of the workman in the premises of the employer or within his control or the employer had knowledge of the accident from any other source. Thus, there is no hard and fast rule about the compliance of Section 10 of the Workmen's Compensation Act, 1923,

which may render the claim not maintainable.

20. In the present case, the employer has not opposed the claim on the basis of want of notice. The Insurance Company has no locus to raise this plea. Moreover, in the application for compensation in para 11 specific plea has been mentioned that respondent no.1 had the knowledge of the accident, which resulted in the death of the deceased Mohd. Asif. For this reason there was no need to give notice under section 10 of the Workmen's Compensation Act, 1923. This plea has not been controverted by the respondent no.1, who is the employer. In this background, we are of the opinion that in the present case the Commissioner has rightly waived the condition of notice and on this account no fault can be found in the impugned judgment and order."

(emphasis supplied)

16. In the present case, in paragraph 16 of written statement the owner / employer / insured has categorically stated that they have informed the Insurance Company Branch Officer Siwan in writing about the accident and death of Driver Govind Kumar. Further, they have not challenged the absence of notice under Section 10 of the Act and employer / insured has not opposed the claim on the basis of want of notice under Section 10 of the Act, Thus, Insurance Company cannot raise this plea.

17. In such view of the matter, facts as well as law as involved, in present case, insofar as notice under Section 10 of the Act is concerned, are fully covered the observation made by Hon'ble Division of this Court in **Rais (supra)**.

18. In what circumstances and context a statute provision can be considered to be mandatory or directory a reference may also be made to a landmark judgment of Hon'ble Supreme Court in the case of **P. T. Rajan vs. T.P.M. Sahir 2003 (8) SCC 498.** Paragraph 49 whereof is quoted as under:-

"49. Furthermore, a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused. (See Raza Buland Sugar Co. Ltd v. Municipal Board, Rampur AIR 1965 SC 895, State Bank of Patiala v. S.K. Sharma 1996 (3) SCC 364, Venkataswamappa v. Special Dy. Commr. (Revenue) 1997 (9) SCC 128 and Rai Vimal Krishna v. State of Bihar 2003 (6) SCC 401)" (emphasis supplied)

19. It is the settled law that procedure is the handmaid of justice. Suffice to refer to a latest judgment of Hon'ble Supreme Court in **Sugandhi (dead) by Lrs. and another vs. P. Rajkumar Rep. By his Power Agent Imam Oli 2020 SCC Online SC 870**. Paragraph 10, whereof is quoted as under:-

"10. It is often said that procedure is the handmaid of justice. Procedural and technical hurdles shall not be allowed to come in the way the of the court while doing substantial justice. If the procedural violation does not seriously cause prejudice to the adversary party, courts must lean towards doing substantial justice rather than relying upon procedural and technical violation. We should not forget the fact that litigation is nothing but a journey towards truth which is the foundation of justice and the court is required to take appropriate steps to thrash out the underlying truth in every dispute. Therefore, the court should take a lenient view when an application is

made for production of the documents under sub-rule (3)." (emphasis supplied)

20. No doubt, in the very first line of Section 10 (1) of the Act the word used is "shall" that "No claim for compensation 'shall' be entertained by a Commissioner unless notice of accident .....", has been used. It is also equally correct that in a normal sense word "shall" is used in mandatory sense. However, it is also golden rule of interpretation that in the field of law, to give the statute a purposeful or functional interpretation and that it should promote the purpose or the object of the Act, as observed in **Bharat Singh (supra),** a construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice, should always be avoided. Keeping this in mind, coupled with the discretion given to the Commissioner by proviso to 3rd proviso to Section 10(1) of the Act by using word "may" that "provided further, that the Commissioner 'may' entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, ... was due to sufficient reason," to my mind, this discretion left with the Commissioner can be best exercised if the word "shall" in first line of Section 10(1) of the Act is taken or interpreted as directory and not mandatory, moreso, when this point is related to procedural part of preferring a claim, and to my mind, it is not referable to substantive right of a claimant, which stood accrued the moment untoward incident or accident has taken place. Moreso, when the Act is a beneficial piece of legislation.

21. Accordingly, it is held that in view of the Act being a beneficial piece of legislation enacted for the benefit of the have-nots and the Commissioner having been given power to entertain the claim petition and decide the same even in absence of notice under Section 10 of the Act, the interpretation of statutory requirement of giving notice under Section 10 of the Act is merely 'directory' and cannot be held to be 'mandatory', which may render the claim not maintainable.

22. Insofar as the applicability of provision of Section 21 (1)(b) of the Act is concerned, again the provision has to be interpreted in the manner so as to serve the purpose and object of this beneficial piece of legislation as the manner in which interpretation has to be given to this clause also is already settled by the judgment of Hon'ble Apex Court in the case of **Bharat Singh (supra)** as noted above.

23. Insofar as territorial jurisdiction in such cases of accident and death is concerned, a reference may be made to certain judgments of Hon'ble Supreme Court in the cases of **Mantoo Sarkar vs. Oriental Insurance Co. Ltd. and others 2009 (2) SCC 244, Malati Sardar vs. National Insurance Company Limited and others 2016 (3) SCC 43 and Morgina Begum vs. Md. Hanuman Plantation Limited 2007 (11) SCC 616.**

24. Paragraphs 16, 18, 20, 21 and 23 of **Mantoo Sarkar (supra)** are quoted as under:-

"16. We say so because ordinarily an appellate court shall not, having regard to the provisions contained in sub-section (1) of Section 21 of the Code of Civil Procedure, entertain an appeal on the ground of lack of territorial jurisdiction on the part of the court below unless he has been prejudiced thereby. Other respondents did not raise any question of jurisdiction.

Although one witness each had been examined on behalf of the truck owner and owner of the bus, neither a question of lack of territorial jurisdiction was raised nor the question of any prejudice had been argued. It is only the first respondent who raised the question of territorial jurisdiction. However, no prejudice was caused to the appellant by the claim petition being tried by the MACT at Nainital.

18. The Tribunal is a court subordinate to the High Court. An appeal against the Tribunal lies before the High Court. The High Court, while exercising its appellate power, would follow the provisions contained in the Code of Civil Procedure or akin thereto. In view of sub-section (1) of Section 21 of the Code of Civil Procedure, it was, therefore, obligatory on the part of the appellate court to pose unto itself the right question, viz., whether the first respondent has been able to show sufferance of any prejudice. If it has not suffered any prejudice or otherwise no failure of justice had occurred, the High Court should not have entertained the appeal on that ground alone.

20. A distinction, however, must be made between a jurisdiction with regard to subject matter of the suit and that of territorial and pecuniary jurisdiction. Whereas in the case falling within the former category the judgment would be a nullity, in the latter it would not be. It is not a case where the Tribunal had no jurisdiction in relation to the subject matter of claim. As a matter of fact the civil court had no jurisdiction to entertain the suit. If the Tribunal had the jurisdiction to entertain a claim petition under the Motor Vehicles Act, in our opinion, the Court should not have, in absence of any finding of sufferance of any prejudice on the part of the first respondent, entertained the appeal.

21. In Bikash Bhushan Ghosh v. Novartis India Ltd., [(2007) 5 SCC 591], this Court has held :

"17. There is another aspect of the matter which cannot be lost sight of. If the provisions contained in the Code of Civil Procedure are given effect to, even if the Third Industrial Tribunal, West Bengal had no jurisdiction, in view of the provisions contained in Section 21 of the Code of Civil Procedure, unless the respondent suffered any prejudice, they could not have questioned the jurisdiction of the court. In Kiran Singh v. Chaman Paswan this Court held: (AIR p. 342, paras 6-7)

`6. ... If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was `coram non judice' and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position.

7. Section 11 enacts that notwithstanding anything in Section 578 of the Code of Civil Procedure an objection that a court which had no jurisdiction over a suit or appeal had exercised it by reason of overvaluation or undervaluation, should not be entertained by an appellate court, except as provided in the section. Then follow provisions as to when the objections could be entertained, and how they are to be dealt with. The drafting of the section has come in--and deservedly--for considerable criticism; but amidst much that is obscure and confused, there is one principle which stands out clear and conspicuous. It is that a decree passed by a court, which would have had no jurisdiction to hear a suit or appeal but for overvaluation or undervaluation, is not to be treated as, what it would be but for the

section, null and void, and that an objection to jurisdiction based on overvaluation or undervaluation, should be dealt with under that section and not otherwise.

The reference to Section 578, now Section 99 CPC, in the opening words of the section is significant. That section, while providing that no decree shall be reversed or varied in appeal on account of the defects mentioned therein when they do not affect the merits of the case, excepts from its operation defects of jurisdiction. Section 99 therefore gives no protection to decrees passed on merits, when the courts which passed them lacked jurisdiction as a result of overvaluation or undervaluation. It is with a view to avoid this result that Section 11 was enacted. It provides that objections to the jurisdiction of a court based on overvaluation or undervaluation shall not be entertained by an appellate court except in the manner and to the extent mentioned in the section. It is a self-contained provision complete in itself, and no objection to jurisdiction based on overvaluation or undervaluation can be raised otherwise than in accordance with it.

With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional court, unless there was a consequent failure of justice. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 99 CPC and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained under Section 11 of the Suits Valuation Act.' "

23. We cannot also lose sight of the fact that the appellant herein was a labourer. The justness or otherwise of the amount of compensation has not been disputed before us. If the High Court judgment is to be complied with, appellant would again have to initiate another proceeding either at Bareilly or Gurgaon or at Delhi or at Jabalpur. The same evidence would have to be rendered once again."

(emphasis supplied)

25. Paragraphs 14 and 16 of **Malati Sardar (supra)** are quoted as under:-

"14. We are thus of the view that in the face of judgment of this Court in Mantoo Sarkar (supra), the High Court was not justified in setting aside the award of the Tribunal in absence of any failure of justice even if there was merit in the plea of lack of territorial jurisdiction. Moreover, the fact remained that the insurance company which was the main contesting respondent had its business at Kolkata.

15. Reliance placed on decisions of this Court in G.S. Grewal and Jagmittar Sain Bhagat is misplaced. In G.S. Grewal, the subject matter of dispute was not covered by the definition of "service matters" under Section 3(o) of the Armed Forces Tribunal Act, 2007 and on that ground, it was held that the Armed Forces Tribunal had no jurisdiction in the matter. Thus, it was a case of inherent lack of jurisdiction over the subject matter.

Similarly in Jagmittar Sain Bhagat, the claimant before the Consumer Protection Forum was found not be a "consumer" under Section 2(1) (d) of the Consumer Protection Act, 1986 and on that ground the order of the consumer forum was held to be without jurisdiction. The said cases did not deal with the issue of territorial jurisdiction.

16. The provision in question, in the present case, is a benevolent provision for the victims of accidents of negligent driving. The provision for territorial jurisdiction has to be interpreted consistent with the object of facilitating remedies for the victims of accidents. Hyper technical approach in such matters can hardly be appreciated. There is no bar to a claim petition being filed at a place where the insurance company, which is the main contesting parties in such cases, has its business. In such cases, there is no prejudice to any party. There is no failure of justice. Moreover, in view of categorical decision of this Court in Mantoo Sarkar (supra), contrary view taken by the High Court cannot be sustained. The High Court failed to notice the provision of Section 21 CPC."(emphasis supplied)

26. In the case of **Morgina Begum (supra)** even this controversy regarding provision of interpretation of Section 21 (1)(b) of the Act has also given. Paragrpahs 6, 7, 8 and 9 whereof are also quoted as under:-

"6. Section 21 (1)(b) of the Act clearly provides that the claim petition may be filed by the claimant where the claimant ordinarily resides. In our opinion, the expression `ordinarly resides' means where the person claiming compensation normally resides at the time of filing the claim petition. The proviso to Section 21 which is also relevant for the present controversy, provides that in case the Commissioner, other than the Commissioner having jurisdiction over the area in which the accident took place, entertains the claim petition then he shall give a notice to the Commissioner having jurisdiction over the area and the state Government concerned. The Amended Section 21 has been specifically introduced in the Act by Amending Act No. 30 of 1995 with effect from 15th September, 1995 in order to benefit and facilitate the claimants. The Statement of Objects and Reasons for the Amendment of the Act, a copy of which has been produced before us, clearly mentions that the amendment has been brought about for benefits of the claimants viz. either the workmen or their dependents. The relevant portion of the Statement of Objects and Reasons, reads as under:-

"It is also proposed to introduce provision for facilitating migrant workmen to file compensation claims before the Commissioners having jurisdiction over the area where they or their dependents ordinarily reside. Provision for transfer of compensation from one Commissioner to another has also been made."

7. The idea behind introduction of this amendment is that migrant labourers all over the country often go elsewhere to earn their livelihood. When an accident takes place then in order to facilitate the claimants they may make their claim not necessarily at the place where the accident took place but also at the place where they ordinarily reside. This amendment was introduced in the Act in 1995. This was done with a very laudable object, otherwise it could cause hardship to the claimant to claim compensation under the Act. It is not possible for poor workmen or their dependents who reside in one part of the country and shift from one place to another

for their livelihood to necessarily go to the place of the accident for filing a claim petition. It may be very expensive for the claimants to pursue in such a claim petition because of the financial and other hardship. It would entail the poor claimant traveling from one place to another for getting compensation. Labour statutes are for the welfare of the workmen.

8. This Court has in Bharat Singh v. Management of New Tuberculosis Centre, New Delhi and Ors., [1986] 2 SCC, 614 has taken the view that welfare legislation should be given a purposive interpretation safeguarding the rights of the have-nots rather than giving a literal construction. In case of doubt the interpretation in favour of the worker should be preferred.

9. The view which we are taking has been taken by a Division Bench of the Orissa High Court in the case of S.K. Saukat Ali Alias Sekho S.K. v. Commissioner for Workmen's Compensation-cum-Deputy Labour Commissioner, Cuttack and Ors., (1999) 2 Transport and Accident Cases 638 (Ori) and the Andhra Pradesh High Court in the case of Noorjahan v. National Insurance Co. Ltd. Hyderabad and Anr. (1999) 3 T.A.C. 276 (AP). Hence, we are of the opinion that the view taken by both these High Courts is correct. A claimant can apply before the Commissioner having jurisdiction over the area where the claimant resides, and it is not always necessary to prefer a claim petition where the accident has taken palce. This is for the facility of the workmen and advances the cause of welfare of the worken. Therefore, the view taken by the Gauhati High Court in the impugned order that the claim petition could only be filed at the place where the accident had taken place, cannot be sustained. Section 21 (1)(b) read with its proviso is a beneficial legislation for the welfare of the workmen and by the above, interpretation, it will advance the cause of the workmen. Therefore, we are of the opinion that the view taken by the Gauhati High Court in the impugned order cannot be sustained and accordingly we set aside the impugned order."(emphasis supplied)

27. Clearly, as per the law laid down the claim petition cannot be rejected on the ground of territorial jurisdiction alone, where the claims are preferred under such beneficial piece of legislation.

28. On perusal of record, I find that although the vehicle was insured in the branch office of the appellant-Company at district Siwan and the accident had also taken place in district Siwan (Bihar), however, in paragraphs 16 and 18 it has been categorically stated that the claimants are landless labourers and have shifted to District Gorakhpur and are residing there. It has futher been stated that the opposite party no. 1 is also permanent resident of District Kushinagar and that the Insurance Company has its regional office at Gorakhpur (which is not in dispute). Hence, in the light of law settled by Hon'ble Apex Court that once the insurance Company has branch offices at different places, therefore, no substantial injury or injustice was done to the insurance-Company.

29. In such view of the matter, I do not find that any substantial question for consideration before this Court has arisen in this appeal on facts of the case. However, the question nos. A and D as framed in the memo of appeal are considered and answered in the light of the observations made by Hon'ble Supreme Court in **Sir Chunilal (supra)** against the

Insurance Company, that requirement of notice under Section 10(1) of the Act is directory in nature and the claim petition would be maintainable and cannot be thrown in absence thereof, and that in view of Section 21 of the Act, as the Insurance Company has branch office everywhere and therefore, no prejudice is caused to the company, the Tribunal did not lack jurisdiction to decide the claim petition.

30. Present appeal is devoid of merits and is accordingly dismissed.

(2021)01ILR A216
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2020

BEFORE

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

FAFO No.- 1237 of 2018

Subhadra Pandey ..Appellant/Claimant
Versus
Siddharth Agrawal & Ors.
...Respondents/Opposite Parties

Counsel for the Appellant:
Sri Vidya Kant Shukla

Counsel for the Respondents:
Sri Rajiv Ojha

A. Civil Law - Motor Vehicles Act (59 of 1988) - Section 168 - Compensation - Determination - widow claimant getting family pension - Issue - Can the claimant, a widow who receives family pension be deprived of compensation ? - Held - there can be no deduction of pension, provident fund and insurance receivable by claimant widow - no deduction from the pension is allowed (Para 7, 10)

B. Civil Law - Motor Vehicles Act (59 of 1988)- Section 166 - Compensation - Interest - 'Tax Deducted at Source' TDS - U/s 194A (3) (ix) of the Income Tax Act, 1961 - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/- insurance company/owner is/are entitled to deduct appropriate amount under the head of TDS - if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority (Para 15)

Deceased a retired railway employee, getting pension - Pension was halved & the widow (claimant) was getting Rs.14,000 as family pension - Tribunal held that as the claimant was getting pension of Rs.14,000, hence, there was no loss to her and did not award any amount under the head of loss of earnings - Held - Rs.5000 x 12 x 7 = 4,20,000/- plus Rs.70,000/- plus 10% increase in every three years as per the decision in Sarla Verma namely Rs.7,000/-. Hence, the total compensation would be Rs.4,97,000/-

Partly Allowed. (E-4)

List of Cases cited :-

1. National Insurance Company Limited Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 1050

2. Apex Court in Ramilaben Chinubhai Parmar & ors. Vs National Insurance Co. Ltd. & ors. 2014 ACJ 1430 &in Vimal Kanwar & ors. Vs Kishore Dan & ors., 2013 (3) T.A.C. 6 (S.C.)

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

1. Heard Sri Vidya Kant Shukla, learned counsel for the appellant and Sri Rajiv Ojha, learned counsel for the respondent and perused the record.

2. This appeal, at the behest of the claimant, challenges the judgment and award dated 11.12.2017 passed by Additional District Judge, Court No.14/Motor Accident Claims Tribunal, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 284 of 2014 awarding a sum of Rs.70,000/-with interest at the rate of 7% as compensation.

3. Brief facts as they emerge are that the deceased was 62 years of age at the time of accident which is not in dispute. The claimant was the sole surviving legal heir of the deceased is also not in dispute. The deceased was a retired railway employee and was getting pensions. The pension was halved and the widow was getting Rs.14,000/- which shows that she lost Rs.14,000/- because of the said demise of her husband. The Tribunal has awarded only Rs.70,000/- as per the judgment in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** holding that there was no loss of income.

4. The Tribunal very strangely held that claimant was the legal heir and legal representative of the deceased, the deceased was 62 years of age whose income was shown to be Rs.30,000/- per month but no document was produced and, therefore, the Tribunal did not believe the income to the deceased to be Rs.30,000/-. The Tribunal thereafter went on to hold that the deceased had retired from Railways in the year 2010, he was receiving pension of Rs.28,000/- and after his death, family pension of Rs.14,000/- is being received by the claimant herself. Therefore, as the deceased was getting Rs.28,000/- approx as pension, 50% of the same he would be spending on himself and, therefore, Rs.14,000/- would be the monthly datum figure available to the widow.

5. The Tribunal thereafter very strangely held that she was getting pension of Rs.14,000/-, hence, there was no loss to her and, therefore did not award any amount under the head of loss of earnings and deducted the entire amount granting only Rs.70,000/- with 7% rate of interest. This could not have been done is the submission of learned counsel for the appellant.

6. Can the claimant a widow who receives family pension be deprived of compensation is the main question which arises for consideration. If the answer to it is in the negative, what compensation is she entitled to?

7. In support of his argument, learned counsel for the appellant has relied on the decisions of the **Apex Court in Ramilaben Chinubhai Parmar and others Vs. National Insurance Co. Ltd. and others, 2014 ACJ 1430 and in Vimal Kanwar and others vs. Kishore Dan and Others, 2013 (3) T.A.C. 6 (S.C.)** and has submitted that the deduction of provident fund, pension and insurance receivable by claimants has been deprecated in the said decision.

8. As against this Sri Rajiv Ojha, learned counsel for the respondent has submitted that pecuniary advantage is a different issue and the said judgment would not apply to the facts of this case.

9. Submission of Sri Ojha appears to be very attractive but in this case as can be seen, even if this Court goes by the principles of loss of dependency as propounded by the Apex Court and the High Courts, the Tribunal ought to have considered the fact that had her husband survived, she would have got a sum of Rs.28,000/- per month which has now been halved. The multiplier applicable would be '7' as the deceased was in the age bracket of 61-65 years in view of the decision of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** which has been not considered by the Tribunal and has given reasonings which can be said to be questionable.

10. In view of the decision of this Court in First Appeal From Order No.3154 of 2013 **(Regional Manager, UPSRTC Vs. Smt. Nisha Dubey and others),** no deduction from the pension is allowed. In this case the Tribunal has not granted any amount leave apart deduction from family pension.

11. I am in agreement with learned counsel for the appellant and even if the rough datum figure is considered, it can be considered to be Rs.5000 x 12 x 7 = 4,20,000/- plus Rs.70,000/- plus 10% increase in every three years as per the decision in **Sarla Verma (Supra)** namely Rs.7,000/-. Hence, the total compensation would be Rs.4,97,000/-

12. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

13. Hence, amount of Rs.4,97,000/- with interest at the rate of 7.5% from the date of the filing of the claim petition till the amount is deposited be paid to the claimant.

14. The claimant is widow of a railway officer and, therefore, she is not an illiterate, hence, all the amount need not be invested but shall be transferred to her account which shall be given by her within eight weeks from today. The amount already paid be deducted from the amount to be paid.

15. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to

claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

16. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. Record and proceedings be sent to the Tribunal. A copy of this order be forwarded to the Tribunal concerned for knowledge.

17. This Court is thankful to both the learned Advocates for getting this matter disposed of during this pandemic.

(2021)01ILR A219
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2020

BEFORE

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

FAFO No. 1553 of 2020

Sri Sanju Kushwaha ...Appellant/Claimant
Versus
Sri Vimal Kumar Verma & Anr.
...Respondents/Opposite Parties

Counsel for the Appellant:
Sri Shreesh Srivastava

Counsel for the Respondents:
Sri Sushil Kumar Mehrotra, Sri Sushil Kumar Mehrotra

A. Civil Law - Employees' Compensation Act (8 of 1923) – Section4A - Interest - Where any employer is in default in paying the compensation due under the Act within one month from the date it fell due, the Commissioner shall direct that the employer *shall*, pay simple interest at the rate of twelve per cent - Issue - Whether Assistant Labour Commissioner can award interest less than what the statute has fixed, namely, 12% - No - Court deprecated the practice of grant of interest less than what is specific under the statute (Para 4)

B. Civil Law - Employees' Compensation Act (8 of 1923)– Section 4A - Interest - Issue - when the interest becomes due and from whom - Held - it is for the Insurance Company to pay the interest - claimant becomes entitled to interest within a period of one month from the date the amount accrues to him (Para 5)

Accident took place, i.e., 25.10.2017 & the owner who was insured by the respondent did not make the payment - Commissioner, Workmen's Compensation awarded a sum of Rs.6,24,000/- & ordered if within 30 days the Insurance Company does not deposit amount, they shall deposit the amount with interest at the rate of 7 per cent - Held - If the Insurance Company has not yet deposited the amount, it shall deposit the amount with interest at the rate

of 12% from one month from the date of accident, i.e., 25.11.2017

Partly Allowed. (E-4)

List of Cases cited :-

1. Oriental Insurance Company Vs Siby George & ors. 2012(4) T.A.C. 4 (SC)

2. North East K.R.T.C. Vs Smt. Sujatha C.A No. 7470 of 2009 Dt 2.11.2018

3. Smt. Surekha & ors .Vs B.M. National Insurance Comp. Ltd Civil Appeal No. 10018 of 2017

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

1. Heard Sri Shreesh Srivastava, learned counsel for the appellant and Sri S.K. Mehrotra, learned counsel for the respondents.

2. Sri A.K. Verma, Commissioner, Workmen's Compensation Act 1923/Assistant Labour Commsioner, Kanpur Region, Kanpur on 15.7.2020 has awarded a sum of Rs.6,24,000/- and has considered the application as if it is under the Motor Vehicles Act. He has passed an order which is conditional in nature that if within 30 days the Insurance Company does not deposit amount, they shall deposit the amount with interest at the rate of 7 per cent.

3. Fact that the appellant-claimant was an employee is not in dispute; vehicle caused him injuries which can be said to be arising out of his employment is not in dispute and; the Insurance Company having insured the vehicle with the workmen is not in dispute, hence, no facts are mentioned except that the accident occurred on 25.10.2017 and no technical pleas are raised. Compensation awarded is not in challenge.

4. The two questions of law which arise for consideration are-firstly that can Assistant Labour Commissioner award interest less than what the statute has fixed, namely, 12% under the provisions 4-A of the Workmen's Compensation Act (hereinafter referred to as 'the Act')? A similar issue has arisen before this Court where the Court has deprecated the practice of grant of interest less than what is specific under the statute. The reason being the word usef 'shall' which has been interpreted by the Courts time and again. The second question arises when the interest becomes due and from whom? Of course, as per the Judgement, it is for the Insurance Company to pay the interest as no other technical defects, as can be raised under the Employees Compensation Act, are raised.

5. I am pained to pen down that the Workmen's Commissioner in Uttar Pradesh are time and again to be conveyed that they are supposed to follow the statute under which they are functioning. I am supported in my view by the Judgments rendered by Supreme Court in **Oriental Insurance Company Vs. Siby George and others, 2012(4) T.A.C. 4 (SC); Civil Appeal No. 7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha** decided on 2.11.2018; and **Civil Appeal No. 10018 of 2017, Smt. Surekha and others Vs. the Branch Manager, National Insurance Company Ltd.** decided on 3.8.2017 which holds that Insurance Company has to be made liable and further the relevant date from when the interest would be payable is decided therein, namely, one month of the date, it accrues.

6. Learned counsel Sri S.K. Mehrotra tried to point out that the Judgment is just and proper, however, I am not convinced as the statute demands that the claimant becomes entitled to interest within a period of one month from the date the amount accrues to him. In our case, the amount accrued to him one month after the accident took place, i.e., 25.10.2017 and the owner Vimal Kumar Verma, who was insured by the respondent no.2 did not make the payment.

7. In view of the aforesaid, Judgment and award impugned herein is modified. If the Insurance Company has not yet deposited the amount, it shall deposit the amount with interest at the rate of 12% from one month from the date of accident, i.e., 25.11.2017.

8. It goes without saying that once the amount is deposited, the Tribunal shall disburse the same and the Insurance company shall not deduct TDS as against the settled principles of law.

9. The appeal is, therefore, partly allowed.

10. This Court is thankful to Sri S.K. Mehrotra for ably assisting this Court and Sri Vidya Kant Shukla, for acting as Amicus Curiae for pointing out the Judgments on the matter.

(2021)01ILR A221
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

FAFO No.- 1615 of 2017

National Insurance Company Ltd.
...Appellant
Versus
Smt. Kiran & Ors. ...Respondents

Counsel for the Appellant:
Sri Arvind Kumar

Counsel for the Respondents:
Sri Chandra Bhan Gupta, Sri Vidya Kant Shukla

Civil Law - Motor Vehicles Act (59 of 1988)- Section 168 - Compensation - Computation - Insurance company challenged Motor Accident Claims Tribunal award on the ground of excessive compensation awarded to claimants - Deceased aged about 35 years - earned Rs.15,000/- per month as self employed tailor working from home - Tribunal awarded 50% towards future prospects & awarded Rs. 1 lakh each to three persons towards love and affection - *Held* - in view of the judgment of the Hon'ble Apex Court in the case of Sarla Verma and Pranay Sethi future prospects reduced from 50% to 40% - Conventional Head which includes loss of love & affection and funeral expenses as per Pranay Sethi modified to Rs 70,000/- (Para 15, 16)

Partly allowed. (E-4)

List of cases cited :

1. Sarla Verma Vs Delhi Transport Corporation (2009) 6 SCC 121 : 2009 (2) TAC 677

2. National Insurance Co. Ltd. Vs Pranay Sethi & 3 ors. (2017) 16 SCC 680 : 2017 (4) TAC 673

3. New India Assurance Company Vs Somwati 2020 Legal Eagle (SC) 541 : 2020 SCC Online SC 720

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

1. Heard Sri Arvind Kumar, learned counsel for the appellant and Sri Vidya Kant Shukla, learned counsel appearing for the claimant-respondents no. 1 to 8.

2. Present appeal has been filed challenging the judgment and order dated 21.2.2017 passed by the Additional District Judge, Court No. 7, Kanpur Nagar/Motor Accident Claims Tribunal, Kanpur Nagar in M.A.C. No. 737 of 2015.

3. The award is being challenged on the ground of excessive compensation awarded to the claimants.

4. Shorn of details, facts of the case are that on 17.6.2015 at about 10 p.m. on GT road near R.K. Hospital, P.S. Chaubeypur, district Kanpur when the deceased Jai Prakash was coming alongwith his friend on Motorcycle no. UP 77 Q 5127 he was hit by Truck no. UP 78 AT 2282 which was allegedly being driven rashly and negligently. He was taken to the Hospital and ultimately he died due to injuries suffered in the accident. It was claimed that he was aged about 35 years and was earning Rs.15,000/- per month as self-employed tailor working from home.

5. In view of the ground taken in the appeal this Court is concerned with Issue no. 2 which is to the effect as to what compensation the claimants are entitled for?

6. The appellant-Company is not challenging its liability as apparently there was no breach of policy conditions. Per month income of the deceased was assessed and presumed @ Rs. 6,000/- by the learned Tribunal is also not under challenge. However, learned counsel for the appellant submits that 1/4th amount is to be deducted towards personal expenditure of the deceased and not 1/5th. The Tribunal has committed mistake in making deduction of 1/5th only towards personal expenditure of the deceased on the ground that there are eight dependents. He submits that the minors are to be taken as half unit and therefore, the total unit comes to 5 and 1/2 only and accordingly 1/4th deduction has to be made towards personal expenditure. The multiplier applied is not in issue. However, he submits that only 40% could have been awarded towards future prospects and 50% has been incorrectly awarded. It was further submitted that in view of the judgment of the Hon'ble Apex Court passed in Civil Appeal No. 3093 of 2020, New India Assurance Company Vs. Pinki only Rs. 40,000/- should be awarded towards love and affection and consortium and separate amount cannot be awarded to different individuals. Submission, therefore, is that the compensation awarded is highly excessive.

7. Per-contra, learned counsel appearing for the claimant-respondents has supported the impugned award, however, he submitted that in view of the judgement of the Hon'ble Apex Court in the case of **Sarla Verma Vs. Delhi Transport Corporation (2009) 6 SCC 121 : 2009 (2) TAC 677** the learned Tribunal has rightly deducted 1/5th towards personal expenditure of the deceased taking dependency of eight persons. He further submitted that 50% has rightly been awarded towards future prospects. He

further submits that the award is not liable to be disturbed and justified amount has been awarded.

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

9. In **Sarla Verma (supra)** in paragraph 42 it was held as under:-

"42. We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

10. In **National Insurance Co. Ltd. Vs. Pranay Sethi and others (2017) 16 SCC 680 (5 Judges) : 2017 (4) TAC 673** in paragraphs 39, 40, 41, 42 and 59 it was held as under:-

"39. In Reshma Kumari, the three-Judge Bench, reproduced paragraphs 30, 31 and 32 of Sarla Verma and approved the same by stating thus:-

"41. The above does provide guidance for the appropriate deduction for personal and living expenses. One must bear in mind that the proportion of a man's net earnings that he saves or spends exclusively for the maintenance of others does not form part of his living expenses but what he spends exclusively on himself does. The percentage of deduction on account of personal and living expenses may vary with reference to the number of dependent members in the family and the personal living expenses of the deceased need not exactly correspond to the number of dependants.

42. In our view, the standards fixed by this Court in Sarla Verma on the aspect of deduction for personal living expenses in paras 30, 31 and 32 must ordinarily be followed unless a case for departure in the circumstances noted in the preceding paragraph is made out."

40. The conclusions that have been summed up in Reshma Kumari are as follows:-

"43.1. In the applications for compensation made under Section 166 of the 1988 Act in death cases where the age of the deceased is 15 years and above, the Claims Tribunals shall select the multiplier as indicated in Column (4) of the Table prepared in Sarla Verma read with para 42 of that judgment.

43.2. In cases where the age of the deceased is up to 15 years, irrespective of Section 166 or Section 163-A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the Table in Sarla Verma should be followed.

43.3. As a result of the above, while considering the claim applications made under Section 166 in death cases where the age of the deceased is above 15 years, there is no necessity for the Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act.

43.4. The Claims Tribunals shall follow the steps and guidelines stated

in para 19 of Sarla Verma for determination of compensation in cases of death.

43.5. While making addition to income for future prospects, the Tribunals shall follow para 24 of the judgment in Sarla Verma.

43.6. Insofar as deduction for personal and living expenses is concerned, it is directed that the Tribunals shall ordinarily follow the standards prescribed in paras 30, 31 and 32 of the judgment in Sarla Verma subject to the observations made by us in para 41 above."

41. On a perusal of the analysis made in Sarla Verma which has been reconsidered in Reshma Kumari, we think it appropriate to state that as far as the guidance provided for appropriate deduction for personal and living expenses is concerned, the tribunals and courts should be guided by conclusion 43.6 of Reshma Kumari. We concur with the same as we have no hesitation in approving the method provided therein.

42. As far as the multiplier is concerned, the claims tribunal and the Courts shall be guided by Step 2 that finds place in paragraph 19 of Sarla Verma read with paragraph 42 of the said judgment. For the sake of completeness, paragraph 42 is extracted below :-

"42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M- 16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

59. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

11. A reference may also be made to law laid down by the Hon'ble Apex Court in the case of **New India Assurance Company Vs. Somwati 2020 Legal Eagle (SC) 541 : 2020 SCC Online SC 720**, paragraph 63 whereof is quoted as under:

"63. At this stage, we consider it necessary to provide uniformity with respect to the grant of consortium, and loss of love and affection. Several Tribunals and High Courts have been awarding compensation for both loss of consortium and loss of love and affection. The Constitution Bench in Pranay Sethi (supra), has recognized only three conventional heads under which compensation can be awarded viz. loss of estate, loss of consortium and funeral expenses."

12. In this case "loss of consortium" is "loss of love and affection" has been dealt with in detail and it was held that consortium is to include loss of love and affection and if consortium is awarded to all the amount that can be awarded under the same head cannot exceed Rs. 40,000/-.

13. In such view of the matter, I am of the opinion that the amount awarded by the Tribunal is excessive in nature and the same is to be re-assessed which can be done in this appeal as well.

14. In so far as the award of deduction of 1/5th of the amount towards personal expenditure is concerned, in view of the fact that the total amount is being reduced ultimately, I am not inclined to interfere in the said deduction made by the Tribunal in the facts and circumstances of the case.

15. In so far as the award towards future prospects to the extent of 50% is concerned, in view of the judgment of the Hon'ble Apex Court in the case of *Sarla Verma (Supra)* and *Pranay Sethi (Supra)* the same is to be reduced from 50% to 40% and is accordingly reduced.

16. In so far as the amount awarded towards love and affection to three persons at the rate of Rs. 1 lakh each that is to be reduced to Rs. 40,000/- maximum as held by the Hon'ble Apex Court in the case of Somwati (Supra), however, a sum of Rs. 70,000/- is to be awarded to the maximum under all such head which includes loss of love and affection and funeral future expenses also. In view thereof, the total amount which can be granted under this head is modified to Rs. 70,000/-. Therefore, the amount is now to be calculated in the following manner:-

Income - Rs. 6,000 x 12	= Rs. 72,000.00
40% future prospects Rs. 2400 x 12	= Rs. 28,800.00
	= Rs. 1,00,800.00

1/5 Deduction for personal expenses	- Rs. 20,160.00
	Rs. 80,640.00
Multiplier	x 17
	Rs.13,70,880.00
Medical Bills	+1,12,176.00
Conventional Head as per Pranay Sethi	+ 70,000.00
	Rs.15,53,056.00

17. The awarded compensation is accordingly reduced from Rs. 20,13,376/- to Rs. 15,53,056/- as calculatee above, however, the aforesaid amount shall carry interest as dirtected by the learned Tribunal.

18. The appeal, accordingly, stands partly allowed.

(2021)01ILR A226
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2020

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

FAFO No.- 3316 of 2013

M/s Vidyawati Constructions Company ...Appellant

Versus

Union of India ...Opposite Party

Counsel for the Appellant:
Sri Vinod Sinha, Sri Krishna Agrawal, Sri Mahesh Sharma, Sri Manish Goyal

Counsel for the Respondent:
Sri Anil Kumar, Sri Tarun Varma

A. Civil Law - Arbitration and Conciliation Act (26 of 1996)- Section 11 - Appointment of arbitrators - Derogation - no derogation in the appointment of arbitrator can be made where the clause specifically provides for certain persons to be appointed as arbitrator - In the instant case clause 64(3)(b) of the agreement provided for the composition of the Arbitral Tribunal of two arbitrators, who are gazetted railway officer, who were to appoint an Umpire – as agreement itself provided for arbitrators, then no question arises to derogate from the said arbitration clause and appoint a retired Judge (Para 76, 88)

B. Civil Law - Arbitration and Conciliation Act (26 of 1996)- Sections 11, 34(2)(a)(v) & 37 - Arbitral award - Setting aside of on the ground composition of the arbitral tribunal was not in accordance with the agreement of the parties

Appellant awarded contract for construction of building complex - As respondents did not make full payment hence appellant invoked arbitration clause - Application filed for appointment of arbitrator under Section 11 (4) - Court on 26.08.1998 appointed two arbitrator in terms of Clause 64 of the GCC - Arbitral Tribunal entered into reference - Appellant filed modification Application filed with a prayer for appointing another person as presiding arbitrator - on 26.09.2003, the then Chief Justice, treated the modification application as application u/s 11 & appointed retired Chief Justice as the sole arbitrator without taking note of earlier Arbitral Tribunal - respondents filed objections u/s 16 raising preliminary objection regarding composition & constitution of the Arbitral Tribunal - *Held* - constituting fresh Arbitral Tribunal without replacing the earlier Tribunal or terminating its mandate, was against the agreement entered into between the parties - there was no dispute

between the parties to the very constitution of the Arbitral Tribunal in the year 1998 - only a presiding arbitrator could have been substituted or after termination of the earlier Arbitral Tribunal, could have constituted a new Arbitral Tribunal (Para 53, 54, 89)

Dismissed. (E-4)

List of Cases cited :-

1. Narayan Prasad Lohia Vs Nikunj Kumar Lohia & ors. AIR 2002 SC 1139

2. B.S.N.L. Ltd. Vs Motorola India (P. Ltd.) 2008 (12) SCALE 720

3. St. of Orissa & ors . Vs Gokulananda Jena, (2003) 6 SCC 465

4. S.B.P. and Co. Vs M/s. Patel Engineering Ltd. & anr. AIR 2006 SC 450

5. Northern Eastern Railway & ors. Vs Tripple Engineering Works 2014 (3) Arb. LR 327 (SC)

6. Dakshin Shelters P. Ltd. Vs Geeta S. Jauhari (2012) 5 SCC 152

7. U.O.I. Vs BESCO Ltd. AIR 2017 SC 1628

8. Bharat Wire Ropes Ltd. Vs U.O.I. & ors. (2012) 5 ADJ 644

9. Abdul Gaffar Vs Sri Jaichandlal Ashok Kumar & Co. Pvt. Ltd. & anr. JT (2000) 8 SC 152

10. Citibank N.A. Vs TLC Marketing & anr .(2008) 1 SCC 481

11. Konkan Railway Corporation Ltd. & anr. Vs Rani Construction Pvt. Ltd (2002) 2 SCC 388

12. B.S. Bajwa Vs St. of Pun. (1998) 2 SCC 523

13. M.M.T.C. Ltd. Vs Sterlite Industries (India) Ltd. AIR 1997 SC 605

14. SVG Molasses Co. B.V. Vs Mysore Mercantile Co. Ltd. & ors. 2007 (9) SCALE 89

15. I.O.C. Ltd. Vs Raja Transport (P) Ltd., MANU/SC/1502/2009

16. Antrix Corporation Ltd. Vs Devas Multimedia P. Ltd. (2014) 11 SCC 560

17. Rail India Technical & Economic Services Ltd. Vs Vidyawati Construction Ltd., Writ Petition No. 16445 of 2001, Dt. 24.05.2001

18. NHAI Vs Bumihiway DDB Ltd. (JV) & ors., (2006) 10 SCC 763

19. Lion Engineering Consultants Vs St. of H.P. & ors. (2018) 16 SCC 758

20. Aargee Engineers &Co. & anr. Vs Era Infra Engineering Ltd. & ors.,(2017) 4 ADJ 513

21 Basai Steels Pvt. Ltd. Vs Gobins India Engineering Pvt. Ltd. & anr., 2018 (5) Arb. LR 480(Karn.) (DB)

(Delivered by Hon'ble Rohit Ranjan Agrawal, J.)

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short "Act 1996") has been filed assailing the judgment and order dated 09.09.2013 passed by District Judge, Allahabad allowing objection under Section 34 of the Act, 1996 in Arbitration Case No. 25 of 2008, Union of India vs. M/s. Vidyawati Construction Company, against award

dated 21.02.2008 made by the sole arbitrator.

2. Facts in nutshell, are that appellant was awarded a contract for construction of multistorey RCC frame building complex (Ground + 3 stories) for office of General Manager, Railway Electrification, Allahabad (now Prayagraj) for total cost of Rs.87,76,517/-, and a letter of acceptance of contract was issued on 13.03.1989. Due to administrative reasons, awarded work was reduced from G+3 to G+2 and original cost was revised and reduced to Rs.66,32,912/- and the work was to be completed within 18 months (i.e. by 18.09.1990). However, actual work was completed on 31.05.1993, and final amount paid to the appellant was Rs.68.77 lacs.

3. Appellant submitted his final bill for Rs.4,26,54,807/- on 15.04.1994. As respondents did not make full payment hence on 18.05.1996, appellant invoking the arbitration clause sent a registered letter requesting that panel of arbitrators under Clause 64(3)(b) of General Condition of Contract be forwarded to them for selection of an arbitrator. The respondents authorities on 27.06.1996, 07.10.1996 and 17.01.1997, through the said letters required details of the claim made by appellant.

4. Sometimes in January, 1997, appellant filed Civil Misc (Arbitration) Application No. 35 of 1997 for appointment of arbitrator under Section 11 (4) of the Act of 1996. This application was contested by the Railway authorities and a counter affidavit was filed, wherein it was stated in para 6 that a panel of arbitrator was appointed by the General Manager. After hearing the parties, this Court on 26.08.1998 appointed one Smt. Tanuja Pandey, as railway nominee and Sri O.P. Narang as the appellant's nominee, as arbitrators. The order further required that as per Clause 64 (3)(b), before entering into the reference two arbitrators were required to nominate an Umpire who shall be the Gazetted Officer and to whom the case may be referred in the event of any difference between the two arbitrators. It was on 05.10.1998 that both the arbitrators jointly agreed and appointed one Sri P.K. Sharma, Chief Engineer N.F. Railway, as Umpire. But a Civil Misc. (Arbitration) Application No. 47 of 1998 was filed by the appellant for complying the earlier order dated 26.08.1998 for appointment of an Umpire by the two arbitrators so appointed. In the counter affidavit filed by Railways, it was stated that both the arbitrators have jointly agreed for name of Sri P.K. Sharma. This Court on 01.11.1999 disposed of the application approving the name of P.K. Sharma as the Umpire.

5. The Arbitral Tribunal entered into reference and statement of claim was filed by appellant on 06.01.1999, while statement of defence was filed by respondents Railway on 06.04.1999.

6. The appellant in the year 2000 filed a Civil Misc. Review/ Correction Application No. 101974 of 2000 in Arbitration Application no. 47 of 1998 with a prayer that the Umpire appointed by the Court may be treated as the presiding arbitrator of the Arbitral Tribunal in view of Act, 1996. This Court on 15.03.2002 allowed the application filed by appellant and held that the Umpire shall be treated as the presiding arbitrator of the Tribunal. It appears that on 24.04.2002, the presiding arbitrator, P.K. Sharma showed his unwillingness to act as a presiding arbitrator, thus, two arbitrators so appointed by this Court through letter dated

02.05.2000 informed the Registrar of this Court about refusal/ resignation of Sri P.K. Sharma and requested for nominating presiding arbitrator so that the proceedings can be resumed.

7. Meanwhile on 10.09.2002, appellant filed a Civil Misc. Modification Application No. 8 of 2002, with a prayer for modifying the earlier order of this Court dated 15.03.2002 for appointing another person as presiding arbitrator (not being a person belonging to Railway Department). This modification application was filed in the earlier Civil Misc. (Arbitration) Application No. 35 of 1997. But on 26.09.2003, the matter was placed before the then Chief Justice, who treated the modification application as application under Section 11 of the Act and appointed Mr. Justice H.N. Seth, a retired Chief Justice of this Court as the sole arbitrator, while the proceedings were pending before the earlier Arbitral Tribunal appointed by this Court on 26.08.1998.

8. The first arbitration meeting was held on 05.12.2003 before the sole arbitrator appointed on 26.09.2003, wherein the counsel for both the parties agreed that under order of Chief Justice constituting the Tribunal, appointment of two earlier arbitrators stands superseded and further agreed that respective statement of claim and defence already filed by the parties before previous arbitrators should form basis of adjudication in the present proceedings. Claimant was granted time until 02nd January, 2004 to file statement of claim, while respondents were granted time till 15th January, 2004 for filing statement of defence.

9. Both the parties filed their copies of statement of claim, defence and rejoinder, which were filed by them before previous arbitrators in the second meeting held before the sole arbitrator on 14.02.2004. Parties were given time to check and verify whether each of them has filed correct copies of documents and nothing has been omitted therefrom. It was made open to the parties to file additional documents for supporting their respective cases after serving the copies thereof on the other side, fixing 12.03.2004, as the next date.

10. In the third meeting held on 12.03.2004, claimant-appellant filed application of date praying that respondents be directed to supply copy of certain documents. On the said date, respondents agreed that they will furnish copies of bill, as far as Measurement Book (M.B's.) were concerned, it was stated that they are Railways internal records and there was no provision for giving copies thereof. After hearing the parties, the sole arbitrator directed the respondent-Railway to supply photo copy of M.Bs. It was further observed that parties had filed their respective statement of claim, defence and reply. As claimants had filed number of annexures as the record show, it had become necessary for the respondents to modify their statement of defence in the light of those annexures and were granted a month's time for this purpose.

11. On the next date i.e. 24.04.2004, respondents filed objections under Section 16 of the Act raising dispute to the effect that Tribunal has no jurisdiction to decide the claim. The arbitrator on 20.10.2004 rejected the preliminary objection regarding composition and constitution of the Tribunal on the ground of delay in raising the objections. The arbitrator, thereafter, proceeded and gave award on 21.02.2008. This award was put to

challenge through objections under Section 34 of the Act of 1996 before the District Judge, Allahabad, which was numbered as Arbitration Case No. 25 of 2008. The court below on 09.09.2013 set aside the award dated 21.02.2008 passed by Mr. Justice H.N. Seth, a former Chief Justice of this Court considering the objections filed by respondent- Railway under Section 34 of the Act.

12. Heard Sri Manish Goyal, learned Senior Counsel assisted by Sri Krishna Agrawal, learned counsel for the appellant and Sri Tarun Varma, along with Sri Anil Kumar, learned counsel for the respondents.

13. It is contended on behalf of appellant that the sole basis of order impugned is the ground under Section 34(2)(a)(v) of the Act, 1996 inasmuch as the District Judge recorded a conclusion to the effect that appointment of sole arbitrator by the Chief Justice was against the terms and conditions of the agreement entered into between the parties.

14. Sri Manish Goyal, learned Senior Counsel submitted that challenge under Section 35(2)(a)(v) was not available to the respondents as ground of challenge does not fulfill the ingredients of Section 34(2)(a)(v), and the District Judge completely overlooked the qualifying part of the said section and has not noticed the fact that parties derogated and such derogation was permissible under the law. He further submitted that agreement between the parties cannot be the sole criteria and appointment of sole arbitrator cannot be said to dehors the agreement of parties. Section 10 of the Act specifically prohibits appointment of even number of arbitrators, while agreement of the parties specifically provided for appointment of even number of arbitrators and it was only in case when the even number of arbitrators were divided in their opinion that the matter could have travelled to Umpire. This was squarely in violation of Section 10(1) of the Act, and under such circumstances, provisions of Section 10(2) of the Act will apply. This aspect was not dealt by the court below and, therefore, the application could not have been allowed merely on the ground of applying under Section 34(2)(a)(v) of the Act which was to be read along with other provisions of the Act that includes Section 4, Section 10 and Section 16 of the Act.

15. According to him, a fundamental error was committed by the court below in setting aside the award on the misconceived ground of Section 34(2)(a)(v) and the application could not have been entertained.

16. Reliance has been placed upon decision in case of ***Narayan Prasad Lohia vs Nikunj Kumar Lohia & Ors, AIR 2002 SC 1139*** (Para 16 and 19), and ***B.S.N.L. Ltd. vs. Motorola India (P. Ltd.), 2008 (12) SCALE 720*** (Para 18).

17. Secondly, it was submitted that challenge to jurisdiction of appointment of sole arbitrator stood waived by conduct of respondents and hence by virtue of Section 4 of the Act, respondents were not competent to challenge the jurisdiction of arbitrator. It was submitted that order of appointing the sole arbitrator was made on 26.09.2003 and against the said appointment, neither any appeal was filed nor any objection was raised while the sole arbitrator was being appointed by the then Chief Justice. As it is evident from proceedings before the sole arbitrator on

05.12.2003, 14.02.2004 and 12.03.2004 that the parties and their advocates have acquiesced to the jurisdiction of sole arbitrator and also acquiesced to the previous appointment of two arbitrators being superseded. The objection for the first time came up after order were passed on 12.03.2004, directing respondents to provide photo copies of M.Bs. relating to reinforcement of steel to the claimant which was an uncomfortable order for respondents that an objection was raised on 24.04.2004 relating to jurisdiction of the Tribunal.

18. This according to him, was an abuse of process on the part of respondents who is a State and is bound to act fairly. All these aspects have been dealt in extenso by sole arbitrator but no reason has been given by the court below (District Judge) for upsetting the finding so recorded. It was also submitted that statement of defence was already on record and the parties in their first meeting had accepted that the statement of claim and defence filed before the previous arbitrator should form basis of adjudication before the sole arbitrator and the arbitrator had granted time till 15th January, 2004 for submitting statement of defence.

19. As the second meeting was held on 14.02.2004, parties had filed statement of claim, defence and rejoinder, as such any objections in regard to challenge to jurisdiction in view of provisions contained in Section 16(2) of the Act could have been raised till that point of time but respondents-Railways filed objection on 24.04.2004 after the filing of statement of defence which was rightly repelled by the arbitrator on 20.10.2004. Thus, by legal fiction, waiver will come into play as contemplated by Section 4 of the Act and challenge to jurisdiction of Arbitral Tribunal stood waived by conduct of respondents. Reliance on this point of waiver has been made in case of ***Narayan Prasad Lohia*** (supra), ***Motorola India (P. Ltd.)*** (supra) and ***State of Orissa and others vs. Gokulananda Jena, (2003) 6 SCC 465*** (Paras 5, 6 and 7).

20. The third point canvassed by learned Senior Counsel was that the sole arbitrator rightly recorded finding while rejecting the objection of the respondents as to jurisdiction of Arbitral Tribunal, while the District Judge solely relying upon the decision of the Apex Court in the case of ***S.B.P. and Co. vs. M/s. Patel Engineering Ltd. and another, AIR 2006 SC 450,*** held that appointment of sole arbitrator could not have been challenged and the said judgment was prospective while the sole arbitrator was appointed in the year 2003 and only objections under Section 16(2) could have been made before the Arbitral Tribunal.

21. According to him, neither the points raised nor statutory provisions have been dealt by the court below and without appreciating the statutory scheme of Part-I of the Act, learned District Judge had proceeded to hold the appointment of sole arbitrator against the terms and conditions of the agreement. It was further contended that the court below misconstrued the provision and did not notice the fact that where technical qualifications are not mentioned in the arbitration clause, then the parties can derogate and under such circumstances, this Court rightly appointed a retired Judge as a sole arbitrator and the court below had not touched upon the impact of Section 10 or Section 4 of the Act.

22. Reliance has been placed upon decision in the case of ***Northern Eastern Railway and others vs. Tripple Engineering Works, 2014 (3) Arb. LR 327 (SC), Dakshin Shelters P. Ltd. vs. Geeta S. Jauhari, (2012) 5 SCC 152, Union of India vs. BESCO Ltd., AIR 2017 SC 1628*** and ***Bharat Wire Ropes Ltd. vs. Union of India and others, (2012) 5 ADJ 644.***

23. The next point canvassed by Sri Goyal was that the appointment of sole arbitrator and award pronounced by him have subserved the purpose of parties and this Court had rightly appointed a retired Judge as sole arbitrator instead of appointing presiding arbitrator, as the very purpose of Act of 1996 is to provide speedy remedy instead of formal process of litigation. It is designed to provide alternative dispute resolution and in order to achieve objective that different facets are to be weighed that, inter alia, include low cost, early disposal and convenience of parties, and these three facets are not exhaustive but illustrative.

24. According to him, what is to be made is that prejudice may not be caused to any of the parties and in the present case no single ground was taken in application under Section 34 by respondents that they suffered any prejudice in the decision making process of the sole arbitrator. The outcome may be their prejudice but that is how the law takes its own course. Further, there is no statement to the effect that arbitrator was biased or the decision making process stood invalidated by the conduct of arbitrator, thus, under such circumstances, proceedings before sole arbitrator subserved the purpose of arbitration and did not cause prejudice to either of the parties. Reliance on this issue has been placed upon decision in case of ***Abdul Gaffar vs. Sri Jaichandlal Ashok Kumar and Co. Pvt. Ltd. and another, JT (2000) 8 SC 152 and Citibank N.A. vs. TLC Marketing and another, (2008) 1 SCC 481.***

25. Sri Goyal then invited the attention of the Court to Section 23 of the Act which is statement of claim and defence. Sub-section (1) of Section 23 provides that within the period of time agreed upon between the parties or determined by Arbitral Tribunal, the claimants shall state the fact supporting his claim, the points at issue and relief or remedy sought, and the respondents shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

26. According to him, sole arbitrator on 05.12.2003 had granted time uptil 15th January, 2004 for filing statement of defence which was filed in the second meeting held on 14.02.2004 by respondents-Railways. Now, according to Section 16(2), plea regarding that Arbitral Tribuanl does not have jurisdiction shall be raised not later than the submissions of statement of defence, thus, Section 16(2) has to be read along with Section 23(1) of the Act, and in the present case objections challenging the very Arbitral Tribunal were raised by respondents on 24.04.2004 i.e in the fourth meeting, thus, the said objections were rightly rejected by the sole arbitrator.

27. While Section 25 provides for default of a party and Sub-section (b) of Section 25 is in regard to the respondent failing to file his statement of defence in accordance with Sub-section (1) of Section 23, in that case the Arbitral Tribunal shall continue the proceedings without treating

that failure in itself has an admission of the allegation by the claimant. Thus as the statement of defence, according to Sri Goyal was filed on 14.02.2004 and objections to the constitution of the Arbitral Tribunal was not filed as per provisions of Section 16(2), there is a default committed by the respondents which cannot be cured and Section 25(b) provides for the default in case of non filing of statement of defence by respondent, the same shall be treated as a default by respondents in not filing the objections as mandated in Section 16(2), at the time of filing of written statement.

28. Replying to the above arguments, Sri Tarun Varma, learned counsel appearing for respondents submitted that as per Clause 64(3)(a)(ii) of General Condition of Contract two arbitrators, who shall be the Gazetted Railway Officer of equal status, were to be appointed in manner laid down in Clause 64(3)(b), one from the Department side and other from the side of contractor, and the two arbitrators so nominated shall nominate an Umpire who shall also be Gazetted Railway Officer.

29. According to him, this Court on the Application No. 35 of 1997, on 26.08.1998 had appointed Smt. Tanuja Pandey from the side of respondents and Sri O.P. Narang, from the side of contractor-appellant, as arbitrator and by the same order, they were required to nominate an Umpire as provided in Clause 64(3)(b). As one P.K. Sharma was jointly agreed as an Umpire, this Court on 01.11.1999, accepted his nomination. It was on the correction application filed by appellant in the year 2000 that Sri P.K. Sharma was treated as presiding arbitrator of the Tribunal instead of an Umpire vide order dated 15.03.2002.

30. As Arbitral Tribunal had already entered into reference on 06.01.1999, presiding arbitrator showed his unwillingness to act, which was intimated to the Registrar of this Court on 02.05.2002. Simultaneously, a modification application was also moved by the appellant for appointment of presiding arbitrator which was dealt by the Chief Justice as an application under Section 11 and a new Arbitral Tribunal *de novo* was constituted, without superseding or terminating the mandate of the earlier Tribunal.

31. Sri Varma submitted that the Tribunal which was constituted by this Court on 26.08.1998 was still in existence as the proceedings before the same were not terminated, neither the order appointing sole arbitrator took note of the fact that earlier Arbitral Tribunal was in existence and order passed on 26.09.2003 superseded the earlier Arbitral Tribunal. It is also contended that neither there was any prayer in the modification application for terminating the Arbitral Tribunal nor for appointment of sole arbitrator and prayer was made only for appointment of presiding arbitrator not being an officer of Railway. As the earlier appointments of two arbitrators were in terms of Clause 64 of the GCC, fresh appointment made was against the agreement/ contract entered into between the parties.

32. Sri Varma submitted that appointment of the sole arbitrator made on 26.09.2003 could not be challenged in view of the law prevalent at that time as in case of ***Konkan Railway Corporation Ltd. and another vs. Rani Construction Pvt. Ltd., (2002) 2 SCC 388***, it was held by Apex Court that such an order was an administrative order.

33. He further submitted that on the first date before the sole arbitrator, consent

given by counsel as regards constitution of Tribunal of sole arbitrator is not binding on the Railways as held in the case of ***B.S. Bajwa vs. State of Punjab, (1998) 2 SCC 523***. As on that date appellants were directed to file claim by 2nd January, 2004 and respondents' statement of defence by 15th January, 2004. On 14.02.2004, which was the second date fixed before the sole arbitrator, the parties had filed their copies of statement of claim, defence and rejoinder which were filed by them before previous arbitrators and nothing new was filed and the sole arbitrator had granted time for verifying the documents filed by each of the parties and had also granted time to file additional documents for supporting their respective cases.

34. It was in the third meeting held on 12.03.2004 that claimant/ appellant had filed application requiring the respondents to file certain documents, wherein the sole arbitrator had directed the respondents to supply photo copies of M.B's. relating to reinforcement of steel to the claimant. The sole arbitrator had recorded in the said proceedings that claimant had filed number of annexures and thus respondents were granted liberty to modify their statement of defence in light of those annexures. On the next date fixed i.e. fourth meeting which was held on 24.04.2004, respondents had filed their objections under Section 16(2) and thus, there was no delay as the sole arbitrator had already granted time to modify their statement of defence, meaning thereby that statement of defence till that date was not complete.

35. He, next submitted that plea of waiver raised by appellant as mandated in Section 4 of the Act of 1996 cannot be attracted in the present case, as after the Arbitral Tribunal was constituted on 26.08.1998 by this Court in terms of agreement, there was no need to file objection as to jurisdiction. However, subsequently the Chief Justice on 26.09.2003 had appointed a retired Chief Justice of this Court as sole arbitrator against the agreement without terminating the mandate of the earlier Arbitral Tribunal, hence the Railways filed objection as to jurisdiction/ composition of Tribunal under Section 16 before the Arbitral Tribunal of sole arbitrator.

36. According to him, reliance placed on decision of ***B.S.N.L vs. Motorola India Pvt. Ltd.*** (supra) does not come to the rescue of appellant. He further submitted that proceedings before Arbitral Tribunal of Sri H.N. Seth was going on and no hearing had taken place, except exchange of pleadings and permitting respondents to rectify/ modify their defence statements, thus, no hearing commenced till 24.04.2004 nor defence statement filed by respondents had attained finality.

37. As far as Section 10 of the Act is concerned, he submitted that as agreement Clause 64 of General Condition of Contract provides for two arbitrators, who are to be nominated by both the parties (i.e Railway and Contractor) and the two appointed arbitrators were to nominate an Umpire, which was followed, while application under Section 11 of the appellant was decided on 26.08.1998. Reliance has been placed upon decision of the Apex Court in case of ***M.M.T.C. Limited vs. Sterlite Industries (India) Ltd., AIR 1997 SC 605.***

38. The third point canvassed by Sri Varma is that while appointing Arbitral Tribunal under Section 11, the Court cannot alter the terms of contract and cannot direct for appointing a sole

arbitrator in place of three arbitrators as provided in the agreement, as it would amount to altering the terms of agreement entered into between the parties.

39. Reliance has been placed upon decision of Apex Court in case of ***SVG Molasses Co. B.V. vs. Mysore Mercantile Co. Ltd. and others, 2007 (9) SCALE 89*** (Paras 12 and 15), ***Indian Oil Corporation Ltd. vs. Raja Transport (P) Ltd., MANU/SC/1502/2009*** and ***Antrix Corporation Ltd. vs. Devas Multimedia P. Ltd., (2014) 11 SCC 560.***

40. Referring to Sections 12 and 13 of the Act, respondents counsel submitted that it is no doubt true that arbitrators may be challenged on the ground of justifiable doubts, independence, impartiality and not possessing qualification. While Section 13 provides a party who intends to challenge arbitrator on the grounds mentioned in Section 12 within 15 days after becoming aware.

41. He contended that Respondent-Railways never challenged the arbitrator on the ground of justifiable doubts, independence, impartiality and qualification and their case was not covered under Sections 12 and 13 of the Act, which is also reflected from the order of sole arbitrator dated 20.10.2004 rejecting their objection. The case of respondents is solely against the composition of the Arbitral Tribunal and objection was filed under Section 16(2) of the Act.

42. According to him, the law prevailing at the time when order under Section 11 was passed that it was an administrative order in terms of the law laid down by the Apex Court in case of ***Konkan Railway Corporation Ltd.*** (supra) and no appeal would lie against such order and the decision of ***S.B.P. and Co.*** (supra) came subsequently thus, was not applicable at that time and the Apex Court in the case of ***Gokulananda Jena*** (supra) had already held that all the grounds of attack can very well be raised before the arbitrator as alternative remedy is available under the Act itself.

43. Reliance has also been been placed on a decision of Division Bench of this Court in case of ***Rail India Technical and Economic Services Ltd. vs. Vidyawati Construction Ltd.,*** Writ Petition No. 16445 of 2001, decided on 24.05.2001, wherein it was held that writ petition was not maintainable as any objection to be raised against the order of Chief Justice has to be raised under Section 16 of the Act.

44. It was then contended that Section 15 of the Act of 1996 provides that where a mandate of an arbitrator terminates, a substitute arbitrator shall be appointed. In the present case, as the presiding arbitrator P.K. Sharma resigned/ withdrawn, a substitute arbitrator could have been appointed as per Section 15(2) of the Act which was not done. Reliance has been placed upon a decision in case of ***National Highways Authority of India vs. Bumihiway DDB Ltd. (JV) and others., (2006) 10 SCC 763.***

45. The next point raised by learned counsel was that provisions of Section 34 of the Act clearly provides the grounds for setting aside Arbitral Award, wherein Section 34(2)(a)(v) itself provides that award may be set aside when the composition of Arbitral Tribunal is not in accordance with agreement. As a retired Chief Justice was appointed as the sole arbitrator against the terms of the

agreement, so this case squarely fell within the ambit of Section 34(2)(a)(v). As in the application filed under Section 34, answering respondents had requested that point raised as regards to the composition of Arbitral Tribunal be decided first as a preliminary issue, against which the appellant had filed objections and the court below after hearing the parties decided the objection on 09.09.2013. Reliance has been placed on decision of Apex Court in case of ***Lion Engineering Consultants vs. State of H.P. and others, 2018 (16) SCC 758.***

46. I have heard learned counsel for the parties and perused the material on record.

47. Before proceeding to decide the issue in hand, a glance of the General Condition of Contract (GCC) is necessary, which is extracted hereasunder:

"64. (1) ***Demand of arbitration. -*** *In the event of any dispute or difference between the parties here to as to the construction or operation of this contract, or the respective rights and liabilities of the parties, on any matter in question, dispute or difference on any account, or as to the withholding by the railway of any certificate to which the contractor may claim to be entitled to or if the Railway fails to make a decision within a reasonable time then and in any such case, but except in any of the excepted matters referred to in clause 63 of these conditions, the Contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference be referred to arbitration. Such demand for arbitration shall specify the matters which are in question dispute or difference and only such dispute or difference of which the demand has been made and no other shall be referred to arbitration.*

(2) ***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 to payable by the Railway shall be withheld on an account of such proceedings provided however shall be open for arbitrator or arbitrators to consider and decide whether or not such work should continue during arbitration proceedings.*

(3) (a) ***Arbitration****- Matter in question dispute or difference to be arbitrated upon shall be referred for decision to:-*

(I) A sole arbitrator who shall be General Manager or a nominated by him in that behalf in cases where the claim in question is below Rs. 300000/- and in cases where the issues involved not of a complicated nature. The General Manager, shall be the Sole Judge to decide whether or not the issues involved are of complicated nature.

(ii) Two Arbitrators, who shall be Gazetted Railway Officers equal status to be appointed in the manger laid down in claim 64(3)(b) for all claims of Rs. 300000/- and above and for all claim irrespective of the amount of value of such claims if the issue involved are of a complicated nature. The General Manager, shall be the sole Judge to decide whether the issues are of a complicated nature or not. In the event, of the two Arbitrators being divided in their opinion the matter under dispute will be referred to an Umpire to be appoint in the manner laid down in sub clause 3(b) for his decision.

3. (b) For the purpose of appointing two arbitrators as referred to in sub clause (a) (ii) above the Railway will send a panel of more then three names of

Gazetted Railway Officers of one or more depart of the Railway of the Contractor, who will be asked to suggested to the General Manager one name out of the list for appointment as the contractor/ nominee. The General Manager, while so appointing the Contractor/ nominee will also appoint a second arbitrator as the Railway nominee either from the panel or from outside the panel, ensuring that one of the two arbitrators so nominated is invariably from the accounts Department before entering upon the reference the two Arbitrator shall nominate an Umpire who shall be a Gazetted Railway Officer whom the case will be referred to in the event of any difference between the two arbitrators. Officers of the Junior Administrative grade of the Accounts Department of the Railway shall be considered as of equal status to the officers in the intermediate administrative grade of other department of the Railway for the purpose of appointment as arbitrators.

3. (c) If the sole arbitrator appointed under sub clause (a)(i) or one or both the arbitrators appointed under sub clause (b) above resigns his appointment/ resign their appointments or vacated his office/ vacate their offices or is/ are unable or unwilling to act for any reason whatsoever or dies/ die. The General Manager may appoint a new arbitrators to act in his/their place in accordance with the provisions of sub clause (a)(i) of sub clause (b) above as the case may be. Such arbitrator/ arbitrators, as the case may be shall be entitled to proceed with the reference from the stage at which it was left by the previous arbitrator/ arbitrators.

3. (d) The Arbitrator or Arbitrators or the Umpire shall have power to call for such evidence by way of affidavit or otherwise as the Arbitrator or Arbitrators or Umpire shall think proper, and it shall be the duty of the parties here to do or cause to be done all such things as may be necessary to enable the Arbitrator or Arbitrators or Umpire to make the award without any delay.

3. (e) It will be no objection that the person appointed as Arbitrator, Arbitrators, Umpire are Government servants and that in the course of their duties as Govt. servants they have expressed view on all or any of the matter in dispute.

3. (f) Subject as aforesaid, Arbitrator Act 1940 and the Rules there under and any statutory modification thereof shall apply to the Arbitration proceedings under this clause."

48. From the perusal of Clause 64(3)(a)(ii), two arbitrators who are Gazetted Railway Officers of equal status are to be appointed for claims of Rs. 3 lacs and above, and in case of difference of opinion, the matter is to be referred to Umpire in a manner laid down in sub clause 3(b). As it is not in dispute that it was on the application of the appellant filed before this Court for appointment of arbitrator in terms of the agreement under Clause 64(3)(b) of General Condition of Contract, that this Court on 26.08.1998 after hearing both the parties appointed Smt. Tanuja Pandey, arbitrator from the side of respondent-railway and Sri O.P. Narang as arbitrator from the side of appellant. The Court made clear that as per Clause 64(3)(b), before entering into arbitration, arbitrators were required to nominate an Umpire.

49. As record reveals that though both the arbitrators had agreed on the name of one P.K. Sharma as an Umpire, but the same was not conveyed to the appellant, as such another arbitration application no. 47

of 1998 was preferred for the appointment of Umpire. It was through counter affidavit that Railways brought on record name of Sri P.K. Sharma as an Umpire and Court on 01.11.1999 granted approval to his name and the application was disposed of finally.

50. It appears that in the arbitration application no. 47 of 1998, a review/ correction application was filed by the appellant for treating the Umpire, P.K. Sharma as presiding arbitrator of the Arbitral Tribunal as the new act envisages provision for presiding arbitrator and not Umpire. This Court on 15.03.2002 while allowing the application, directed that Sri P.K. Sharma be treated as presiding arbitrator of the Tribunal instead of Umpire. In the meantime, the arbitrators had already entered into the reference and appellant had filed their statement of claim on 06.01.1999 and statement of defence was filed by respondents-Railways on 06.04.1999

51. The two arbitrators, on 02.05.2000 apprised the Registrar of this Court that presiding arbitrator, P.K. Sharma was unable to act and in his place another presiding arbitrator be appointed.

52. Simultaneously, appellant also approached this Court through Civil Misc. Modification Application No. 8 of 2002 filed in earlier Arbitration Application No. 35 of 1997, with a prayer for modifying the order dated 15.03.2002 and appointing another person as presiding arbitrator (not being a person belonging to Railway Department). It appears that this modification application was placed before the then Chief Justice who on 26.09.2003, treating the modification application as a fresh application under Section 11 of the Act appointed one Mr. Justice H.N. Seth, a retired Chief Justice of this Court as the sole arbitrator. The order appointing sole arbitrator did not take care of the fact that earlier Arbitral Tribunal constituted by this Court on 26.08.1998 was already in existence and proceedings were going on, as both the parties had filed their statement of claim and defence under Section 23, and mandate of the earlier Tribunal was not terminated.

53. The contention of learned counsel for the appellant to the extent that the order states that considering facts and circumstances of the case, the Chief Justice proceeded to appoint the sole arbitrator, meaning thereby that the mandate of the earlier Tribunal stood terminated, cannot be accepted on two counts, firstly, that the order dated 26.09.2003 was passed on the modification application which was filed by appellant himself with a prayer for appointing a presiding arbitrator in place of P.K. Sharma, who till then was presiding and had showed his unwillingness to act further. Thus, the Court was very much aware of the fact that Arbitral Tribunal was already in existence and there was a limited prayer for substituting presiding arbitrator in place of P.K. Sharma. The procedure adopted by the Court was not correct as it could not have made any fresh appointment under Section 11 and only a presiding arbitrator could have been substituted, when the mandate of the earlier presiding arbitrator had come to an end.

54. Secondly, the order dated 26.09.2003, in fact, launched a fresh arbitration proceeding by substituting Arbitral Tribunal of a sole arbitrator *de novo* without terminating the mandate of the earlier Arbitral Tribunal constituted by this Court in the year 1998 and the statement of claim and defence had already

been moved by the parties. The only option which was left to the Chief Justice at that point of time was to have modified the order dated 15.03.2002 by substituting with a new presiding arbitrator or after termination of the earlier Arbitral Tribunal could have constituted a new Arbitral Tribunal.

55. In the case of ***SVG Molasses Co. B.V.*** (supra), the Apex Court held that the Court in exercise of its jurisdiction under Section 11(6) of the Act cannot sub-plant the agreement of the parties, as they had entered into arbitration agreement with their eyes wide open. Relevant Paras, 11, 12 and 15 are extracted hereasunder:-

"11. The 1996 Act envisages party autonomy. The constitution of the arbitral tribunal in the manner in which it is to be appointed concededly depends upon the type of substantive agreement. When the parties to the agreement are to nominate one arbitrator each on their behalf, the third arbitrator is appointed by the nominated arbitrators. It is not in dispute that Respondents herein have failed and/or neglected to appoint an arbitrator in terms of the arbitration agreement. A submission was made by the learned Counsel appearing on behalf of Respondents that they would face immense difficulties in proceeding before an arbitral tribunal at Amsterdam in Netherlands; but this Court in exercise of its jurisdiction under Section 11(6) of the 1996 Act cannot supplant the agreement of the parties. The parties entered into the Arbitration Agreement with their eyes wide open. They knew the terms thereof. This Court in exercise of its jurisdiction under Section 11(6) of the 1996 Act cannot alter the terms of the contract.

It is idle to contend that there is no arbitration clause. It is furthermore not in dispute that the applicant is a company carrying on business from Netherlands. The goods are also said to be of Iranian origin. It would, therefore, not be correct to say that the agreement does not fall within the scope of International Commercial Arbitration as defined in Section 2(1)(f) of the 1996 Act. The identity and location of the Petitioner being a foreign country would bring the case within the purview of International Commercial Arbitration.

12. In this case, we are not concerned as to whether any of the respondents has complied with his obligations under the contract or not, the same would fall for determination by the Arbitral Tribunal, nor are we concerned with under what circumstances the said agreement was entered into. The plea raised on behalf of the respondents that by shifting the scene of activity to the Netherlands would be getting undue advantage of situation to the Petitioner is again a matter wherewith we are not concerned at this stage. The law applicable to the agreement may be the Indian law but the same would not mean that the arbitration agreement is invalid. This Court cannot also direct appointment of a single Arbitrator in place of three Arbitrators or change the place of Arbitration as provided for in the agreement. The same would amount to alteration of terms of the agreement entered into by and between the parties. In terms of Section 11(6) of the 1996 Act, the Court would derive jurisdiction only when a person being a party to the Arbitration agreement fails to perform a function entrusted to it thereunder. It is, therefore, not possible to accede to the request of the learned Counsel for the Arbitrator.

*15. In **National Highways Authority of India and Anr. v. Bumihiway DDB Ltd. (JV) and Ors. MANU/SC/4201/2006 : (2006)10SCC763** , it was opined:*

44. The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong.

It is also not a case where Petitioner has waived its right under the arbitration agreement, as was the case of B.S.N.L. and Ors. v. Subhash Chandra Kanchan and Anr. MANU/SC/8490/2006 : AIR2006SC3335."

56. In ***Union of India vs. M.P. Gupta, 2004 LawSuit (SC) 139,*** the Apex Court held that in view of express provision contained, two Gazetted Railway Officers shall be appointed as the arbitrators, a Judge appointed by High Court was held to be invalidated. Relevant Paras 3 and 4 are extracted hereasunder:

"3. The relevant part of clause 64 runs as under:

"64. Demand for arbitration.- (3)(a)(ii) Two arbitrators who shall be gazetted railways officers of equal status to be appointed in the manner laid in clause 64(3)(b) for all claims of Rs. 5,00,000.00 (Rupees five lakhs) and above, and for all claims irrespective of the amount or value of such claim if the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues involved are of a complicated nature or not. In the event of the two arbitrators being undecided in their opinions, the matter under dispute will be referred to an umpire to be appointed in the manner laid down in sub-clause (3)(b) for his decision. (3)(a)(iii) it is a term of this contract that no person other than a gazetted railway officer should act as an arbitrator/ umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all."

4. In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P. K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints justice P.K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months. The appeal is allowed in part and to the extent indicated above. There shall be no order as to costs."

57. In ***Antrix Corporation Ltd.*** (supra), the Apex Court held that arbitration clause once invoked and an arbitrator having been appointed, the arbitration agreement could not have been invoked for second time. Relevant Para 31 is extracted hereasunder:-

" 31. The matter is not as complex as it seems and in our view, once the Arbitration Agreement had been invoked by Devas and a nominee Arbitrator had also been appointed by it, the Arbitration Agreement could not have been invoked for a second time by the Petitioner, which was fully aware of the appointment

made by the Respondent. It would lead to an anomalous state of affairs if the appointment of an Arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an Arbitrator. In our view, while the Petitioner was certainly entitled to challenge the appointment of the Arbitrator at the instance of Devas, it could not do so by way of an independent proceeding Under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an Arbitrator Under Section 11(6) of the 1996 Act, such appointment can be questioned Under Section 13 thereof. In a proceeding Under Section 11 of the 1996 Act, the Chief Justice cannot replace one Arbitrator already appointed in exercise of the Arbitration Agreement.

It may be noted that in case of ***Gesellschaft Fur Biotechnologische Forschun GMBH v. Kopran Laboratories Ltd. and Anr. [(2004) 13 SCC 630],*** *a learned Single Judge of the Bombay High Court, while hearing an appeal Under Section 8 of the 1996 Act, directed the claims/disputes of the parties to be referred to the sole arbitration of a retired Chief Justice with the venue at Bombay, despite the fact that under the Arbitration Agreement it had been indicated that any disputes, controversy or claim arising out of or in relation to the Agreement, would be settled by arbitration in accordance with the Rules of Reconciliation of the International Chamber of Commerce, Paris, with the venue of arbitration in Bombay, Maharashtra, India. This Court held that when there was a deviation from the methodology for appointment of an Arbitrator, it was incumbent on the part of the Chief Justice to assign reasons for such departure. "*

58. In **Grid Corporation of Orissa** (supra), Supreme Court held that once the Arbitral Tribunal was constituted, no ground arose for the application to be entertained under Section 11 for appointment of arbitrator. Relevant Para 25 is extracted hereasunder:-

"25. In ***Konkan Railway Corporation Ltd. and Ors.*** *(supra) it has been held (vide para 21) that in spite of an appointment having been made by the Chief Justice or his designate an objection as to the constitution of the arbitral tribunal being improper or without jurisdiction is capable of being raised before the arbitral tribunal itself under Section 16 of the Act, for an objection not only as to the width of jurisdiction but also one going to the very root of its jurisdiction is entertainable by the arbitral tribunal under Section 16. That being so assuming without holding that there is any substance in the plea of the petitions it is open for them to raise the same before the arbitral tribunal. Once the arbitral tribunal has come into existence, as it has - in my opinion in the facts and circumstances of the case a petition under Section 11(6) of the Act is not an appropriate remedy which the petitioners have chosen. None of the grounds contemplated by Clauses (a), (b) and (c) of Sub-section (6) of Section 11 exists. There is no deficiency in the constitution the arbitral tribunal attributable to any of the parties or the arbitrators. There is no occasion for filing a request petition under Section 11(6) of the Act. "*

59. In ***Baghel Infrastructure Pvt. Ltd. vs. N.T.P.C. Ltd. and three others,*** this Court on 10.11.2014, while deciding arbitration and conciliation application no. 37 of 2014, relying upon the various decisions of the Apex Court held that arbitrator already appointed as per terms

and conditions of the agreement, then application moved under Section 11 to terminate the mandate of the earlier arbitrator is misconceived and not maintainable.

60. In the case of ***National Highways Authority of India and others*** (supra), after fully understanding the importance of arbitration agreement so agreed between the parties, held that there cannot be any deviation. Relevant Para 29 is extracted hereasunder:-

"29. As rightly pointed out by the appellants, the High Court failed to appreciate that in accordance with Section 15(2) of the Act on the termination of the mandate of the Presiding Arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus only respondent No. 2 was authorized to make the appointment. Unless respondent No. 2 failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act. Respondent No. 1 has wrongly invoked the jurisdiction of this Court without first following the procedure agreed to between the parties. Thus no cause of action had arisen in the facts of the case to seek the appointment from the High Court under Section 11(6) of the Act and thus the said petition was premature. The High Court also is not correct in relying on the contention of the respondent No. 1 that in case one of the arbitrators is retired Chief Justice, the Presiding Arbitrator should be at least a retired Chief Justice or a retired Judge of a High Court with considerable experience. It was submitted by learned Solicitor General appearing for the appellants that the said finding of the High Court is self contradictory inasmuch as if the Presiding Arbitrator is a retired Judge of the High Court and one of the arbitrators is a retired Chief Justice of the High Court, the member of hierarchy is upset. Even otherwise, there does not exist any such provision in law which requires that if one of the arbitrators is a retired Judge the Presiding Arbitrator also has to be a retired Judge. The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong. "

61. Thus, the very appointment made on 26.09.2003, ignoring the earlier Arbitral Tribunal constituted on 26.08.1998 and without terminating the mandate of the arbitrators who were appointed in terms of the agreement between the parties, was against the law laid down by the Apex Court, and the argument of the appellant that the earlier appointment of Arbitral Tribunal stood terminated once the Arbitral Tribunal consisting of sole arbitrator was appointed in the year 2003, cannot be accepted as the only application made by appellant was for substitution of presiding arbitrator in place of P.K. Sharma.

62. Thus, the finding recorded by court below on the objections filed under Section 34 is correct that the Court cannot go beyond the terms of agreement when there is a specially procedure laid down for the appointment of arbitrators.

63. Argument of Sri Goyal, learned Senior Counsel that the court below had not noticed the fact that parties derogated and such derogation was permissible under the

law, cannot be accepted as the agreement Clause 64(3)(b) categorically provides for the appointment of two arbitrators, one from each side and two arbitrators to nominate an Umpire. As it is not in dispute in the present case that the appellant had approached this Court for invocation of the agreement Clause 64(3)(b), and Court had appointed two gazetted officers from the panel of Railways, one from the side of the appellant and other from the respondents' side, further, they were required to nominate an Umpire within a month. The appellant moved second application no. 47 of 1998 for the appointment of Umpire and agreed on the name of P.K. Sharma, who was to conduct as an Umpire and the Court approved his candidature vide order dated 01.11.1999.

64. Thereafter, it was on the application of appellant that designation of Sri P.K. Sharma, Umpire was changed/ modified to presiding arbitrator on 15.03.2002. Thus, the appellant cannot blow hot and cold at the same time, as it was on his application that the Court had appointed two arbitrators as well as presiding arbitrators who were conducting the arbitration and constituted Arbitral Tribunal of three persons. As both the parties in the year 1999 itself had submitted themselves to the Arbitral Tribunal and had filed their statement of claim and defence, thus, no question of Section 10 of the Act arises as the parties are bound by their agreement and the Court had appointed the arbitrators in pursuance to Clause 64(3)(b) and there was no violation of provisions of Section 10(1) of the Act and Section 10(2) does not come into play.

65. As the Apex Court had already ruled in case of ***SVG Molasses Co. B.V***.(supra) that Court cannot alter the terms of contract/ agreement. Similarly, in ***M.M.T.C. Ltd.*** (supra) held that two arbitrators appointed shall appoint an Umpire before proceeding with the reference and there was nothing in the new Act to make such agreement unenforceable. Relevant Paras 11, 12 and 13 are extracted hereasunder:-

"11. The arbitration clause provides that each party shall nominate one arbitrator and the two arbitrators shall then appoint an umpire before proceeding with the reference. The arbitration agreement is valid as it satisfies the requirement of Section 7 of the New Act. Section 11(3) requires the two arbitrators to appoint the third arbitrator or the umpire. There can be no doubt that the arbitration agreement in the present case accords with the implied condition contained in para 2 of the First Schedule to the Arbitration Act, 1940 requiring the two arbitrators, one each appointed by the two sides, to appoint an umpire not later than one month from the latest date of their respective appointment.

12. The question is: whether there is anything in the New Act to make such an agreement unenforceable? We do not find any such indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of Sub-section (1) of Section 10 is satisfied and Sub-section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Section 7 of the Act and, therefore is a valid arbitration agreement. The appointment of arbitrators must,

therefore, be governed by Section 11 of the New Act.

13. In view of the fact that each of the two parties have appointed their own arbitrators, namely, Justice M.N. Chandurkar (Retd.) and Justice S.P. Sapra (Retd.), Section 11(3) was attracted and the two appointed arbitrators were required to appoint a third arbitrator to act as the presiding arbitrator, failing which the Chief Justice of the High Court or any person or institution designated by him would be required to appoint the third arbitrator as required by Section 11(4)(b) of the New Act. Since the procedure prescribed in Section 11(3) has not been followed the further consequence provided in Section 11 must follow. "

66. Reliance placed by the appellant on the decision of ***Narayan Prasad Lohia*** (supra), does not help him much, as in the said case two arbitrators had arbitrated and the award was challenged on this ground, but in the present case the General Condition of Contract in Clause 64(3)(b) provided for the two arbitrators, one from each side who were to nominate an Umpire. However, relevant Paras 5, 14, 16 and 19 of the said judgment are extracted hereasunder:-

"5. On 22nd December, 1997 the 1st Respondent filed an Application in the Calcutta High Court for setting aside the Award dated 6th October, 1996. On 17th January, 1998 the 2nd Respondent filed an Application for setting aside this Award. One of the grounds, in both these applications, was that the Arbitration was by two Arbitrators whereas under the Arbitration and Conciliation Act, 1996 (hereinafter called the said Act) there cannot be an even number of arbitrators. It was contended that an arbitration by two arbitrators was against the statutory provision of the said Act and therefore void and invalid. It was contended that consequently the Award was unenforceable and not binding on the parties. These contentions found favour with a single Judge of the Calcutta High Court who set aside the Award on 17th November, 1998. On 18th May, 2000 the Appeal was also dismissed. Hence this Appeal to this Court.

14. We have heard the parties at length./ We have considered the submissions. Undoubtedly, Section 10 provides that the number of arbitrators shall not be an even number. The question still remains whether Section 10 is a Non-derivable provision. In our view the answer to this question would depend on question as to whether, under the said Act, a party has a right to object to the composition of the arbitral tribunal, if such composition is not in accordance with the said Act and if so at what stage. It must be remembered that arbitration is a creature of an agreement. There can be no arbitration unless there is an arbitration agreement in writing between the parties.

16. It has been held by a Constitution Bench of this Court, in the case of Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd. MANU/SC/0053/2002 : [2002]1SCR728 that Section 16 enables the arbitral tribunal to rule on its own jurisdiction. It has been held that under Section 16 the arbitral tribunal can rule on any objection with respect to existence or validity of the arbitration agreement. It is held that the arbitral tribunals authority under Section 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but we are in respectful agreement with the same. Thus it is no longer open to contend that, under

Section 16, party cannot challenge the composition of the arbitral tribunal before the arbitral tribunal itself. Such a challenge must betaken, under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if he so choose, not to raise such a challenge. Thus a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the arbitral tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4. Thus, we are unable to accept the submission that Section 10 is a Non-derivable provision. In our view Section 10 has to be read along with Section 16 and is, therefore a derogable provision.

19. In our view, Section 34(2)(a)(v) cannot be read in the manner as suggested. Section 34(2)(a)(v) only applies if "the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties". These opening words make it very clear that if the composition of the arbitral tribunal or the arbitral procedure is in accordance with the agreement of the parties, as in this case, then there can be no challenge under this provision. The question of "unless such agreement as in conflict with the provisions of this Act" would only arise if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties. When the composition or the procedure is not in accordance with the agreement of the parties then the parties get aright to challenge the award. But even in such a case the right to challenge the award is restricted. The challenge can only be provided the agreement of the parties is in conflict with a provision of Part I which the parties cannot derogate. In other words, even if the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the said Act, then the party cannot challenge the award. The words "failing such agreement" have reference to an agreement providing for the composition of the arbitral tribunal or the arbitral procedure. They would come into play only if there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure. If there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure and the composition of the arbitral tribunal or the arbitral procedure was not in accordance with Part I of the said Act then also a challenge to the award would be available. Thus so long as the composition of the arbitral tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the arbitral tribunal was in conflict with the provisions of Part I of the said Act. This also indicates that Section 10 is a derogable provision. "

67. Similarly, reliance placed upon judgment of Apex Court in case of ***Motorola India Pvt. Ltd.*** (supra) is also of no help to appellant. Relevant Para 18 is extracted hereasunder:-

"18. Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a

party who knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellant. At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellant had not raised any such objections. The appellant therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived."

68. The second ground raised on behalf of the appellant as to waiver by conduct of respondents in not challenging the order constituting the Arbitral Tribunal of sole arbitrator stood waived by virtue of Section 4 of the Act, cannot be accepted, as the law prevalent at that time was that it was an administrative order and the remedy available was by filing objections before the Tribunal, the judgment rendered by Apex Court in case of ***S.B.P. and Co.*** (supra) was delivered on 26.10.2005, which provided that appointment of arbitrator/ Arbitral Triubnal by designated authority was a judicial order. Till that date, the law prevalent was that such an order was an administrative order in view of ***Konkan Railway Corporation Ltd.*** (supra).

69. Argument raised by appellant as to respondents having acquiesced to jurisdiction of the sole arbitrator and their right stood extinguished, cannot be accepted, as the consent before the sole arbitrator will not amount to termination of mandate of Arbitral Tribunal constituted on 26.08.1998 in terms of the agreement executed between the parties. Moreover, time was granted on 12.03.2004 for amending the statement of defence, thus pleadings before sole arbitrator were not complete and the objection filed under Section 16(2) was within the time frame as mandated.

70. The Supreme Court in case of ***Motorola India Pvt. Ltd.*** (supra) had held that the objections were to be raised before the first date of hearing. In the present case, no hearing had taken place and only the exchange of documents were being made between the parties. In ***Gokulananda Jena,*** the Apex Court had held that grounds available for challenge in writ petition under Article 226 of the Constitution is limited because of alternative remedy available under the Act itself, which is provided in Section 16 read with Sections 12 and 13 of the Act.

71. Coming to the next point raised by appellant that as no technical qualification of arbitrators were mentioned in the arbitration clause, then the parties can derogate and appointment of a retired Judge subsequently by the Court as sole arbitrator was justified and the court below had not touched upon the impact of Section 10 or 4 of the Act.

72. Decision in case of ***Tripple Engineering Works*** (supra) relied upon is distinguishable in the present case as in the said case, arbitration could not commence, as in the year 2002 the Northern Eastern Railway which had entered into contract with the contractor, was bifurcated into Northern Eastern Railway and East Central Railway and despite the agreement of year 1994, no arbitrator was appointed and the Court found that a period of two decades

has elapsed since the contractor had raised his claim for alleged wrongful termination of two contracts. As it is evident in the present case that arbitration clause was invoked in the year 1997, on 26.08.1998 two arbitrators were appointed, while Arbitral Tribunal had already entered into reference in the year 1999 itself. Decision in the case of ***Dakshin Shelters P. Ltd.*** (supra) is also of no help to the appellant as the arbitrators were already appointed by the Court on 26.08.1998.

73. In the case of ***BESCO Ltd.*** (supra), the Court while appointing an arbitrator not being a railway officer was in terms of General Conditions and Special Conditions of Contract which did not provide specific railway officer while in the present case the General Condition of Contract, Clause 64(3)(b) provided for two gazetted railway officers, one from the side of appellant and other from the side of Railway and this Court on 26.08.1998 had appointed two arbitrators, who therein had chosen a presiding arbitrator which had the stamp of this Court on 01.11.1999, thus, no question arose for forming a fresh Arbitral Tribunal without terminating the mandate of the earlier one. Reliance placed on the decisions are totally distinguishable to the facts of the present case.

74. In ***Bharat Wire Ropes Ltd.*** (supra), the Court deviated from the agreement from appointing any gazetted railway officer as no name as contemplated by agreement came forward from either side. While in the present controversy, the Court invoking an agreement Clause 64(3)(b) on 26.08.1998, had already appointed two gazetted officers from the panel, as agreed by the parties, thus, this case is totally distinguishable in facts of the present case.

75. In ***Aargee Engineers and Co. and another vs. Era Infra Engineering Ltd. and others, (2017) 4 ADJ 513,*** this Court while deviating from the agreement, appointed arbitrator as the main arbitrator failed to act but in the present case it was not such a case and the Arbitral Tribunal was already in existence and only presiding arbitrator was to be substituted. Reliance placed in case of ***Basai Steels Pvt. Ltd. vs. Gobins India Engineering Pvt. Ltd. and another, 2018 (5) Arb. LR 480(Karn.) (DB)*** is not applicable in the present case.

76. Thus, it is clear that when agreement itself provides for arbitrators who are gazetted railway officer, then no question arises to derogate from the said arbitration clause and appoint a retired Judge. The law on this point is clear that no derogation in the appointment of arbitrator can be made where the clause specifically provides for certain persons to be appointed as arbitrator.

77. Now, coming to the next point as to the award made by sole arbitrator which could sub-serve the purpose of parties and whether the Court had rightly appointed a retired Judge instead of appointing a presiding arbitrator on the application moved by appellant for modification of order dated 15.03.2002. No doubt it is true that Act provides for speedy remedy for disposal of dispute between the parties, but that does not give any room for bypassing the procedure laid down in the Act itself.

78. As the Arbitration is creature of agreement, the parties cannot be allowed to deviate from the same where the agreement is a valid agreement as per Section 7 of the Act.

79. As it was never a case of the respondents that they had suffered any

prejudice in the decision making process of the sole arbitrator, nor they had raised any bias against him and the only objection was to the composition of the Arbitral Tribunal, which was not in accordance as this Court had already constituted the Arbitral Tribunal in the year 1998 itself in pursuance of the agreement executed between the parties, thus, the argument raised that respondents not having raised any bias against the sole arbitrator nor the court below recording any finding, the award so made could not be set aside, cannot be accepted in the facts of the present case, as the constitution of the Tribunal is a very genesis of the dispute and the same having been raised by respondents within time, the arbitrator should not have proceeded and gave his award and the court below had rightly allowed the objections filed under Section 34.

80. Decisions rendered in ***Abdul Gaffar*** (supra) and ***Citibank N.A.*** (supra) are not applicable in the present dispute as this Court had already invoked the arbitration Clause 64(3)(b) on 26.08.1998 and appointed two arbitrators who were to appoint an Umpire.

81. As far as, argument regarding filing of statement of claim and defence under Section 23(1) read with Section 16(2), argument of Sri Goyal that objections under Section 16(2) cannot be filed later than submission of statement of defence is what the Act mandates. Now the question in the present case is the date on which statement of defence was filed by respondents-railways.

82. As it is not in dispute that before the earlier Tribunal, the statement of claim was filed by the appellant on 06.01.1999, while statement of defence was filed on 06.04.1999. These claims were agreed to be filed before the subsequent Arbitral Tribunal constituted on 26.09.2003, and on 05.12.2003, arbitrator had granted time till 15th January for filing the same. On 02.01.2004, arbitrator through his letter had extended that time for filing statement of defence till 05.02.2004. Proceedings of the second meeting, held on 14.04.2004, indicate that the copies of statement of claim, defence and rejoinder, which were filed before the previous arbitrators were filed before the subsequent Arbitral Tribunal, and parties were granted time to check and verify, and further time was granted for filing additional documents. Proceedings of third meeting dated 12.03.2004 indicates that appellant had required certain documents from the respondents and they were directed by arbitrator to provide the necessary copies and further time was granted to respondents to modify their statement of defence, as claimants had filed number of annexures before the arbitrator.

83. Thus, statement of claim and defence was not complete as the arbitral proceedings had started *de novo* before the second Arbitral Tribunal constituted by the Court, documents were being placed before the arbitrator and time was granted for amending their claims. It was on 24.04.2004 when objection was raised regarding composition of Arbitral Tribunal by respondents, thus, it cannot be said that time for filing of statement of defence had closed, as in the previous meeting, time was granted for amending the statement of defence, meaning thereby that statement of defence from the side of respondents was not complete.

84. In ***Motorola India Pvt. Ltd.*** (supra), objections were not raised before the first date of hearing and the Hon'ble Supreme Court was of the view that such

objections cannot be sustained, while in the present case, the stage of filing of statement of defence was not over as mandated in Section 16(2). Moreover, later part of Sub-section (2) of Section 16 provides that a party shall not be precluded from raising plea that Arbitral Tribunal does not have jurisdiction merely because he has appointed or participated in the appointment of arbitrator. Thus, the right of respondents does not stand closed in view of fact that it had appeared and participated when the matter was heard on 26.09.2003, as the right of the respondents is preserved by this statutory provision for raising objection.

85. Considering the facts and circumstances of the case, I find that the Tribunal constituted on 26.09.2003, consisting of sole arbitrator was without terminating the mandate of the earlier Tribunal, constituted by the Court on 26.08.1998, and by the consent of the parties before arbitrator, the mandate of the said Tribunal could not have been terminated and the arbitrator on 05.12.2003 wrongly assumed his jurisdiction and noted down that earlier Tribunal stood superseded in view of consensus made by learned counsel for the parties.

86. Furthermore, as the statements of claim and defence were being finalised between the parties before the subsequent arbitrator, the objections had come up from the respondents' side on 24.04.2004, which cannot be said to be beyond the period prescribed under Section 16(2), as till date the arbitrator himself had kept it open and had granted the opportunity to respondents to modify their statement of defence and in case respondents had not filed their objections on 24.04.2004, and had modified their statement of defence then, question of delay would have arisen.

87. No question of waiver in view of Section 4 arises on the part of respondents as they had never objected to the earlier Arbitral Tribunal and it was after 26.09.2003 when arbitration proceeded *de novo*, then before finalisation of statement of defence, statutory objections under Sub-section (2) of Section 16 were moved questioning the composition of Arbitral Tribunal.

88. Question of derogation does not arise as the agreement between the parties binds them and arbitration being creature of agreement, such derogation is not permissible under the law. Clause 64(3)(b) of the agreement provided for the composition of the Arbitral Tribunal of two arbitrators, who were to appoint an Umpire. As appointment of two arbitrators were made in pursuance to the order of this Court on 26.08.1998 and subsequently an Umpire was appointed on 01.11.1999, the court below rightly repelled the argument of derogation and further, no violation of Section 10(1) of the Act arises and appointment of *de novo* Arbitral Tribunal on the basis of Section 10(2) of the Act, cannot be justified.

89. Appointment of Arbitral Tribunal had been made as per the agreement clause invoked by the appellant before this Court in the year 1997, and constituting fresh Arbitral Tribunal without replacing the earlier Tribunal or terminating its mandate, was against the agreement entered into between the parties, as well as there being no dispute either between the parties to the very constitution of the Arbitral Tribunal in the year 1998. Simply, on the basis of

modification application that fresh Arbitral Tribunal was constituted without taking note of the earlier proceedings.

90. The court below rightly after hearing and considering the objections under Section 34 of the respondents as well as the reply of appellant, set aside the arbitral award dated 21.02.2008.

91. No interference is required in the order dated 09.09.2013 passed by court below, the appeal is devoid of merits and is hereby ***dismissed***.

92. However, parties to bear their own costs.

(2021)01ILR A250
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2020

BEFORE

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

FAFO No.- 3352 of 2016

Smt. Sarita & Ors. ...Appellants/Claimants
Versus
Ankit Kumar & Ors.
...Respondents/Opposite Parties

Counsel for the Appellants:
Sri Vijay Prakash Mishra

Counsel for the Respondents:
Sri Baleshwar Chaturvedi, Sri Rahul Sahai, Sri Saurabh Srivastava

A. Civil Law - Motor Vehicles Act (59 of 1988)- Section 166 - Compensation - Determination - Future Loss of Income/ Future prospects - Compassionate Appointment - compassionate appointment of legal heir would not preclude the family from getting the amount under future loss of income (Para 7)

B. Civil Law - Motor Vehicles Act (59 of 1988) – Section 166 - Compensation - Death claim - Income of deceased Rs.17,885/- p.m. - deduction towards personal expenses of the deceased 1/3rd of income - Multiplier of 15 - Amount under non pecuniary heads : Rs.1,00,000/- Total compensation Rs. 33,19,300/- awarded with interest @ 7.5% p.a. from the date of filing of the claim petition till the amount is deposited. (Para 10, 12)

Partly Allowed. (E-4)

List of Cases cited :-

1. Sarla Verma Vs Delhi Transport Corporation (2009) 6 SCC 121

2. National Insurance Company Ltd. Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 1050

3. Vimal Kanwar & ors. Vs Kishore Dan & ors. 2013 ACJ 1441

4. The New India Assurance Company Ltd. Vs. Hoti Lal & anr. F.A.F.O. No. 1302 of 2006, dated 31.1.2018

5. National Insurance Co. Ltd. Vs Mannat Johat & ors. 2019(2)TAC705 (S.C.)

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

1. Heard Sri Vijay Prakash Mishra, learned counsel for the appellants and Sri Saurabh Srivastava, learned counsel for the respondent-Insurance Company.

2. Facts giving rise to this appeal in narrow compass is that on 5.11.2014,

husband of appellant no.1, namely, Sarita along with her brother, namely, Pravin riding on his motorcycle bearing Registration No. DL7SBW 8095 was going to his village Asawar, Police Station Gulawati from Delhi and when driver, namely, Ankit driving a van bearing Registration No. UP 16 BT 8799 rashly and negligently dashed the said motorcycle on account of which Raj Kumar sustained severe injuries. He was rushed to district hospital where he breathed his last.

3. The claimants (dependents of the deceased) approached the Motor Accident Claims Tribunal/Additional District Judge, Court No.9, Bulandshahr (hereinafter referred to as 'Tribunal' by way of filing M.A.C.P. No.174 of 2015 claiming compensation of Rs. 5,00,000/- and interest at the rate of 15%.

4. The Tribunal by way of impugned judgment and award dated 3.9.2016 awarded a sum of Rs.21,51,140/- as compensation with interest at the rate of 7% from the date of filing claim petition till date of payment. Being dissatisfied, the claimants filed present appeal challenging the said award.

5. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The Insurance Company has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

6. I have perused the Judgment and award impugned herein. Submissions of the learned counsel for the appellant as well as submissions of learned counsel for the respondent are heard at length and are considered.

7. The submissions of the learned counsel for the appellants as well as learned counsel for the respondent are heard at length and are considered. Learned Tribunal has evaluated that for the sum of Rs.2,00,000/- there would be no tax to be deducted then the Tribunal, he has total amount of income and deducts 10% as tax which it could not have done. The income of the deceased as calculated was Rs.17,885/- and that is

7. The income of deceased would be Rs.17,855/- minus tax to be deducted. The appellant does not seek enhancement of salary amount and restricts his claim to Rs.17,855/- as decided by the Tribunal. Learned counsel for the appellant submitted that The Tribunal has not granted any amount under the head of future loss of income in spite of the judgment of Apex Court rendered in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121.** Sri Saurabh Srivastava, learned counsel could not point out that Judgment of Sarla Verma (supra) and subsequent Judgment of Apex Court rendered in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050,** would not apply to the facts of this case. The Tribunal deducted 1/3rd of the income, i.e., Rs. 5,961/- towards personal expenses of the deceased, which, according to the appellants, should be 1/4th . The same is vehemently opposed by Sri Srivastava and this Court is also in agreement with the submission of Sri Srivastava that it cannot be 1/4th but 1/3rd only and, thus, the same is maintained. Multiplier of 15 is also in consonance with the decision rendered in Sarla Verma (**supra**) and Pranay Sethi (**supra**), which calls for no modification. As far as amount towards non-pecuniary damages are concerned, the Tribunal has awarded Rs.15,000/- which calls for interference as looking to the Judgment of Pranay Sethi (**supra**), it should be

Rs.70,000/- plus Rs.10,000/- for every year, hence, lump sum amount would be Rs.30,000/-, and, thus, consolidated amount towards it would come to total of Rs.1,00,000/-.

7. The learned Tribunal has evaluated that for the sum of Rs.2,00,000/-, there would be no tax deduction then the Tribunal considers total amount of income and deducts 10% as tax which could not have been done. Income of the deceased as calculated was Rs.17,885/- and that is how the Tribunal has considered the amount. However, the amount of Rs.17,885/- will have to be considered. The finding of fact of the Tribunal is that son of the deceased has been given employment and, therefore, there is no question of addition of future income. The Tribunal could not have done this. The reason is employment and the income in employment would be because of the service which the son would do. Compensation is for the loss of the deceased. The decision of the Tribunal on this aspect cannot sustain because the Apex Court in catena of decisions laid down that the appointment of legal heir would not preclude the family from getting the amount under future loss of income. I am supported in my view by the decisions, namely, **Vimal Kanwar & others versus Kishore Dan and others, 2013 ACJ 1441** and also in **F.A.F.O. No. 1302 of 2006, The New India Assurance Company Ltd. Vs. Hoti Lal and another,** decided on 31.1.2018. Non-addition of future loss of income cannot be made applicable. The Judgment of the Apex Court in K.R. Madhusudhan and others Vs. Administrative Officer and another, 2011 (4) SCC 689, lays down the principle for deciding future prospects of a salaried person which also nowhere suggests that on death of salaried person if family is benefited by way of retirement benefits or death benefits, the same should not be considered. Hence, the compensation would have to be recomputed.

7. Hence, thecompensation payable to the appellants in view of the decision of the Apex Court in **Pranay Sethi (Supra)** is computed herein below

i. Income: Rs.17,885/-

ii. Percentage towards future prospects :50% namely Rs.8942.5/-

iii. Total income : Rs. 17,885+ 8942.5= Rs.26827.5

iv. Income after deduction of 1/3th : Rs. 17,885/-

v. Annual income : Rs.17,885 x 12 = Rs.2,14,620/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.2,14,620 x 15 = Rs.32,19,300/-

viii. Amount under non pecuniary heads : Rs.1,00,000/-

ix. Total compensation : Rs. 33,19,300/-

8. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johat and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at

a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

9. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

10. The Tribunal be sent this order so that in future, it will remain vigilant while considering motor accident claims for death of a salaried person.

11. This Court is thankful to Sri Vijay Prakash Mishra and Sri Saurabh Srivastava, learned counsel for getting this old matter disposed of during this pandemic.

(2021)01ILR A253
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2017

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE RAJIV LOCHAN MEHROTRA, J.

Writ C No. 10518 of 2013

Raghubir Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Akhilesh Tripathi, Sri Shiv Kant Mishra

Counsel for the Respondents:
C.S.C., Sri G.P. Gupta, Sri Satyam Singh

(A) Civil Law - Land Acquisition Act, 1894 - Section 4 - Publication of preliminary notification and power of officers thereupon, Section 6 - Declaration that land is required for a public purpose , Section 11- A - period shall be which an award within made , Section 30(1) - Dispute as to apportionment , Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 - Section 24(2) - Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases.

Writ petition filed for declaring the impugned notifications under the Land Acquisition Act, 1894 to be invalid and to quash the consequential award given by the respondents - ground - entire proceedings shall be deemed to have been lapsed in terms of Section 11-A of the Land Acquisition Act, 1894 - amount of compensation as determined under the award has not been deposited in terms of Section 30(1) of the Land Acquisition Act, 1894 - consequential award also would be a nullity as the petitioner, even though having been dispossessed is entitled to regain the possession - identical notification - quashed by High Court - connected petitions upheld by the Apex Court. (Para - 2,3)

HELD:- No material so as to establish that the amount (compensation) has been deposited in the Court and has been disbursed to the petitioner under the award dated 31st October, 2002 . Consequently, the writ petition deserves to be allowed on the short ground of the proceedings having lapsed in terms of Section 24(2) of the 2013 Act. (Para -16)

Writ Petition allowed. (E-6)

List of Cases cited :-

1. Satendra Prasad Jain Vs St. of U.P. & ors. , AIR 1993 Volume 5 JT page-385

2. Delhi Development Authority Vs Sukhbir Singh & ors , (2016) 16 SCC 258

(Delivered by Hon'ble Amreshwar Pratap Singh, J. &
Hon'ble Rajiv Lochan Mehrotra, J.)

1. Heard Sri Akhilesh Tripathi, learned counsel for the petitioner, learned Standing Counsel for respondent nos. 1, 2 and 3 and Sri G.P. Gupta for the respondent no.4.

2. This writ petition has been filed praying for declaring the impugned notifications under the Land Acquisition Act, 1894 to be invalid and to quash the consequential award given by the respondents on the ground that the proceedings should be presumed to have lapsed in terms of Section 11-A of the Land Acquisition Act, 1894 and the consequential award also would be a nullity as the petitioner, even though having been dispossessed in the year 2007 is entitled to regain the possession as the very same notification has been quashed by the High Court by the judgment dated 8th September, 2010 in Writ Petition No. 41522 of 2007 as well as other connected petitions that has been upheld by the Apex Court as the special leave petition filed against the same has been dismissed on 2nd May, 2007. Copy of the said judgments are on record.

3. Learned counsel for the petitioner has invited the attention of the Court to the averments made in the supplementary affidavit and the supplementary rejoinder affidavit filed on behalf of the petitioner to contend that not only the acquisition is invalid on account of the aforesaid facts but also in view of the provisions of Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The entire proceedings shall be deemed to have been lapsed as the amount of compensation as determined under the award has not been deposited in terms of Section 30(1) of the Land Acquisition Act, 1894.

4. Thus a two fold argument has been advanced, firstly that the acquisition proceedings have already lapsed and since identical notification has been quashed, the writ petition deserves to be allowed and alternatively applying the provisions of 2013 Act, even if the acquisition subsists, the same shall be deemed to have lapsed as no compensation has been deposited, keeping in view, the law laid down in the case of ***Delhi Development Authority Vs. Sukhbir Singh & Ors*** reported in ***(2016) 16 SCC 258.***

5. Replying to the aforesaid submissions, learned counsel for the state and the learned counsel for the U.P.S.I.D.C. have both urged that the petitioner cannot question the proceedings of acquisition inasmuch as he had earlier filed a writ petition being Writ Petition No. 62263 of 2006 that was dismissed as withdrawn and a restoration application filed for restoring the said petition has also been rejected. Attention has been invited to the said orders dated 28.08.2008 and 29.04.2011.

6. Sri G.P. Gupta, further contends that even assuming for the sake of argument, that the possession was taken in the year 2007, even though on facts he has disputed the same and urged that possession had been taken on 23rd March,

1990, then to even keeping in view the law laid down in the case of ***Satendra Prasad Jain Vs. State of U.P. and others AIR 1993 Volume 5 JT page-385,*** once the land has been vested in the State free from all encumbrances then the issue of lapse does not arise and admittedly, the possession having been taken and handed over to the U.P.S.I.D.C., there is no occasion to grant the relief of quashing the acquisition proceedings or even otherwise interfering with the same in any manner whatsoever. He, therefore, submits that the acquisition cannot be annulled at this stage looking to the the facts of the case and consequently the writ petition deserves to be dismissed.

7. We have gone through the records and the pleadings. We find that the notification under Section 4 took place on 17th August, 1985 followed by the notification under Section 6 on 30th of March 1988. An award was delivered thereafter and compensation was also disbursed. The fact remains that the petitioner was also awarded the compensation who received the same, yet since the respondents were of the opinion that the acquisition has not resulted into the fulfilment of the purpose, therefore, they called upon the petitioner to refund the compensation amount. Since, the petitioner did not refund the amount a recovery certificate was issued and on non payment and non satisfaction of the said recovery amount, the petitioner was also sent behind bars and had to suffer civil imprisonment, whereafter he refunded the amount.

8. The aforesaid peculiar fact has been stated only with a view to point out that this acquisition proceedings had been intervened by a refund at the instance of the state itself, where the petitioner had to suffer imprisonment as well without there being any de-notification of the acquisition proceedings.

9. It so happened that the respondents again proceeded with the acquisition proceedings on the basis of the same notification and delivered a fresh award on 31st October, 2002. It is evident that this award came to be delivered with a finding that possession had been taken on 23rd March, 1990. It is this fact which has been disputed by the petitioner contending that the possession has been taken in the year 2007 and not in 1990 inasmuch as the respondents themselves have admitted not having utilized the land rather they had compelled the petitioner to refund the amount in the circumstances indicated above.

10. The newly awarded amount under the award dated 31st October, 2007, admittedly has not been deposited in any Court nor is it the case of the respondent that in compliance thereof the compensation has been disbursed to the petitioner. However, Sri G.P. Gupta submits that approximately, 95% of the tenure holders have received the compensation amount in relation to the acquisition in question.

11. At this stage, it is relevant to point out that the acquisition proceedings were challenged by the Ram Avtar and other co-tenure holders and these writ petitions were finally allowed on 8th September, 2010 holding that in view of the lapse of the period between the notifications and the award, the provisions of Section 11(A) of the 1894 Act were clearly attracted. The acquisition proceedings in respect of all the petitioners therein were therefore declared to have lapsed.

12. Against the aforesaid judgment of the High Court the U.P. State Industrial Corporation namely the 4th respondent herein filed a special leave to appeal no. 7422 of 2011, and the appeal was dismissed by the judgment dated 2nd May, 2011. The judgment also refers to a consideration of the judgment in the case of Satendra Prasad Jain and others **(supra).**

13. The position, therefore, that emerges is that in respect of other tenure holders the proceedings were treated to have lapsed on the ground that possession had not been taken under Section 11-A of the Act.

14. The distinction which is sought to be raised and pointed out in the present case by the learned counsel for the respondent is that in the instant case, admittedly the possession had been taken in the year 2007.

15. In our considered opinion, even if it is assumed that taking over of such possession disentitles the petitioner from any previous relief as granted to similarly situated tenure holders under the judgment referred to hereinabove, the question still remains as to whether the amount of compensation awarded under the award dated 31st October, 2002 has been deposited in terms of 1894 Act, before the concerned court or not. This is necessary inasmuch as as on date if the acquisition proceedings against the petitioner have already taken place and possession had been taken, the fact remains that under sub Section 2 of Section 24, the petitioner still has a ground made out for interference if the amount of compensation has not been deposited before the court concerned.

16. On a perusal of the affidavits on record and the averments that have been made in the respective affidavits. There is no material so as to establish that the amount has been deposited in the Court and has been disbursed to the petitioner under the award dated 31st October, 2002. To the contrary, the supplementary affidavit filed by the petitioner categorically states that after the judgment delivered by the Apex Court in respect of other co-tenure holders as referred to hereinabove, the name of the respondent no.4 has already been expunged and that all the tenure holders including the present petitioner has been restored. The situation, therefore, that emerges is that even if the petitioner had been dispossessed in the year 2007, the fact remains that his name has been restored in the revenue records by the respondent State authorities pursuant to the judgment of the Apex Court in relation to the same notification in respect of other co-tenure holders. However, no compensation has been deposited before the court concerned. Consequently, the writ petition deserves to be allowed on the short ground of the proceedings having lapsed in terms of Section 24(2) of the 2013 Act and the law as explained by the Apex Court in the Delhi Development Authority case (supra).

17. The writ petition, therefore, is **allowed** and it is hereby declared that acquisition of the land presently involved in the instant case in relation to the petitioner would be deemed to have lapsed. It is open to the respondents to take such steps as may be permissible in law for the purpose of further proceeding in the matter.

(2021)01ILR A257
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 13388 of 2020
Connected with
Writ C No. 12479 of 2020 & 12480 of 2020

M/s Bio Tech System ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mahabir Yadav, Sri Arun Mishra

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Constitution of India - Article 226 - maintainability of a writ petition in contractual matters - no absolute bar to the maintainability of a writ petition in such matters - 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. (Para - 17)

The principal relief sought is with regard to certain claims for payment of contractual amounts in terms of agreements said to have been executed between the parties.(Para - 3)

HELD:- In the present case, the claims sought to be set up by the petitioners have been strongly disputed. The payments in respect of which the petitioners have raised their claims pertain to contractual and commercial obligations, and the pleadings and the material which are on record, do not in any manner indicate that it is a public law remedy which the petitioners are seeking to invoke so as to persuade this Court to exercise its discretionary jurisdiction.(Para - 43)

Writ Petition dismissed. (E-6)

List of Cases cited :-

1. M/s Lalloo Ji Rajiv Chandra & Sons Vs Meladhikari Prayagraj Mela Authority & ors. , (2019) ADJ Online 0081

2. M/S Friscon Media Works Vs St.Of U.P. & 3 ors., Writ-C No. 8104 of 2020 decided on 05.03.2020

3. M/S Odyssey Computers through Marketing Manager Sri Ajai Singh Vs St. Of U.P. & ors. , Miscellaneous bench No. 14618 of 2017 , decided on 07.07.2017

4. Radhakrishna Agarwal & ors. Vs St. of Bihar & ors., (1977) 3 SCC 457

5. Premji Bhai Parmar & ors. Vs Delhi Development Authority & ors., (1980) 2 SCC 129

6. Divisional Forest Officer Vs Bishwanath Tea Company Ltd. , (1981) 3 SCC 238

7. L.I.C. Vs Escorts Ltd. & ors. , (1986) 1 SCC 264

8. Bareilly Development Authority & ors. Vs Ajay Pal Singh & ors. , (1989) 2 SCC 116

9. Hindustan Petroleum Corporation Ltd. & ors.Vs Dolly Das , (1999) 4 SCC 450

10. Kerala State Electricity Board & ors. Vs Kurien E. Kalathil & ors. , (2000) 6 SCC 293

11. State of U.P. & ors. vs Bridge & Roof Co. (India) Ltd , (1996) 6 SCC 22

12. St. of Guj. & ors. Vs Meghji Pethraj Shah Charitable Trust & ors. , (1994) 3 SCC 552

13. St.of Bihar & ors. Vs Jain Plastics & Chemicals Ltd. , (2002) 1 SCC 216

14. K.K.Saksena Vs International Commission on Irrigation and Drainage & ors. , (2015) 4 SCC 670

15. Election Commission of India Vs Saka Venkata Rao & ors. , AIR 1953 SC 210

16. R.(Hopley) Vs Liverpool Health Authority , 2002 EWHC 1723

17. Joshi Technologies International Inc. Vs U.O.I. & ors. , (2015) 7 SCC 728

18. Life Insurance Corporation of India & ors. Vs Asha Goel (Smt.) & anr. , (2001) 2 SCC 160

19. M/s Ipjacket Technology India Private Ltd. Vs M.D. Uttar Pradesh Rajkiya Nirman Nigam Ltd.. , 2019 (6) ADJ 113

20. Naseem Ahmad Vs St. of U.P. & ors. , (2015) 14 SCC 685

21. Surya Constructions Vs St. of U.P. & ors., (2019) 16 SCC 794

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

1. Heard Sri Arun Mishra, learned counsel appearing for the petitioners in the three connected writ petitions, learned Standing Counsel for the respondents and Sri Mahboob Ahmad, learned counsel for respondent nos.2 to 5.

2. All the three writ petitions relate to similar facts and raise common questions of law, therefore, with the consent of the counsel for the parties, the three petitions have been heard together and are being decided by means of a common judgement.

3. In all the three writ petitions, the principal relief sought is with regard to certain claims for payment of contractual amounts in terms of agreements said to have been executed between the parties.

4. Sri Mahboob Ahmad, learned counsel appearing for respondent nos.2 to 5 has raised objections with regard to the maintainability of the writ petition on the ground that the petitioners seek to enforce certain contractual rights and obligations for which the appropriate remedy is to approach the civil court, or if there is any dispute with regard to the terms of the agreement, then in that case, the remedy is to invoke the arbitration clause under the agreement. He submits that the writ petitions are not liable to be entertained for the reliefs which have been prayed for.

5. In support of his contention, learned counsel appearing for the respondents has placed reliance upon the judgements of this Court in **M/s Lalloo Ji Rajiv Chandra And Sons vs. Meladhikari Prayagraj Mela Authority and others, M/S Friscon Media Works vs. State Of U.P. And 3 Others and M/S Odyssey Computers through Marketing Manager Sri Ajai Singh vs. State Of U.P. and others.**

6. Responding to the preliminary objection regarding maintainability of the writ petition, counsel appearing for the petitioners have sought to contend that there is no absolute bar to the maintainability of a writ petition even in contractual matters where there are disputed questions of fact or even where monetary claims are sought to be raised.

7. In order to appreciate the rival contentions, the facts relating to the writ petitions may be briefly adverted to.

8. Writ-C No.13388 of 2020 has been filed principally seeking a writ of mandamus commanding the respondent no.2- Managing Director, Purvanchal Vidhut Vitrana Nigam Ltd., DLW, Varanasi, to release an amount of Rs. 10,78,990/- to the petitioner relating to contractual payments, which the petitioner claims to be due.

9. It is submitted that after completion of the work the petitioner submitted the bills and thereafter despite several requests and representations made by the petitioner, the respondents have not made payment of the amounts which are said to be due to the petitioner as per the terms of the agreements.

10. The pleadings in the writ petition indicate that the petitioner had entered into an agreement with respondent no.4 to carry out the work of shifting of 11KV, LT line & transformer against E-Tender No.69/SE/EUDC-1-A/KM/2018-19 for a sum of Rs. 15,22,436.28 and of E-Tender No.70/SE/EUDC-1-A/KM/2018-19 for a sum of Rs.3,39,290.00. The above agreements are stated to have been entered into between the parties pursuant to L.O.I. issued vide letters dated 24.9.2018.

11. In Writ - C No.12479 of 2020, a claim is sought to be raised for payment of an amount of Rs.7,51,000/- alongwith interest in respect of certain work stated to have been completed by the petitioner pursuant to award of a contract relating to civil works. The payment has been claimed in terms of an agreement executed between the parties and the petitioner has asserted that despite reminders, the amount in question has not been paid.

12. Writ - C No.12480 of 2020 has been filed raising a similar claim with regard to the payment of an amount of Rs.10.11 lacs alongwith interest. In this case also, the petitioner claims to have been awarded a contract as per terms of an agreement entered into with the respondents for certain civil works. The petitioner has asserted that despite completion of the work as per terms of the agreement, the payment due to him has not been made.

13. Learned counsel appearing for the respondents, apart from submitting that the reliefs sought in the writ petition were in the realm of a contractual relationship and as such the same were not amenable to the writ jurisdiction, has also strongly disputed the claims sought to be raised by the petitioners. He has contended that the claims sought to be raised relate to disputed facts pertaining to interpretation of the terms of the agreement for which the appropriate remedy is to invoke the arbitration clause under the agreement or to avail the appropriate civil remedy.

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

15. The pleadings in the writ petitions and the material on record clearly indicate that the petitioners had executed agreements with the respondents for completion of certain civil works. The petitioners claim to have completed the work as per the terms of the agreements and submitted their bills as per specifications which they claim have not been paid to them.

16. A copy of the agreement which is on record in one of the writ petitions (Writ - C No.13388 of 2020) contains an arbitration clause for the purposes of settlement of any dispute which may arise between the contractor and the Engineer of

the contract and the said fact has not been disputed.

17. 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.

18. 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.

19. 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.

20. 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 others** 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.

21. 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 judgment 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."

22. 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".

xxx

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."

23. In **Premji Bhai Parmar and others Vs. Delhi Development Authority** and others a petition was filed under Article 32 before the Supreme Court contending that the surcharge collected by the authority in respect of a flat purchased by the petitioner was illegal. Considering the legal position, it was held that after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se and that no question of violation of Article 14 or of any other constitutional provision arises when the State or its agents, purporting to act within this field, perform any act. The petition was dismissed with the following observations :-

"8...petition to this Court under Article 32 is not a proper remedy nor is this Court a proper forum for reopening the concluded contracts with a view to getting back a part of the purchase price paid and the benefit taken. ..... But after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties *inter se*. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract."

24. In the case of **Divisional Forest Officer Vs. Bishwanath Tea Company Ltd.** the question of maintainability of a writ petition in respect of a claim arising out of the contractual rights and obligations flowing from the terms of a lease was considered, and it was held as follows :-

"8. It is undoubtedly true that High Court can entertain in its extraordinary jurisdiction a petition to issue any of the prerogative writs for any other purpose. But such writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is a denial of equality before law or equal protection of law. The Corporation can also file a writ petition for enforcement of a right under a statute. As pointed out earlier, the respondent (company) was merely trying to enforce a contractual obligation. To clear the ground let it be stated that obligation to pay royally for timber cut and felled and removed is prescribed by the relevant regulations. The validity of regulations is not challenged. Therefore, the demand for royalty is unsupported by law. What the respondent claims is an exception that in view of a certain term in the indenture of lease, to wit, clause 2, the appellant is not entitled to demand and collect royalty from the respondent. This is nothing but enforcement of a term of a contract of lease. Hence, the question whether such contractual obligation can be enforced by the High Court in its writ jurisdiction.

9. Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the civil court. The High Court in its extraordinary jurisdiction would not entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a civil court where a suit for specific performance of contract or for damages could be filed."

25. We may also refer to the judgment in the case of **Life Insurance Corporation of India Vs. Escorts Ltd. and others** 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."

26. We may draw reference to the judgment in the case of **Bareilly Development Authority and others vs. Ajay Pal Singh and others** 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."

27. 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 Das** 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.

28. The maintainability of writ petition under Article 226 in disputes relating to terms of contract with a statutory body fell for consideration in **Kerala State Electricity Board and other Vs. Kurien E. Kalathil and others** 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."

29. Considering the maintainability of a writ petition under Article 226 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. & others vs Bridge & Roof Co. (India) Ltd** 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.

xxx

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."

30. 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 others** 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."

31. In the case of **State of Bihar and others Vs. Jain Plastics & Chemicals Ltd.** 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...

x x x

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."

32. Distinguishing private law from public law, it was held in **K.K.Saksena vs. International Commission on Irrigation and Drainage and others** 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."

33. The Constitution Bench Judgement in the case of Election Commission, **India vs. Saka Venkata Subba Rao and others** and the judgement in the case of **R.(Hopley) vs. Liverpool Health Authority,** 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."

34. 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. Forsyth,** 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."

35. We may also gainfully refer to the judgment in the case of **Joshi Technologies International Inc. vs. Union of India and others** 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."

36. 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,** 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."

37. 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 others**, 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."

38. 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 a recent judgement of this Court in **M/s Ipjacket Technology India Private Limited vs. M.D. Uttar Pradesh Rajkiya Nirman Nigam Limited.**

39. The general principles which may be culled out from the aforementioned judgments is 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.

40. 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 may not exercise its prerogative writ jurisdiction to enforce such contractual obligations.

41. To support the contra view that the High Court in exercise of powers under Article 226 of the Constitution of India could interfere in such matters, attention of this Court has been drawn to the decisions in **Naseem Ahmad vs. State of Uttar Pradesh and others** and **Surya Constructions vs. State of Uttar Pradesh and others.**

42. In the case of **Naseem Ahmad** (supra), the amount in question had been clearly admitted by the respondent authorities and taking notice of the above, it was observed that in view of the peculiar facts of the case, the appeal was being allowed and a direction was made for payment of the amount. The case of **Surya Constructions** (supra) was one in which payment for extra work by the respondent authorities had not been made to the appellant though such work was expressly sanctioned and completed to their satisfaction, and the only reason assigned for not making the payment was that no money was available in the account of the respondent and that payment would be made after availability of the funds from the Government. It was, in this background, that the Court came to the conclusion that there was no dispute as to the amount which had to be paid to the appellant and therefore, the dismissal of the writ petition stating that the disputed questions of fact arise, was held to be not correct inasmuch as there was no disputed question of fact and on the contrary, the amount payable to the appellant was wholly undisputed.

43. We may, therefore, add that it cannot be held in absolute terms that a writ petition is not maintainable in all contractual matters seeking enforcement of obligations on part of the State or its authorities. The limitation in exercising powers under Article 226 in contractual matters is essentially a self-imposed restriction. 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, may be an exception to the aforementioned general principle.

44. In the present case, the claims sought to be set up by the petitioners have been strongly disputed. The payments in respect of which the petitioners have raised their claims pertain to contractual and commercial obligations, and the pleadings and the material which are on record, do not in any manner indicate that it is a public law remedy which the petitioners are seeking to invoke so as to persuade this Court to exercise its discretionary jurisdiction.

45. In view of the foregoing discussions, and keeping in view the facts of the case at hand, we are not inclined to exercise our extraordinary jurisdiction under Article 226 of the Constitution.

46. The writ petitions are accordingly dismissed.

(2021)01ILR A273
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 14045 of 2020

Vijaypal & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kaushal Kumar Singh, Sri N.P. Singh

Counsel for the Respondents:
C.S.C., Sri Rajnish Kumar Rai

(A) Civil Law - Railways Act, 1989 - Section 20A - Power to acqure land, Section 20E - Declaration of acquisition - burden of establishing mala fide lies very heavily on the person who alleges it - Allegations of mala fide are serious in nature and they essentially raise a question of fact - person making such allegations to supply full particulars in the petition - If sufficient averments and requisite materials are not on record - court would not make fishing or roving inquiry - Mere assertion, vague averment or bald statement is not enough to hold the action to be mala fide - must be demonstrated by facts. (Para - 12,14)

Railways acquired land for "Eastern Dedicated Freight Corridor in District Gautam Buddh Nagar" by notification dated 24.08.2009 - issued under Section 20A and 20E of the Act, 1989 - Amendment Act 11 of 2008 has been repealed by Act 23 of 2016 - provisions of Section 20A and Section 20E not available - impugned notifications suffers from *mala fide* - issued without authority of law - deserve to be quashed - land in question has been acquired for a public purpose - all those persons whose land or houses are affected by acquisition shall get compensation in accordance with the provisions of Chapter-IV-A of the Act, 1989.(Para - 3, 4)

HELD:- Submission that Section 20A and 20E are not available after the Repealing Amending Act, 2016, is legally incorrect and baseless. The allegation of *mala fide* made by the petitioners is wholly vague and without proof. The petitioners have failed to discharge the burden of proving *mala fide*. The impugned notification does not suffer from any error of law or mala fide.(Para - 9,15)

Writ Petition dismissed. (E-6)

List of Cases cited :-

1. Jethanand Betab Vs The State Of Delhi(Now Delhi Administration) , AIR 1960 SC 89

2. Mohd. Junaid Ajaz & ors. Vs U.O.I. & ors. , (2016) 116 ALR 380

3. Ajit Kumar Nag Vs . General Manager (PJ), Indial Oil Corpn. Ltd (Para-56) , (2005) 7 SCC 764

4. E.P. Royappa Vs St. of T.N. & anr. para-92) , (1974) 4 SCC 3

5. Dhampur Sugar (Kashipur) Ltd. Vs State of Uttaranchal & ors. , (para-83), (2007) 8 SCC 418

6. Chandra Prakash Singh & ors. Chairman, Purvanchal Gramin Bank & ors., (paras-15 and 16) , 2008 (2) ESC 177 (SC)

7. Tara Chand Khatri Vs Municipal Corporation of Delhi & ors., (para-27) , AIR 1977 SC 567

(Delivered by Hon'ble Surya Prakash Kesharwani, J. &
Hon'ble Jayant Banerji, J.)

1. Heard Sri N.P. Singh, learned counsel for the petitioners, Sri Rajnish Kumar Rai, learned counsel for the respondent Nos.1, 2 and 4 and Sri B.P. Singh Kachhawah, learned standing counsel for the State-respondent No.3.

2. This writ petition has been filed praying for the following relief:

"(i) issue a writ, order or direction in nature of certiorari, thereby quashing the impugned notification i.e. the notification dated 11th February, 2019 ***(Annexure P-1)*** *and the notification dated 6th November, 2019 under Section 20E of the Act of 1989s* ***(Annexure P-2),*** *being illegal, arbitrary and is void in law.*

(ii) issue a writ, order or direction in nature of mandamus thereby restraining the Respondents, its officers, agents, servants etc from interfering with the possession of the petitioners from their existing Abadi in village - Chamravali-Boraki and land falling in village Hazratpur;

(iii) issue a writ or order or direction in the nature of mandamus thereby directing the Respondents, its officers, agents, servants etc to carry out the development of the ***"Eastern Dedicated Freight Corridor in District Gautam-budh Nagar in State of Uttar Pradesh"*** *over the acquired land, as approved by the Central Government in terms of which the acquisition of land was made in terms of Annexure P-5 (colly);*

*(iv) issue a writ order or direction in the nature of mandamus thereby directing the Respondents, its officers, agents, servants etc from producing the entire record pertaining to the special railway project of "****Eastern Dedicated Freight Corridor in District Gautam-budh Nagar in State of Uttar Pradesh****" as approved by the Central Government for issuance of the acquisition notification being annexed as Annexure P-5 (colly);"*

3. Learned counsel for the petitioners submits as under:

(i) By the Railways (Amendment) Act, 2008 (Act 11 of 2008), the provisions of Chapter-IV-A (Section 20A to 20P) were incorporated in the principal Act, i.e. Railways Act, 1989. The aforesaid Amendment Act has been repealed by the Repealing Amendment Act, 2016 (No.23 of 2016) dated 09.05.2016. The impugned notifications have been issued under Section 20A and 20E of the Act, 1989. Since the Amendment Act 11 of 2008 has been repealed by Act 23 of 2016, therefore, the provisions of Section 20A and Section 20E were not available. Consequently, the impugned notifications have been issued without authority of law and, therefore, they deserve to be quashed.

(ii) Initially, the railways acquired land for "Eastern Dedicated Freight Corridor in District Gautam Buddh Nagar" by notification dated 24.08.2009. At that time, the respondents left the abadi area of the petitioners' villages Chamravali-Boraki and Hazaratpur but by the impugned notification some area of the petitioners' villages has been acquired. This cannot be done since the respondents have

earlier not acquired the land in question while issuing acquisition notification dated 24.08.2009. Therefore, the impugned notification suffers from *mala fide*.

4. Sri Rajnish Kumar Rai, learned counsel for the respondent Nos.1, 2 and 4 submits as under:

(i) The land in question has been acquired for a public purpose, i.e. Eastern Dedicated Freight Corridor and all those persons whose land or houses are affected by acquisition shall get compensation in accordance with the provisions of Chapter-IV-A of the Act, 1989.

(ii) The provisions of Chapter IV-A of the Act, 1989 are not affected by repeal of the Amending Act, 2008 by the Repealing and Amending Act, 2016, which fact is also evident from Section 4 of the Repealing and Amending Act, 2016.

(iii) The acquisition notification dated 11.02.2019 was issued under Section 20A. As per provisions of Section 20B of the Act, 1989, the petitioners or the persons affected by acquisition notification, had liberty to make an objection within 30 days from the date of publication of the notification but neither there is any pleading in the writ petition nor any material has been brought on record to show that the petitioners have submitted any objection under Section 20B. The other impugned notification dated 06.11.2019 has been issued under Section 20E of the Act, 1989 whereby acquisition has been made.

(iv) The entire acquisition has been made well in accordance with law and only for a public purpose i.e. for construction of Eastern Dedicated Freight Corridor.

(v) Neither there is any *mala fide* in issuing the impugned notification nor the petitioners have placed any material on record to establish even prima facie that there is any *mala fide* on the part of the respondents. The submission of *mala fide* is wholly baseless and without any foundation.

Discussion and Findings:-

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

6. In **Jethanand Betab vs The State Of Delhi(Now Delhi Administration),** Hon'ble Supreme Court held as under:

"(5).....
..... *.....*
.....
.....
.....

The substance of the aforesaid provisions may be stated thus: ***The Act of 1949 inserted S. 6 (1 -A) in the Act of 1933. The 1949 Act was repealed by the 1952 Act, but the latter Act saved the operation of other enactments*** *in which the repealed enactment has been applied, incorporated or referred to. The first question that arises for consideration is whether the amendments inserted by the 1949 Act in the 1933 Act were saved by reason of S.4 of the 1952 Act.*

(6) The general object of a repealing and amending Act is stated in ***Halsbury's Laws of England, 2nd Edition, Vol. 31, at p. 563,*** *thus:*

"A statute Law Revision Act does not alter the law, but simply strikes out certain enactments which have become unnecessary. It invariably contains elaborate provisos."

In Khuda Bux v. Manager, Caledonian Press, A.I.R. 1954 Cal. 484,

Chakravartti, C.J., neatly brings out the purpose and scope of such Acts. The learned Chief Justice says, at p.486:

"Such Acts have no Legislative effect, but are designed for editorial revision, being intended only to excise dead matter from the statute book and to reduce its volume. Mostly, they expurgate amending Acts, because having imparted the amendments to the main Acts, those Acts have served their purpose and have no further reason for their existence. *At times inconsistencies are also removed by repealing and 'amending Acts. The only object of such Acts, which in England are called Statute Law Revision Acts, is legislative spring-cleaning and they are not intended to make any change in the law. Even so, they are guarded by saving clauses drawn with elaborate care,. . .".*

It is, therefore, clear that the main object of the 1952 Act was only to strike out the unnecessary Acts and excise dead matter from the statute book in order to lighten the burden of ever increasing spate of legislation and to remove confusion from the public mind. The object of the Repealing and Amending Act of 1952 was only to expurgate the amending Act of 1949, along with similar Acts, which had served its purpose.

(7) ***The next question is whether S.4 of the Act of 1952 saved the operation of the amendments that had been inserted in the Act of 1933 by the repealed Act.*** *The relevant part of S.4 only saved other enactments in which the repealed enactments have been applied, incorporated or referred to. Can it be said that the amendments are covered by the language of the crucial words in S.4 of the Act of 1952, namely, "applied, incorporated or referred to".* ***We think not. Section 4 of the said Act is designed to provide for a different situation, namely, the repeal of an earlier Act which has been applied, incorporated or referred to in a later Act. Under that section the repeal of the earlier Act does not affect the subsequent Act.*** *The said principle has been succinctly stated in Maxwell on Interpretation of Statutes, 10th Edition, page 406:*

"Where the provisions of one statute are, by reference, incorporated in another and the earlier statute is afterwards repealed the provisions so incorporated obviously continue in force so far as they form part of the second enactment."

So too, in ***Craies on Statute Law, 3rd Edition, the same idea is expressed in the following words, at p. 349:***

"Sometimes an Act of Parliament, instead of expressly repeating the words of a section contained in a former Act, merely refers to it, and by relation applies its provisions to some new state of things created by the subsequent Act. In such a case the "rule of construction is that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second ".

The Judicial Committee in Secy. of State v. Hindusthan Co-operative Insurance Society, Ltd. 58 Ind App. 259: (AIR 1931 PC 149), endorsed the said principle and restated the same, at p. 267 (of Ind App): (at p.152 of AIR), thus:

"This doctrine finds expression in a common-form section which regularly appears in the amending and repealing Acts which are passed from time to time in India. ***The section runs:*** *" The repeal by this Act of any enactment shall not affect any Act..... in which such enactment has been applied, incorporated or referred to."* ***The independent existence of the two Acts is therefore recognized; despite the death of the parent Act, its offspring***

survives in the incorporating Act. *Though no such saving clause appears in the General Clauses Act, their Lordships think that the principle involved is as applicable in India as it is in this country."*

It is, therefore, manifest that S.4 of the 1952 Act has no application to a case of a later amending Act inserting new provisions in an earlier Act, for, where an earlier Act is amended by a later Act, it cannot be said that the earlier Act applies, incorporates or refers to the amending Act. The earlier Act cannot incorporate the later Act, but can only be amended by it. *We cannot, therefore, agree with the view expressed by the Punjab High Court in Mohinder Singh v. Mst. Harbhajan Kaur, ILR (1955) Punj 625; ((S) AIR 1955 Punj 141) and in Darbara Singh v. Karnail Kaur, 61 Pun LR 702 that S.4 of the Repealing and Amending Act of 1952 applies to a case of repeal of an amending Act.*

11. ***For the aforesaid reasons, we hold that S.6 (1 -A) of the Act continued to be on the statute book even after the amending Act of 1949 was repealed by Act XLVIII of 1952, and that it was in force when the offence was committed by the appellant."***

7. In **Mohd. Junaid Ajaz and others vs. Union of India and others,** a Division Bench of this court held as under:.

"6. ***The effect of these provisions is that where any enactment has been applied, incorporated or referred to in any Act, the repealing provisions shall not affect the Act in which such enactment has been applied, incorporated or referred to.*** *As a result of the provisions of Amending Act No.27 of 2013 with effect from 1 November 2013, sub-sections (1) and (4) of Section 83 were substituted. Sub-section (1) expanded the jurisdiction of the Waqf Tribunal. Prior to the amendment, the jurisdiction of the Waqf Tribunal was to determine any dispute, question or other matter relating to a waqf or waqf property under the Act. In addition to this, the substituted provisions of sub-section (1) also empower the Waqf Tribunal to determine matters relating to eviction of tenants or determination of rights and obligations of a lessor and lessee in respect of property under the Act. Moreover, under sub-section (4), the Tribunal is, in terms of the substituted provisions, to consist of three members. Earlier, the Act had contemplated a one member Tribunal consisting of a judicial officer.* ***Once the amendment was notified and came into force on 1 November 2013, the amendment was incorporated into the provisions of the parent Act. Hence, the provisions of Section 4 of the Repealing and Amending (Second) Act, 2015 (Act No.19 of 2015) would stand attracted and the repeal of the Amending Act would have no effect on the incorporation of the provisions of the Amending Act which had already been effected prior to the repeal.***

7. ***The legislature adopts the device of repealing enactments which amend the parent legislation with a view to ensure that they do not crowd the statute book. The principle which however, emerges from a provision such as Section 4, is that the repeal of the amending legislation will not affect the amendments which have already been incorporated in the parent legislation.*** *This principle has also been enunciated in the judgment of the Supreme Court in* ***Jethanand Betab Vs State of Delhi.*** *In that case, in the Indian Wireless Telegraphy Act, 1933, as it original stood, there was no specific provision making the possession of a wireless transmitter an offence. By an*

Amending Act, Section 6 (1-A) was inserted by which, the possession of a wireless transmitter was constituted as a separate offence. The Amending Act was repealed by a Repealing and Amending Act 1952. The submission was that as a result, on the date of the alleged commission of the offence the said section was not on the statute book. The Repealing and Amending Act contained a provision by which, the legislature clarified that the repeal of any enactment by the Act shall not affect any other enactment in which the repealed enactment has been applied, incorporated or referred to. The Supreme Court explained the import of Section 4 of the Repealing and Amending Act in the following terms:

"6. ...

It is, therefore, clear that ***the main object of the 1952 Act was only to strike out the unnecessary Acts and excise dead matter from the statute book in order to lighten the burden of ever increasing spate of legislation and to remove confusion from the public mind.*** *The object of the Repealing and Amending Act of 1952 was only to expurgate the amending Act of 1949, along with similar Acts, which had served its purpose."*

10. Following these principles, it is clear that once the provisions of the amending legislation, namely, Amending Act 27 of 2013 had been brought into force and the amendments have been incorporated in the provisions of the Waqf Act, 1995, the subsequent repeal of the amending legislation would not affect the amendments which had already been effected."

8. The Railways (Amendment) Act, 2008 (Act 11 of 2008) incorporated Chapter IV-A (Sections 20A to 20P) in the principal Act, i.e. The Railways Act, 1989. By the Repealing Amending Act, 2016 (Act 23 of 2016), the Amendment Act, 2008 has been repealed with a saving clause in Section 4 as under:-

*"**4.Savings.-** The repeal by this Act of any enactment shall not affect any other enactment in which the repealed enactment has been applied, incorporated or referred to;*

and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing;

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognized or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force."

9. The principles laid down by Hon'ble Supreme Court in **Jethanand Betab** (supra) and by this court in **Mohd. Junaid Azad and others** (supra) and reading of the Repealing Amendment Act, 2016 make it clear that the main object of the Repealing Amendment Act, 2016 was only to expurgate the Amendment Act

2008 along with similar Acts, which had served its purpose. Once the provisions of the amending legislation, i.e. the Amendment Act, 2008 had been brought into force and the amendments have been incorporated in the principal Act, i.e. the Railways Act, 1989, the subsequent repeal of the amending legislation by the Repealing Amendment Act 2016 would not affect the amendments which had already been effected. Thus, the first submission of learned counsel for the petitioners that Section 20A and 20E are not available after the Repealing Amending Act, 2016, is legally incorrect and baseless. Therefore, the first submission of the learned counsel for the petitioners is rejected.

10. The second and the last submission of learned counsel for the petitioners is that initially the respondents have not acquired the land in question, therefore, the acquisition by the subsequent notification dated 11.02.2019 under the Railways Act, 1989, suffers from *mala fide*. This submission has no force and deserves to be rejected. Under Section 20B of the Act, 1989, the person affected by the acquisition notification has the right to make an objection within 30 days from the date of publication of the notification but there is nothing on record to show that the petitioners have submitted any objection. After about one year of the acquisition notification, the petitioners have filed the present writ petition and made baseless allegation of *mala fide*. No evidence has been brought on record to establish that the impugned notification suffers from *mala fide*.

Burden of Proving Mala Fide:-

11. It is well settled that the burden of proving *mala fide* is on the person making the allegations and the burden is 'very heavy'. There is presumption of exercise of power bonafidely and in good faith. The allegation of *mala fide* are often more easily made than made out and the very seriousness of such allegation demands proof of high degree of credibility. The allegation of *mala fide* made by the petitioners is wholly vague and without proof. The petitioners have failed to discharge the burden of proving *mala fide*. Our conclusions on principles of law as afore-noted are also supported by the law laid down by Hon'ble Supreme Court in **Ajit Kumar Nag vs. General Manager (PJ), Indial Oil Corpn. Ltd (Para-56)** and **E.P. Royappa vs. State of Tamil Nadu and another, (para-92).**

12. In the case of **Dhampur Sugar (Kashipur) Ltd. vs. State of Uttaranchal and others, (para-83),** Hon'ble Supreme Court considered the question of *mala fide* and held as under:

*"83.**Allegations of mala fide are serious in nature and they essentially raise a question of fact. It is, therefore, necessary for the person making such allegations to supply full particulars in the petition. If sufficient averments and requisite materials are not on record, the court would not make fishing or roving inquiry. Mere assertion, vague averment or bald statement is not enough to hold the action to be mala fide. It must be demonstrated by facts. Moreover, the burden of proving mala fide is on the person levelling such allegations and the burden is very heavy. The charge of mala fide is more easily made than made out. As stated by Krishna Iyer, J. in Gulam Mustafa v. State of Maharashtra, (1976) 1 SCC 800 : AIR 1977 SC 448], it is the last refuge of a losing litigant.** In the case on*

hand, except alleging that the policy was altered by the Government, to extend the benefit to respondent No. 4, no material whatsoever has been placed on record by the appellant. We are, therefore, unable to uphold the contention of the learned counsel that the impugned action is mala fide or malicious."

13. The principles laid down in the aforesaid case have been reiterated by Hon'ble Supreme Court in the case of **Chandra Prakash Singh and others vs. Chairman, Purvanchal Gramin Bank and others, (paras-15 and 16).**

14. In the case of **Tara Chand Khatri vs. Municipal Corporation of Delhi and others, (para-27),** Hon'ble Supreme Court held that the High Court would be justified in refusing to carry on investigation into the allegations of mala fides if necessary particulars of the charge making out a prima facie case are not given in the writ petition. The burden of establishing *mala fide* lies very heavily on the person who alleges it.

15. In view of the discussion made above, we find that the petitioners have completely failed to prove the allegations of mala fide. The impugned notification does not suffer from any error of law or mala fide. Therefore, the second submission made by learned counsel for the petitioners, is rejected.

16. For all the reasons afore-stated, **the writ petition is dismissed.**

(2021)01ILR A280
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2020

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 17214 of 2020

Om Prakash & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Yayadeo Sharma, Deepika Sharma

Counsel for the Respondents:
C.S.C., Sri Anuj Pratap Singh, Sri Pratik J. Nagar

(A) Civil law - Land Acquisition Act, 1894 - Section 4 - notification , Section 28-A - application for Re-determination of the amount of compensation on the basis of the award of the Court - application under Section 28A of the Act would be maintainable when it is submitted within three months from the date of the award of the Reference Court - application submitted beyond the period given therein, would be barred by limitation - A direction for its consideration can be given only when it is maintainable and not otherwise. (Para -13,26)

Land belonging to the petitioners was acquired - notification - award - petitioners accepted compensation - compensation of other land determined on higher side - reference under Section 18 followed by the judgment of the Civil Court and finally by the Apex Court - application under Section 28A of the Act for enhancement of compensation - question for consideration - whether a direction for enhancement of compensation can be given in the light of Section 28A of the Act of 1894 and for that consideration of the application having not preferred within three months to the award of the Court . (Para - 2)

HELD:- A direction to the authority to consider the application cannot be given without considering relevant provisions of the law. The application under Section 28A is not maintainable in this case having been filed after lapse of three years of the judgment. Accordingly, the directions sought by the petitioners cannot be given.(Para -28)

Writ Petition dismissed. (E-6)

List of Cases cited :-

1. Muni Ram & ors. Vs St. of U.P. & ors. , Special Leave Petition (C) Diary No. 42598/2019

2. Patram & ors. Vs St. of U.P. & 2 ors., Writ C No. 15726 of 2019 decided on 16.09.2019

3. Sukhdeo & ors. Vs St. of U.P., AIR 1992 Allahabad 142

4. K. Subbarayudu & ors. Vs The Special Deputy Collector (Land Acquisition), 2017 (8) SCALE Page 61

5. Karan Singh & 16 ors. Vs St. of U.P. & 2 ors., Writ C No. 329 of 2020 decided on 07.01.2020

6. Ramesh & 31 ors. Vs St. of U.P. & 2 ors., Writ C No. 603 of 2020 decided on 28.01.2020

7. U.O.I. Vs Mangatu Ram & ors., 1997 (6) SCC 59

8. Babua Ram & ors. Vs St. of U.P. & anr., 1995 (2) SCC 689

9. St. of An. P. & anr. Vs Marri Venkaiah & ors., 2003 (7) SCC 280

10. Tota Ram Vs St. of U.P. & ors., 1997 (6) SCC 280

11. Sakuru Vs Tanaji, AIR 1985 Supreme Court 1279

(Delivered by Hon'ble Munishwar Nath Bhandari, J. &

Hon'ble Piyush Agrawal, J.)

1. This writ petition has been filed with the following reliefs which are quoted herein for ready reference-:

"(i) Issue a writ, order or direction in the nature of mandamus directing to the respondent no.2 to decide the application of the petitioner under Section 28A Land Acquisition Act dated 20.02.2020 very expeditiously by the reasoned and speaking order and communicate to the petitioners.

(ii) Issue a writ, order or direction in the nature of mandamus directing to the respondents to provide the compensation of the petitioners of the acquired land at the rate of Rs. 65/- per sq. yard along with other benefit and interest of the solatium according to law.

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

(iv) Award to cost of the petition in favour of the petitioners."

2. It is a case where a land belonging to the petitioners in village Gujarpur was acquired. A notification under Section 4 of the Land Acquisition Act, 1894 (In short *"Act of 1894"*) was published on 01.03.1989. An award was thereupon made after completion of the process. The petitioners accepted the compensation. It is alleged that the compensation of other land was determined on higher side subsequently on a reference under Section 18 followed by the judgment of the Civil Court and finally by the Apex Court on 05.12.2016. The petitioners made an application under Section 28A of the Act of 1894 on 20.02.2020 for enhancement of compensation. A perusal of the application

shows that land of the petitioners was in village Gujarpur while the land of others was in village Haldona Ecchar Kaasna Tugalpur. In any case, the question for our consideration would be as to whether a direction for enhancement of compensation can be given in the light of Section 28A of the Act of 1894 and for that consideration of the application having not preferred within three months to the award of the Court..

3. Learned counsel for the petitioners submits that the issue raised in this petition is pending consideration before the Apex Court in the case of ***Muni Ram and others Vs. State of U.P. and others, Special Leave Petition (C) Diary No. 42598/2019.*** The prayer was to defer the matter awaiting judgment of the Apex Court.

4. For our perusal, judgment of this Court in the case of ***Patram and others Vs. State of U.P. and 2 others, Writ C No. 15726 of 2019 decided on 16.09.2019*** has been referred wherein Muni Ram was alleged to be a party. The judgment in the case of Patram ***(supra)*** has been perused by us to find out as to whether it was in reference to the same facts, as are available on record. In the instant case, application is under Section 28A of the Act of 1894 and was not submitted within three months, rather it was after more than three years from order of the Court. We find that in the case of Patram ***(supra)***, the issue aforesaid has not been discussed and decided.

5. At this stage, learned counsel for the petitioners made a reference of the judgment of this Court in the case of ***Sukhdeo and others Vs. State of U.P., AIR 1992 Allahabad 142.*** A reference of paragraph 7 and 8 of the said judgment has been given to indicate that the period of limitation cannot be counted in rigid manner but has to be from the date of knowledge of the award of the Court and accordingly delay in maintaining the application under Section 28A of the Act of 1894 should not be determined rigidly.

6. Learned counsel for the petitioners has further made a reference of the judgment of the Apex Court in the case of ***K. Subbarayudu and others Vs. The Special Deputy Collector (Land Acquisition), 2017 (8) SCALE Page 61*** wherein the amount was enhanced after condoning the delay, as the Special Appeal was dismissed by the High Court having being filed with the delay of 3671 days.

7. A further reference of the judgment of this Court in the case of ***Karan Singh and 16 others Vs. State of U.P. and 2 others, Writ C No. 329 of 2020 decided on 07.01.2020*** has been given. Therein direction was given for consideration of pending application under Section 28A of the Act of 1894. Similar order was passed in the case of ***Ramesh and 31 others Vs. State of U.P. and 2 others, Writ C No. 603 of 2020 decided on 28.01.2020.*** The prayer of learned counsel for the petitioners is accordingly to pass a similar order.

8. Learned counsel for the petitioners has further made a reference of Section 28A (3) of the Act of 1894 to press upon the Court to direct the respondents to refer the matter for enhancement of compensation. It is submitted that irrespective of sub-section 1 and 2 of Section 28A, the matter needs to be referred to the Court under sub-Section 3 of Section 28A and accordingly prayer is to direct the authorities to refer the matter to the Court under sub-Section 3 of Section 28A of the Act of 1894.

9. We have considered the submissions advanced by the learned counsel for the petitioners and perused the record carefully. The fact available on record shows that a notification under Section 4 of the Act of 1894 was published in the Gazette on 01.03.1989. The land belonging to the petitioners was acquired though copy of the award has not been enclosed along with the writ petition and even the petitioners have not given detail for it other than the date of award, which is 30.06.1990. The contents of the writ petition do not show refusal or protest to accept the amount of compensation and in the absence of any pleading, it goes without saying that the petitioners accepted the compensation without protest. The application under Section 28-A of the Act of 1894 was preferred on 20.02.2020 in reference to the judgment of the Apex Court dated 05.12.2016 after more than three years.

10. The question for our consideration is as to whether application under Section 28-A is maintainable in the instant case so as to direct for its consideration. For ready reference, Section 28A is quoted herein -:

28A Re-determination of the amount of compensation on the basis of the award of the Court-:

(1) Where in an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the Court: Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18.

11. An application under Section 28A is maintainable within three months from the date of the award of the Court enhancing the compensation. In the instant case, the petitioners have relied on the judgment of Apex Court dated 05.12.2016 and if at all it is taken to be in reference to the acquisition of land under the same notification, the application under Section 28A is much beyond the period of three months. In fact after more than three years and thereby is not maintainable. The exclusion is only the period requisite for obtaining a copy of the award of the Court. The "Court" otherwise means the "Principal Civil Court" as defined under the Act of 1894.

12. This Court is not having authority rather for that any other Court to make interpretation of the provisions different than what has been legislated by the Parliament. A direction for consideration of the application under Section 28A can be given if it is submitted as per the statutory provision and not otherwise. A perusal of the application filed by the petitioners reveals it to be in reference to Article 141 of the Constitution of India. Article 141 provides for precedence to be followed but in the instant case we do not find a judgment of the Apex Court in favour of the petitioners on the issues involved in the present case rather it is against them. The issue is as to whether application under Section 28A of the Act of 1894 would be maintainable beyond the period given therein.

13. The issue in reference to limitation for maintaining an application under Section 28A of the Act of 1894, has been decided by the Apex Court in the case of ***Union of India Vs. Mangatu Ram and others, 1997 (6) SCC 59.*** It has been held that an application under Section 28A of the Act of 1894 would be maintainable when it is submitted within three months from the date of the award of the Reference Court. If an application is submitted beyond the period given therein, would be barred by limitation. Paragraph 17 of the said judgment is quoted herein for ready reference-:

"17. In respect of the notification published on 18.06.1984, the Collector made his award on 31.01.1986 under Section 11. On reference under Section 18 at the instance of some claimants, the reference Court, by its award and decree dated 21.11.1988, enhanced the compensation. The application under Section 28A was filed on 01.10.1991. The written application can be filed by some who had not sought the reference under Section 18. Though they are entitled to make the application, the application should be filed within three months from the date of the award of the reference Court excluding the time taken for obtaining the certified copy of the award as provided under proviso to Section 28A. Since the application under Section 28A was filed beyond three months, on the above facts, the same is barred by limitation. The award of the enhanced compensation to the respondents in this appeal is clearly illegal and without jurisdiction."

14. The same issue was decided by the Apex Court in its earlier judgment in the case of ***Babua Ram and Others Vs. State of U.P. and another, 1995 (2) SCC 689.*** The issue was decided not only in reference to the limitation for an application but even as to which award of the Court should be taken note for the purpose of reckoning maintainability of the application under Section 28A of the Act of 1894 and limitation. It was held that the subsequent award of the Court would not give successive cause of action when multiple awards are made at different times or dates. Paragraph 20 of the said judgment is quoted herein for ready reference-:

"20. The question then is when exactly the period of limitation starts running for making an application in writing under Sub-section (1) of Section 28-A. A bare reading of Sub-section (1) along with its proviso would indicate that the making of the award by the civil court or judicial officer which becomes the judgment and decree under Section 26, is the starting point from which the period of

limitation is allowed for making an application under Section 28-A. However, the person aggrieved in computing the period of three months allowed for making an application under Section 28-A would be entitled to exclude the day on which the award was pronounced by the court or the judicial officer and the time requisite for obtaining the certified copy of the award which is a judgment and decree under Section 26. In other words, the proviso to Sub-section (1) of Section 28-A excludes the requisite time taken for obtaining the copy of the award and in computation of the period of three months from the date of the award, the time required to obtain a certified copy of the award should be excluded. Limitation begins to run from the date the award was pronounced by the court under Section 26. It is well-settled that the law of limitation limits the time after which a suit or other proceeding cannot be entertained in a court of justice or before appropriate authority, though it does not affect the substantive rights of the parties. Once the limitation begins to run, it runs in its full course until its running is interdicted by an order of the court. Explanation to Section 11 provides internal evidence in this behalf to make the point poignantly clear which states that in computing two years period to make award under Section 11, the period during which any action or proceeding to be taken in pursuance of the declaration under Section 6 is stayed by an order of a court, should be excluded. The legislature prescribed three months' limitation to quicken diligence like caveat emptor and provided to a non-protester right to redetermination provided the application in writing is made to the Collector within three months from the date of the award of the civil court of original jurisdiction, excluding the requisite time taken to obtain a copy of the award. In other words, the right and remedy provided by Section 28-A(1) stands extinguished with the expiry of three months from the date of the award under Section 26. It is true that in a given set of facts, there could be more than one reference under Section 18 at the behest of different claimants of the lands covered by Section 4(1) Notification and the court may make successive awards at various times. Compensation given in the respective awards may vary and may be higher than the one given in an earliest award. In the teeth of the express language in Sub-section (1) of Section 28-A, limitation of three months once expires in respect of earliest award by efflux of time, none of the later awards could provide any assistance to revive the lapsed time under Section 28-A(1) nor provide fresh cause of action or successive causes of action when multiple awards are made at different times or dates. Application under Section 28-A(1) may be made at the instance of the self-same person or different persons. Any other interpretation would amount to re-writing the proviso to Sub-section (1) of Section 28A. The judgment and decree of the Court of appeal either under Section 54 or under Section 96 of C.P.C. or under Articles 132, 133 or 136 of the Constitution does not furnish fresh cause of action nor provide fresh limitation to make application under Section 28-A(1) of the Act as has already been held in that they are not covered under Part III of the Act. May be that they are continuation of original decree made in Section 26(2) and in law the executable decree is that of the Supreme Court of the High Courts. But the legislature has conferred right of reopening the award under Section 11 only when the civil court under Section 26 awarded higher compensation in Part III to a person having an interest in the land covered by the same

Notification under Section 4(1) and an application in writing if made within limitation."

15. In the case of ***State of Andhra Pradesh and another Vs. Marri Venkaiah and Others, 2003 (7) SCC 280,*** the issue determined by the Apex Court is even in reference to the knowledge of the award of the Court, while considering the provision of Section 28A. It was held that only period requisite for obtaining copy can be excluded and not in reference to the knowledge of the order. Paragraph 7 of the said judgment is quoted herein for ready reference-:

"7. Plain language of the aforesaid Section would only mean that the period of limitation is three months from the date of the Award of the Court. It is also provided that in computing the period of three months, the day on which the award was pronounced and the time requisite for obtaining the copy of the award is to be excluded. Therefore, the aforesaid provision crystallizes that application under Section 28-A is to be filed within three month from the date of the award by the Court by only excluding the time requisite for obtaining the copy. Hence, it is difficult to infer further exclusion of time on the ground of acquisition of knowledge by the applicant."

16. A perusal of the para quoted above shows that in a given case, the acquisition of knowledge of the award of the Court by the applicant has not been accepted for exclusion of the period of limitation.

17. In the subsequent judgment, it was further held that the application under Section 28A of the Act should be in reference to the award passed by the Principal Civil Court. In any case, even if, in the instant case, subsequent order is also taken note of i.e. of the Apex Court, the application was moved much beyond the period of limitation. The issue aforesaid was decided by the Apex Court even in the case of ***Tota Ram Vs. State of U.P. and others, 1997 (6) SCC 280.*** Paragraph 3 of the said judgment is relevant and is quoted herein for ready reference-:

"3. A reading thereof clearly that a person whose land is acquired under a common notification issued under Section 4 (1) of the Act but who failed to avail of the remedy of reference under Section 18, is eligible to make a written application within three months from the date of the award of the court enhancing the compensation. It has been interpreted by this court that the "court " means court of original civil jurisdiction to whom reference under Section 18 would lie. Admittedly, the award of the reference court having been made on 18.05.1990, the limitation began to run from that date. The proviso to Section 28-A gives a right to the persons to obtain the certified copy of the award and decree and the time taken for obtaining the certified copy of the award and the decree shall be excluded in computing the period of three months. In view of the express language, the question of knowledge does not arise and, therefore, the plea of the petitioner that the limitation of three months begins to start from the date of the knowledge is clearly unsustainable and cannot be accepted. The High Court, therefore, is rightly in its decision in that behalf."

18. The para quoted above not only makes it clear that knowledge of the order would not be relevant rather exclusion is of

the period requisite for obtaining certified copy and in the judgment ***(supra)*** it has further been held that the Court means *"the Court of Original Civil Jurisdiction"* to whom reference under Section 18 was made. In the instant case, the date of award by Principal Civil Court has not been given otherwise limitation has to be determined from the date of the award of the Principal Civil Court. However, as clarified earlier, even if it is taken from the date of the judgment of the Apex Court, the application was moved after more than three years i.e. period much beyond the limitation given under Section 28A of the Act of 1894.

19. In that regard, another judgment of the Apex Court relevant to the present matter is in the case of ***Sakuru Vs. Tanaji, AIR 1985 Supreme Court 1279.*** In the said case, it was made clear that Section 5 of the Limitation Act would not apply to an application before the authority. It applies only to the proceeding before the Court. Paragraph 3 of the said judgment is quoted herein for ready reference-:

"3. After hearing both sides we have unhesitatingly come to the conclusion that there is no substance in this appeal and that the view taken by the Division Bench in Venkaiah's case is perfectly correct and sound. It is well settled by the decisions of this Court in Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli & Ors. [1970] 1 S.C.R. 51, Nityananda M. Joshi & Ors. v. Life Insurance Corporation of India & Ors. [1970] 1. S.C.R. 396 and Sushila Devi v. Ramanandan Prasad and Ors. [1976] 2. S.C.R. 845 that the provisions of the Limitation Act, 1963 apply only to proceedings in "Courts" and not to appeals or applications before bodies other than Courts such as quasi-judicial Tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on Courts under the Codes of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein under Section 90 of the Act not being a Court, the Limitation Act, as such, had no applicability to the proceedings before him. But even in such a situation the relevant special statute may contain an express provision conferring on the appellate authority, such as the Collector, the power to extend the prescribed period of limitation on sufficient cause being shown by laying down that the provisions of Section 5 of the Limitation Act shall be applicable to such proceedings. Hence it becomes necessary to examine whether the Act contains any such provision entitling the Collector to invoke the provisions of Section 5 of the Limitation Act for condonation of the delay in the filing of the appeal. The only provision relied on by the appellant in this connection is Section 93 of the Act which, as it stood at the relevant time, was in the following terms:-

"93. Limitation - Every appeal and every application for revision under this Act shall be filed within sixty days from the date of the order against which the appeal or application is filed and the provisions of the Indian Limitation Act, 1908 shall apply for the purpose of the computation of the said period."

On a plain reading of the section it is absolutely clear that its effect is only to render applicable to the proceedings before the Collector, the provisions of the Limitation Act relating to 'computation of the period of limitation. The provisions relating to computation of the period of limitation are contained in Sections 12 to

24 included in Part III of the Limitation Act, 1963. Section 5 is not a provision dealing with computation of the period of limitation. It is only after the process of computation is completed and it is found that an appeal or application has been filed after the expiry of the prescribed period that the question of extension of the period under Section 5 can arise. We are, therefore, in complete agreement with the view expressed by the Division Bench of the High Court in Venkaiah's case that Section 93 of the Act did not have the effect of rendering the provision of Section 5 of the Limitation Act, 1963 applicable to the proceedings before the Collector."

20. The judgment aforesaid has been quoted because learned counsel for the petitioners has made a reference of the judgment of the Apex Court where condonation of delay in filing of the special appeal before the Division Bench was allowed without realizing that Section 5 of the Limitation Act applies therein being in the Court proceeding whereas it does not apply to an application before the authority.

21. Thus, for all the reasons and in reference to the judgments quoted above, we do not find that any of the judgments cited by the counsel for the petitioners provides assistance. Yet, we are dealing with those judgments/orders, as cited before us.

22. In this regard, we are first considering the order of the Apex Court in the case of Muni Ram and others ***(supra)*** wherein after condoning the delay, notice on the S.L.P. has been issued. Learned counsel for the petitioners has referred to a copy of the judgment of this Court in the case of Patram and others ***(supra)*** to indicate that the S.L.P. in the case of Muni Ram and others was against the said judgment, though we do not find name of Muni Ram in the case of Patram and others ***(supra)*** but taking it as per the statement of the counsel, we have gone through the judgment in the case of Patram and others. We find no discussion in reference to the issue involved in regards to the period to make an application. The direction in the case of Patram and others ***(supra)*** is for consideration of the application and if the facts narrated in the said judgment are taken note of, the application for it was submitted on 04.03.2017 i.e. within a period of three months from the date of the judgment of the Apex Court dated 05.12.2016 and in the instant case, it is after the period of more than three years. Thus, judgment in the case of Patram and others ***(supra)*** will have no bearing on the issue involved in this case. The pendency of the S.L.P. is not in reference to the issue of delay in maintaining application under Section 28A of the Act of 1894 so as to defer the hearing of this case.

23. So far as the judgment of the Coordinate Bench in the case of Sukhdeo and others ***(supra)*** is concerned, while considering the facts of that case, the Court noted about the knowledge of the award because application to seek reference under Section 18 was filed beyond the period given under the said provision. The Court noted the date of the award and the date of knowledge. In the said judgment, it has not been held that an application under Section 28A of the Act of 1894 can be preferred beyond the period given therein and for that even an application under Section 18 rather had rigidly applied but was from the date of the knowledge of the award though the award is published in the Gazette but ignoring the aforesaid, the judgment in the case of Sukhdeo and Others ***(supra)*** was

given but without ignoring the period of limitation. The judgment of the Apex Court in the case of State of A.P. Vs. Marri Venkaiah ***(supra)*** however deals with the issue otherwise and is binding on this Court. The date of knowledge is not relevant for Section 28A of the Act of 1894. The issue of knowledge was decided by the Apex Court even in the case of Tota Ram ***(supra)***.

24. The case of the petitioners is not otherwise in reference to the knowledge of judgment of the Apex Court rather it has not been even mentioned either in the writ petition or in the application. Accordingly, the judgment in the case of Sukhdeo and others ***(supra)*** provides no assistance to the petitioners.

25. The next judgment cited by the counsel for the petitioners is in the case of K. Subbarayudu and others ***(supra)*** wherein the issue was different then what is involved in the present matter. In that case, an appeal before the Division Bench of the High Court was preferred with the delay of 3671 days, thus, was dismissed. The Apex Court interfered therein but not in reference to the delay in filing of the application under Section 28A of the Act of 1894 so as to apply the said judgment in the present case. An appeal before the High Court can be supported by an application under Section 5 of the Indian Limitation Act for condonation of delay but such a provision does not apply for an application under Section 28A of the Act of 1894. There is no provision for condoning the delay in maintaining the application under Section 28A of the Act of 1894 and there is no prayer for it in the application at Annexure-2. Thus, the judgment in the case of K. Subbarayudu and others ***(supra)*** does not provide any assistance rather the judgment of the Apex Court in the case of Sakuru ***(supra)*** would apply. It is held that Section 5 of the Limitation Act would not apply for an application before the authority. It has been discussed in the earlier paragraphs of this judgment.

26. Learned counsel for the petitioner then cited other judgments of this Court where directions were given for consideration of the application. We find no discussion in reference to provisions of Section 28A (1) indicating the period for maintaining application whereas in the present matter, we have discussed the issue aforesaid. An application filed beyond the period given under Section 28A of the Act of 1894 would not be maintainable. A direction for its consideration can be given only when it is maintainable and not otherwise. Thus, any of the judgments by this Court where the issue in reference to Section 28A (1) has not been determined, cannot have bearing in the present matter.

27. An argument has been raised in reference to Section 28A (3) of the Act of 1894 without realizing that it is not independent but is in reference of sub-Section 2 of Section 28A. Sub-Section 2 directs the Collector to hold enquiry into the matter on the receipt of an application under sub-Section 1 and according to give notice to all concerned for opportunity of hearing. Sub-Section 3 to Section 28A provides that if an award passed under sub-Section 2 is not acceptable to any person then he may, by written application, seek reference of the matter for determination of the compensation by the Court. For application of sub-Section 3, the necessity is of an award under sub-Section 2 of Section 28A which does not exist.

28. In the light of the aforesaid, we are unable to pursue ourselves to accept any of the prayers made in the writ petition.

A direction to the authority to consider the application cannot be given without considering relevant provisions of the law. We have recorded our finding that the application under Section 28A is not maintainable in this case having been filed after lapse of three years of the judgment. Accordingly, the directions sought by the petitioners cannot be given.

29. The writ petition is, accordingly, **dismissed.**

(2021)01ILR A290
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2020

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 19287 of 2020

Kabeer Jaiswal ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Sagar Yadav

Counsel for the Respondents:
A.S.G.I., Sri Hridai Narain Pandey

(A) Civil Law - Constitution of India - Article 19(1) (a) - freedom of speech and expression , Article 21 - right to liberty - to have a name and to express the same in the manner, a person wishes, is a part of the right of the freedom of speech and expression under Article 19(1)(a) as well as right to liberty under Article 21 of the Constitution of India - The right enshrined under Article 19(1) (a) of the Constitution of India are fundamental rights and can be taken away or restricted only in accordance with the procedure prescribed under Article 19(2) of the Constitution of India .(Para -11,20)

Petitioner with an intent to change his name from Rishu Jaiswal to Kabir Jaiswal got a notice published in the notification in the Gazette of India - Petitioner moved an application through the school concerned for change of name in the certificates, granted by the CBSE - school in question forwarded the request to the Board - Board rejected the application for change of name - ground - particulars of the school records do not show the change of name as sought by the petitioner. (Para - 2,3)

HELD:- The Rules as framed by the CBSE do not have any statutory flavour . It is clear that the CBSE Regulations relied upon by the respondents cannot be considered to be a ''law' as required under Article 19(2) through which reasonable restrictions can be imposed on the freedom of expression guaranteed under Article 19 (1) (a). The right of freedom of expression guaranteed to the petitioner under Article 19 (1) (a), in the present case freedom of expression through change of name, cannot be denied to the petitioner and he is entitled to change his name. (Para - 25,27)

Writ Petition allowed. (E-6)

List of Cases cited :-

1. Anand Singh Vs U.P. Board of Secondary Education & ors. , 2014 (3) ADJ, 443

2. Ankit Singh Vs U.O.I. & ors. , 2019(9) ADJ, 664

3. Kailash Gupta Vs CBSE , 2020 SCC Online Ker 1590

4. Rayaan Chawla Vs University of Delhi & anr., vide Judgment dated 06.11.2020 passed in W.P. (C) No. 6813 of 2020

5. Abhishek Kumar Vs U.O.I. & ors.. , 2014 SCC Online Del 3459

6. Jigya Yadav Vs CBSE , MANU/DE/3700/2010

7. Minor Raana Chariappa Kalianda Vs CBSE & anr. , vide judgment dated 2.8.2019 passed in W.P. No. 20171 of 2019

8. St. of M.P. & anr. Vs Thakur Bharat Singh , AIR 1967 SC 1170

9. Bijoe Emmanuel & ors. Vs St. of Kerala & ors. , (1986) 3 SCC 615

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

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard counsel for the petitioner and Sri Hriday Narain Pandey, Advocate appearing on behalf of respondent nos. 2 to 4, the Board.

2. The present petition has been filed by the petitioner saying that the petitioner had appeared in the Secondary School Examination in the academic year 2011-13, i.e. Class-X bearing Roll No. 5118987 and Senior School Certificate Examination in the year 2015 i.e. Class-XII bearing Roll No. 5653747, conducted by the Central Board of Secondary Education, Delhi in the name of Rishu Jaiswal son of Santosh Kumar Jaiswal and had passed the said examinations also. The petitioner later on, with an intent to change his name from Rishu Jaiswal to Kabir Jaiswal got a notice published in the notification in the Gazette of India baring Gazette No. 44] New Delhi, Saturday, November 2-November 8, 2019 (Kartika 11, 1941) Part-IV, page No. 2060 and moved an application for correction of the name from Rishu Jaiswal to Kabir Jaiwal.

3. The petitioner claims that the name was changed in the Aadhar Card and the PAN Card also in pursuance to the Gazette Notification, however, when the petitioner moved an application through the school concerned for change of name in the certificates, granted by the CBSE, the school in question forwarded the request to the Board and the Board vide order dated 27.5.2020 has rejected the application for change of name on the ground that the particulars of the school records do not show the change of name as sought by the petitioner. The said order is under challenge in the present writ petition.

4. The counsel for the petitioner has argued that once a Gazette Notification has been issued and no objections have been filed, it has been announced to the world in "rem' that the petitioner intends to change his name and no plausible cause exists for the Board to reject the same. He further states that once the petitioner had made a request for change of name through the school concerned and there was no opposition to the same, the Board should have no objection in change of name as sought by the petitioner.

5. The petitioner has placed reliance on the judgment of this Court in the case of ***Anand Singh Vs. U.P. Board of Secondary Education and Others; 2014 (3) ADJ, 443*** and the judgment of this Court in the case of ***Ankit Singh Vs. Union of India and Others; 2019(9) ADJ, 664.*** He thus argues that the Board is adopting a hyper technical approach in rejecting the request whereas the petitioner has taken all steps to announce to the world through the Gazette Notification. The petitioner also states that he shall not take any benefit only on account of change of name other than the rights to which the petitioner is entitled. He

further argues that the identity of the person remains the same, only the petitioner intends to change the first name and, therefore, the writ petition deserves to be allowed.

6. Sri H.N. Pandey appearing on behalf of respondent nos. 2 to 4, the Board, has brought before me the copy of the examination bye-laws to argue that the request cannot be considered as the requirement is as under amended Rules 69.1 (i) and 69.1 (ii), which are quoted hereinbelow:-

"69.1(i)-

(Change in Candidate name, Mother Name & Father Name)

Applications regarding changes in name of surname of candidates will be considered provided the changes have been admitted by the Court of law and notified in the Government Gazette before the publication of the result of the candidate in cases of change in documents after the court orders caption will be mentioned on the document "CHANGE ALLOWED IN NAME/FATHER'S NAME/MOTHER'S NAME/GUARDIAN'S NAME FROM _____TO _____ ON (DATED) ____ AS PER COURT ORDER NO.____ DATED____

69.1(ii)

(Correction in candidate name, Mother Name & Father Name)

Correction in name to the extent of correction in spelling errors, factual typographical errors in the Candidate's name/Surname, Father's name/ Mother's name or Guardian's name to make it consistent with what is given in the school record or list of candidate (LOC) submitted by the school may be made.

Application for correction in name of Candidate/Father's/Mother's/Guardian's name will be considered only within Five years of the date of declaration of result provided the application of the candidate is forwarded by the Head of institution with the following attested documents.

a. True Copy of Admission form(s) filled in by the parents at the time of admission duly attested by the Head of the concerned Institution.

b. True Copy of the School Leaving Certificates of the previous school submitted by the parents of the candidate at the time of admission duly attested by the Head of the concerned institution.

c. True Copy of the portion of the page of admission and withdrawal register of the school where the entry has been made in respect of the candidate, duly attested by the Head of the concerned institution.

d. The Board may effect necessary corrections after verification of the original records of the school and on payment of the prescribed fee.

This rule will be applicable to all cases after Class X/XII 2015 examination onwards."

7. He has further prayed that the said Rule is applicable, however, he argues that he may be permitted time to file a counter affidavit to oppose the request so made by the petitioner.

8. After hearing the parties, I am not inclined to grant any time for counter affidavit as on the basis of the Rules produced by counsel for the respondents, the matter can be decided only on the grounds of reading of the bye-laws as the matter is to be decided only on interpretation of the Rules applicable.

9. A perusal of the Rules cited by the counsel for the respondents make it clear

that Rule 69.1(i) pertains to the permission for change in the candidate name/mother's name/father's name in a case where the request is so made prior to the publication of the result of the candidate and Rule 69.1(ii) permits the correction in the candidate name, mother's name and father's name subsequent to the declaration of the results only if it is at variance with the names so recorded in the School records. Thus in sum and substance, either of the two Rules do not permit the change of name of the candidate or the father's name or mother's name subsequent to the declaration of result.

10. The question with regard to the change of name was considered by the Kerala High Court the case of ***Kailash Gupta v. CBSE, 2020 SCC Online Ker 1590,*** wherein the Court recorded as under:-

"1. Four centuries ago, when William Shakespeare wrote the Classic "Romeo and Juliet", he felt that name did not matter much. In the present times, if one is asked the same question "What's in a name"?, the answer would be:

"Its everything".

1.1 In this writ petition, this Court is confronted with an instance where a young girl, who wished for a change of name, stumbled upon an obstacle in the form of CBSE who turned down her request for incorporating the change of name on a hyper technicality.

xxxxx

8. Name is something very personal to an individual. Name is an expression of one's individuality, one's identity and one's uniqueness. Name is the manner in which an individual expresses himself to the world at large. It is the foundation on which he moves around in a civil society. In a democracy, free expression of one's name in the manner he prefers is a facet of individual right. In Our Country, to have a name and to express the same in the manner he wishes, is certainly a part of right to freedom of speech and expression under Article 19 (1) (a) as well as a part of the right to liberty under Article 21 of the Constitution of India. State or its instrumentalities cannot stand in the way of use of any name preferred by an individual or for any change of name into one of his choice except to the extent prescribed under Article 19(2) or by a law which is just, fair and reasonable. Subject to the limited grounds of control and regulation of fraudulent or criminal activities or other valid causes, a bonafide claim for change of name in the records maintained by the Authorities ought to be allowed without hesitation.

xxxxx

12. Power of interpretation available to this Court to correct errors committed by the draftsman is quite wide. When the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. The above mentioned principle has been restated in the decisions in Pentiah v. Mudalla Veeramallappa, (AIR 1961 SC 1107), Eera v. State (Govt. of NCT of Delhi), (2017) 15 SCC 133), and also by a Full Bench of this Court in Viswambaran P.N. v. T.P. Sanu, ((2018) 2 KLT 947)."

11. The aforesaid judgment clearly stated that to have a name and to express

the same in the manner, a person wishes, is a part of the right of the freedom of speech and expression under Article 19(1)(a) as well as right to liberty under Article 21 of the Constitution of India. In the said judgment, the Kerala High Court was dealing with the scope of Rule 69.1(i) of the Rules of the CBSE and the Court permitted the change of name prior to the declaration of result by CBSE by holding the same to be a right flowing under Article 19(1) (a) and Article 21 of the Constitution of India.

12. In the present case at hand, a perusal of the Rules, as already recorded above, makes it clear that the case of the petitioner falls neither under Rule 69.1 (i) nor under Rule 69.1(ii) and thus this Court has to consider whether the request of the petitioner made for change of name in the certificate, issued by the CBSE, can be permitted at this stage or not.

13. The High Court of Delhi also considered the same issue in the case of ***Rayaan Chawla vs. University of Delhi & Anr., vide Judgment dated 06.11.2020 passed in W.P. (C) No. 6813 of 2020,*** wherein the Court was considering the request of the petitioner for permitting the change in the name in the records of the University of Delhi and the University of Delhi on the basis of a notification dated 1.7.2015 refused to permit the name change on the ground that in terms of the notification, the student is firstly required to get the name changed in the records of the CBSE. The Court held that it was impossible to get the name changed in the CBSE records as the Regulations in question do not permit the same, however, it directed the University of Delhi to permit the petitioner to change the name. The Court also considered that the publication for change of name itself provided that the change of name shall be prospective from the date of publication and thus it reconciled the difficulties that may arise on account of different names in the CBSE records and the University record by directing the University of Delhi to incorporate the changed name by recording the "changed name alias/nee earlier name" in the records of the University. The High Court passed the said order based upon the earlier Division Bench judgment of the Delhi High Court in the case of ***Abhishek Kumar v. Union of India & Ors., 2014 SCC Online Del 3459,*** wherein the Division Bench was dealing with a case of change of name and in respect to the petitioner therein who had sought to change his name after he had passed out of CBSE School. In the context of the said case, the Division Bench had held as under:-

"10. Else, we are of the opinion that the issuance of revised certificates with changed name as sought by the petitioner would create a discrepancy and reflect a status which did not exist at the time of issuance thereof. The petitioner though has changed his name, but after the date of issuance of the said certificates. Axiomatically the certificates cannot bear the changed name. If anyone were to make a deeper inquiry, they will wonder that if the name was changed only in 2011, how the changed name appears on certificates issued on a prior date. Rather the procedure of having a Gazette Notification for changed name is intended to obviate the said difficulties and to give sanctity to the change in name. The said view was taken by one of us (Rajiv Sahai Endlaw, J.) in Pallavi @ Pallavi Chandra v. C.B.S.E. MANU/DE/2842/2010 and in order dated 9th November, 2010 in W.P.(C) No. 4044/2010 titled Ashik Gurung v. CBSE

and which matters are not found to have beenagitated further. We see no reason to take a different view."

14. The High Court of Delhi in the case of ***Rayaan Chawla vs. University of Delhi (Supra)*** also referred to the judgment of the Delhi High Court in the case of ***Jigya Yadav v. CBSE, MANU/DE/3700/2010,*** wherein a challenge was made to the constitutional validity of bye-law 69.1 (i) of the CBSE Education Examination Bye-Laws and had held as under:-

"20. The test laid down in Kruse Vs. Johnson (supra) has been adopted by the Indian Supreme Court in the case of H.C. Suman & Anr. Vs. Rehabilitation Ministry Employees' Cooperative House Building Society Ltd., New Delhi & Ors,. (1991) 4 SCC 485 at page 499 wherein it has been held as under:-

"In Kruse v. Johnson it was held that in determining the validity of bye-laws made by public representative bodies, such as country councils, the court ought to be slow to hold that a bye-law is void for unreasonableness. A bye-law so made ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it. In view of this legal position the Notification dated October 27, 1987 deserves to be upheld as, in our opinion, it does not fall within any of the exceptions referred to in the case of Kruse v. Johnson."(emphasis supplied)"

xxxx

22. Moreover, we are of the view that the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the Court to take a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the Court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or bye-law which would bring about the result of rendering the system unworkable in practice - as contended by the respondent no. 1 in its counter affidavit."

15. In the context of the facts, as argued before the learned Single Judge of the Delhi High Court, the High Court permitted the name change in the University records by directing to record the "changed name alias/nee earlier name"

16. The question of change of name was also considered by the High Court of Madras in the case of ***Minor Raana Chariappa Kalianda Vs. CBSE and Anr, vide judgment dated 2.8.2019 passed in W.P. No. 20171 of 2019,*** wherein the High Court observed as under:-

"4. The above reasoning of the 1st respondent/Central Board of Secondary Education, is not in consonance with the intention of the petitioner as well as the law. The birth name of the petitioner herein has been now changed and wide publicity has been given both in the Government Gazette as well as Local daily as required

under the law. Pursuant to that, the name of the petitioner has been changed in the Aadhar Card and other records. Unless and until, the petitioner Educational certificate also carries the present name, there will be confusion in the identity of the person and it will be misleading. Once a person opts to change his name and carries out the necessary change by publication in the Government Gazette as required under law, the said change should be uniformly carried out in all the documents to retain the uniqueness of the identity. If the contention of the 1st respondent, accepted, that the name change will only have prospective effect and not retrospective effect, then a person will be having more than two names on record and the identify of the person will be misleading. Therefore, the reasoning given by the 1st respondent for refusing to carry out the correction in the mark sheet is untenable and against the spirit of law.

5. In the said circumstances, the Writ Petition is Allowed. The 1st respondent is hereby directed to re-consider the request of the petitioner herein and pass appropriate order, within a period of four weeks from today. No order as to costs."

17. In view of the judgments as recorded above, this Court finds that the Kerala High Court as well as the Delhi High Court have held that the individual "name' is a facet of right of expression, which is guaranteed under Article 19(1) (a) read with Article 21 of the Constitution of India. The freedom of expression as guaranteed under Article 19(1) (a) includes within its sweep all forms of expressions and name in the present world is clearly a strong expression. Thus, I agree with the judgments of the Kerala High Court as well as the Delhi High Court to hold that change of name is an expression guaranteed under Article 19(1) (a) of the Constitution of India.

18. The next question, which is more important in the present case, is as to the Regulations of the CBSE, which prohibit the change of name except in the scenario as emphasized under Regulation 69.1 (i) and 69.1 (ii) can be used to deny the rights enshrined under Article 19 (1) (a) of the Constitution of India.

19. The Central Board of Secondary Education is a Society registered under the Societies Registration Act, and is governed by the Bye-Laws although the Central Board of Secondary Education Draft Bill-2012 was issued by the Legislative Department on 7th August, 2012, however, the said Act was never enacted and the CBSE continues to be a Society registered under the Societies Registration Act. The notification issued by the Examination Committee on 1.2.2018 itself records that the Rules with regard to the change of name were based upon the recommendation of the Examination Committee made at its meeting held on 15.12.2017. A bare perusal of the said notification read with the fact that the CBSE is a Society, the said Rules do not have any statutory flavour.

20. The right enshrined under Article 19(1) (a) of the Constitution of India are fundamental rights and can be taken away or restricted only in accordance with the procedure prescribed under Article 19(2) of the Constitution of India.

21. Thus, what is to be considered is whether the Rules framed by the CBSE would fall within the scope of Article 19(2). Article 19(2) of the Constitution of India is reproduced hereinunder:-

"[(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the [sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.]"

22. Constitution Bench of Supreme Court considered the scope of "law' as laid down under Article 19(2) and in the context of freedom enshrined under Article 19(1)(d), the Supreme Court considered as to how the restrictions can be placed under Article 19(2). The Supreme Court in the case of ***State of M.P. and another v. Thakur Bharat Singh; AIR 1967 SC 1170*** recorded, as under:-

"In our judgment, this argument involves a grave fallacy. All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and exclusive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid."

23. The Supreme Court was again confronted with the circulars issued by the Kerala Education Authorities providing a code of conduct for teachers and pupils and it was considered as to whether the said code qualifies the test as laid down under Article 19(2) and can have the effect of restricting the freedoms guaranteed under Article 19(1)(a). The Supreme Court in the case of ***Bijoe Emmanuel and Others Vs. State of Kerala and Others; (1986) 3 SCC 615*** held as under:-

"16. We have referred to Article 19(1)(a) which guarantees to all citizens freedom of speech and expression and to Article 19(2) which provides that nothing in Article 19(1)(a) shall prevent a State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by Article 19(1)(a) in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. ***The law is now well settled that any law which be made under clauses (2) to (6) of Article 19 to regulate the exercise of the right to the freedoms guaranteed by Article 19(1)(a) to (e) and (g) must be "a law" having statutory force and not a mere executive or departmental instruction.*** *In Kharak Singh v. State of U.P. [AIR 1963 SC 1295, 1299 : (1964) 1 SCR 332] the question arose whether a police regulation which was a mere departmental instruction, having no statutory basis could be said to be a law for the purpose of Article 19(2) to (6). The Constitution Bench answered the question in the negative and said :*

"Though learned counsel for the respondent started by attempting such a justification by invoking Section 12 of the Indian Police Act he gave this up and conceded that the regulations contained in

Chapter XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be 'a law' which the State is entitled to make under the relevant clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19(1), nor would the same be 'a procedure established by law' within Article 21. The position therefore is that if the action of the police which is the arm of the executive of the State is found to infringe any of the freedoms guaranteed to the petitioner the petitioner would be entitled to the relief of mandamus which he seeks, to restrain the State from taking action under the regulations."

17. The two circulars on which the department has placed reliance in the present case have no statutory basis and are mere departmental instructions. They cannot, therefore, form the foundation of any action aimed at denying a citizen's fundamental right under Article 19(1)(a). Further it is not possible to hold that the two circulars were issued "in the interest of the sovereignty and integrity of India, the security of the State, friendly relation with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence" and if not so issued, they cannot again be invoked to deny a citizen's fundamental right under Article 19(1)(a). In Kameshwar Prasad v. State of Bihar [AIR 1962 SC 1166 : 1962 Supp 3 SCR 369, 383-4] a Constitution Bench of the Court had to consider the validity of Rule 4-A of the Bihar Government Servants Conduct Rules which prohibited any form of demonstration even if such demonstration was innocent and incapable of causing a breach of public tranquillity. The Court said:

"No doubt, if the rule were so framed as to single out those types of demonstration which were likely to lead to a disturbance of public tranquillity or which would fall under the other limiting criteria specified in Article 19(2) the validity of the rule could have been sustained. The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration -- be the same however innocent and however incapable of causing a breach of public tranquillity and does not confine itself to those forms of demonstrations which might lead to that result."

Examining the action of the Education Authorities in the light of Kharak Singh v. State of U.P. [AIR 1963 SC 1295, 1299 : (1964) 1 SCR 332] and Kameshwar Prasad v. State of Bihar [AIR 1962 SC 1166 : 1962 Supp 3 SCR 369, 383-4] we have no option but to hold that the expulsion of the children from the school for not joining the singing of the National Anthem though they respectfully stood up in silence when the Anthem was sung was violative of Article 19(1)(a)."

24. The said two judgments, as recorded above, were considered and followed by the Supreme Court in the case of ***Union of India Vs. Naveen Jindal and Another; (2004) 2 SCC 510.*** While considering the executive instructions of the Government of India as contained in Flag Code viz a viz rights of the people enshrined under Article 19 (1) (a) of the Constitution of India, the Supreme Court recorded as under:-

"28. Before we proceed further, it is necessary to deal with the question,

whether Flag Code is "law"? Flag Code concededly contains the executive instructions of the Central Government. It is stated that the Ministry of Home Affairs, which is competent to issue the instructions contained in the Flag Code and all matters relating thereto are one of the items of business allocated to the said Ministry by the President under the Government of India (Allocation of Business) Rules, 1961 framed in terms of Article 77 of the Constitution of India. The question, however, is as to whether the said executive instruction is "law" within the meaning of Article 13 of the Constitution of India. Article 13(3)(a) of the Constitution of India reads thus:

"13. (3)(a) 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;"

29. A bare perusal of the said provision would clearly go to show that executive instructions would not fall within the aforementioned category. Such executive instructions may have the force of law for some other purposes; as for example those instructions which are issued as a supplement to the legislative power in terms of clause (1) of Article 77 of the Constitution of India. The necessity as regards determination of the said question has arisen as Parliament has not chosen to enact a statute which would confer at least a statutory right upon a citizen of India to fly the National Flag. An executive instruction issued by the appellant herein can any time be replaced by another set of executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution of India; as for the purpose of regulating the exercise of right of freedom guaranteed under Articles 19(1)(a) to (e) and (g) a law must be made.

30. In Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] this Court held: (AIR p. 1299, para 5)

"Though learned counsel for the respondent started by attempting such a justification by invoking Section 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Chapter XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be 'a law' which the State is entitled to make under the relevant clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19(1), nor would the same be 'a procedure established by law' within Article 21. The position therefore is that if the action of the police which is the arm of the executive of the State is found to infringe any of the freedoms guaranteed to the petitioner the petitioner would be entitled to the relief of mandamus which he seeks, to restrain the State from taking action under the regulations."

31. To the same effect are the decisions of this Court in State of M.P. v. Thakur Bharat Singh [AIR 1967 SC 1170] and Bijoe Emmanuel v. State of Kerala [(1986) 3 SCC 615] ."

25. In view of the judgments of the Supreme Court, the Rules as framed by the CBSE do not have any statutory flavour and cannot be considered to be the "law' as required for placing a reasonable restrictions on the rights enshrined under Article 19(1)(a), in terms of Article 19(2) of the Constitution of India.

26. In any event, even for restricting the scope of Article 19 (1) (a) by means of any law, it is clear that the operation of such law by the State imposing reasonable restrictions should be in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with the Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence.

27. In view of the law as pronounced by the Supreme Court, it is clear that the CBSE Regulations relied upon by the respondents cannot be considered to be a "law' as required under Article 19(2) through which reasonable restrictions can be imposed on the freedom of expression guaranteed under Article 19 (1) (a). Thus, I have no hesitation in holding that the right of freedom of expression guaranteed to the petitioner under Article 19 (1) (a), in the present case freedom of expression through change of name, cannot be denied to the petitioner and he is entitled to change his name.

28. It is further to be considered that different name in different records will lead to undue hardship to both the petitioner and the respondents, as such to reconcile the issue and the hardships that may be faced by the CBSE in changing the name, as the certificate issued by the earlier name has already been issued to the petitioner, taking a cue from the judgment in the case of ***Rayaan Chawla (Supra),*** I direct that the CBSE shall record in their records the name of the petitioner as "Kabir Jaiswal alisa/nee Rishu Jaiswal" in the records of the CBSE and shall issue a fresh certificate recording the name as directed above in respect of the Secondary School Examination of the academic sessions 2011-2013 Class-X bearing Roll No. 5118987 and the Senior School Certificate Examination of the year 2015 i.e. Class-XII bearing Roll No. 5653747. The said exercise shall be carried out by the respondents within a period of two months from the date a copy of the order is produced before the respondent no. 2.

29. The writ petition is **allowed** in terms of the said order.

30. Copy of the order downloaded from the official website of this Court shall be treated as certified copy of this order.

(2021)01ILR A300
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2020

BEFORE

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

Writ C No. 19538 of 2020

Hindustan Aeronautics Ltd. Transport Aircraft Division Chakeri, Kanpur Nagar ...Petitioner

Versus

State of UP & Ors. ...Respondents

Counsel for the Petitioner:
Sri Diptiman Singh

Counsel for the Respondents:
C.S.C.

(A) Labour Law - Industrial Disputes Act, 1947 - Section 10(1)(c) - U.P. Industrial Disputes Act, 1947 - Section 4-K - reference - no principle known to law which permits an administrative review of judicial action - law envisages judicial review of administrative action, and in some cases, legislative action also - Judicial orders can be undone by invoking the

appellate, revisional or supervisory procedures by approaching a higher judicial forum - It cannot be done by an executive or administrative action - impugned order passed by the Labour Commissioner and consequential notice issued by the Labour Court quashed. (Para - 18)

Reference was made by the State Government under Section 10(1)(c) of the Industrial Disputes Act, 1947 at the behest of respondent no. 4, who are an employees' association of the petitioners - dispute referred was one relating to promotion of two employees of the petitioner - dispute has been referred by the State Government under Section 10(1)(c) of the Central Act and the same requires to be adjudicated by a Court constituted under the Central Act - reference order has referred the dispute to the Labour Court which was not a Court constituted under the Central Act. (Para - 8)

HELD:- Labour Commissioner is not a Court. He exercises the powers of the State Government to make a reference that is not a judicial power of any kind. All that he can exercise is an administrative or executive power conferred on the Government. Delegation of powers under Section 39 of the Central Act made by the Central Government is to exercise the administrative power of making a reference to the competent Court. It is in no way a judicial authority of supervision over the Labour Court, conferred on the Commissioner. Impugned order undoing a judicial order by an administrative determination is ultra vires and without jurisdiction.(Para - 18)

Writ Petition allowed. (E-6)

List of Cases cited :-

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

1. This writ petition has been filed, challenging an order passed by the Labour commissioner, U.P. Kanpur dated 05.05.2020 and a notice dated 03.07.2020 issued by the Presiding Officer, Labour Court (3) U.P., Kanpur, in Adjudication Case No. 115 of 2020.

2. In compliance with the order dated 07.12.2020, a better affidavit has been filed by Mr. Mahadeo N. Bobde, presently a Member (Judicial), Board of Revenue at Lucknow and formerly, the Labour Commissioner, U.P., Kanpur Nagar. By an earlier order dated 26.11.2020, the named officer was required to file a personal affidavit for the reasons indicated therein. He filed a personal affidavit on 07.12.2020. It was not found satisfactory. He was granted an opportunity to file a better affidavit. The affidavit dated 16.12.2020 has been filed, in compliance with the order dated 07.12.2020, as already indicated.

3. The explanation offered by Mr. Mahadeo N. Bobde is accepted.

4. Notice was issued to respondent no. 4, in compliance with this Court's order, by speed post, bearing Consignment No. EU296438326IN, which has been delivered to the fourth respondent on 01.12.2020. It is so indicated in the Office Report dated 05.12.2020. The Office report also shows that their conclusion about delivery by speed post is based on a post office report dated 05.12.2020, along with a track of the consignment that is attached. An affidavit of service dated 05.12.2020 has also been filed by Mr. Diptiman Singh, learned counsel for the petitioner, which encloses with it a copy of the dasti notice handed over to the petitioner by the office on 27.11.2020. A perusal of the second copy of the notice form shows that service has been effected dasti also upon respondent no. 4 on 01.12.2020. Accordingly, service upon the fourth respondent is held good. No one appears his behalf.

5. Heard Mr. Diptiman Singh, learned counsel for the petitioner and Mr. Vinod Kant, learned Additional Advocate General assisted by Mr. Shriprakash Singh, learned Standing Counsel appearing on behalf of respondent nos. 1, 2 and 3.

6. Hindustan Aeronautics Limited is a Central Government undertaking that functions under the Ministry of Defence, Government of India. It is a company incorporated under the provisions of Indian Companies Act, with its Registered Office at 15/1, Cubbon Road, Bengaluru. The Company is engaged in the manufacture, repair and overhauling of aircraft and other defence equipment. They provide services and cater to the requirements of the defence services in India. The petitioner has several units across the country.

7. This writ petition relates to the Transport Aircraft Division, HAL, Kanpur. The Transport Aircraft Division, Kanpur deals with the manufacture, maintenance, overhauling and repair of transport aircraft used by the Defence Forces of the Nation. It is represented on behalf of the petitioner that the President of India, being the Head of the Executive and Supreme Commander of the Armed Forces under Article 53 of the Constitution, commands 100% shares holding of the company : some directly, the others vicariously. The President of India holds six shares out of eleven and all the other five directors are high ranking officers of the Ministry of Defence, Government of India, who function under the direct control of the President of India as the Supreme Commander of the Armed Forces. It is thus made out that the appropriate Government vis-a-vis the petitioner under the Industrial Disputes Act, 1947 are the Central Government.

8. It figures that on 26.07.2007, a reference was made by the State Government under Section 10(1)(c) of the Industrial Disputes Act, 1947 (for short, "the Central Act') at the behest of respondent no. 4, who are an employees' association of the petitioners. The dispute referred was one relating to promotion of two employees of the petitioner w.e.f. 01.07.2005. It is pleaded on behalf of the petitioner that the reference order clearly shows that the dispute has been referred by the State Government under Section 10(1)(c) of the Central Act and the same requires to be adjudicated by a Court constituted under the Central Act. However, the reference order dated 26.07.2007 has referred the dispute to the Labour Court (5), Kanpur which was not a Court constituted under the Central Act.

9. The aforesaid case was registered as Adjudication Case No. 137 of 2008 on the file of the Labour Court (5), Kanpur. On January the 13th, 2009, the petitioners filed their written statement in the cause. A preliminary objection was raised with regard to the competence of the Labour Court inasmuch as the Labour Court was not constituted under the Central Act. It was urged that a Labour Court constituted under the Central Act alone could have jurisdiction relating to a dispute between the petitioner and its workman.

10. During the course of proceedings, two issues were framed on 9th September, 2009. Issue no. 1 was regarding the competence of the authorized representative appointed to represent the employer-petitioners. That is not of relevance here. The second issue framed as Issue No. 2 reads thus (translated into English from Hindi vernacular):

"Whether the Labour Court constituted by the Government of U.P. has jurisdiction to hear the reference or it is cognizable by the Labour Court constituted by the Central Government?"

11. There is no reason to disbelieve the petitioners' unrebutted case to the effect that after a detailed hearing, the Labour Court (3), Kanpur vide its order dated 17.07.2019, held that the Labour Court (3) is not competent to hear the matter, as it is not constituted under the Central Act. It was held that the reference was made under the Central Act and the Court constituted under the U.P. Industrial Disputes Act, 1947 had no jurisdiction to hear and determine it. The order of reference dated 26.06.2007 was held to be bad in law and one conferring no jurisdiction.

12. It is averred in paragraph 20 of the writ petition that the order dated 17.07.2019 passed by the Labour Court has not been challenged by respondent no. 4 before any higher judicial forum/Court. Thus, the order dated 17.07.2019 has attained finality. It is also asserted that the order dated 17.07.2019 was made after hearing both parties at length and proper opportunity was provided by the Labour Court to the fourth respondent. It figures that on 14.11.2019 and 18.12.2019, the fourth respondent made applications to the Labour Commissioner, Kanpur seeking a review of the order dated 17.07.2019 passed by the Labour Court (3). Those applications are on record, compendiously annexed as Annexure-9 to the writ petition.

13. The Labour Commissioner, curiously enough, sought opinion of the District Government Counsel (Civil), Kanpur. The District Government Counsel vide his opinion dated 17.03.2020, advised the Labour Commissioner that the adjudication case could be heard by a Court constituted under the U.P. Industrial Disputes Act, 1947. That opinion of the District Government Counsel dated 17th March, 2020 is also on record. The Labour Commissioner sent a memo dated 05.05.2020 to the Labour Court (3), with a request that the order dated 17.07.2019 may be reviewed and the adjudication case may be heard by that Labour Court. This communication from the Labour Commissioner to the Labour Court (3), Kanpur says after extracting the opinion that the Labour Commissioner had received from the District Government Counsel that bearing in mind the DGC's opinion the Government have decided (the Labour Commissioner exercising delegated powers of the State Government) to send back the matter to the Labour Court for a review of its judgment.

14. The memo dated 05.05.2020, which, in substance, is an order passed by the Labour Commissioner, also returns along with it the original order dated 17.07.2019 passed in Adjudication Case No. 115 of 2010 to the Labour Court (3), Kanpur, enclosing with it a photostat copy of the District Government counsel's opinion. This memo dated 05.05.2020 issued by the Labour Commissioner, U.P., Kanpur and addressed to the Presiding Officer, Labour Court (3) Kanpur is hereinafter called "the impugned order'.

15. Acting on the impugned order, the Labour Court (3), Kanpur issued notice afresh to the petitioner, taking cognizance of the Adjudication Case No. 115 of 2010 which had already been decided by the Labour Court, in terms of which the award dated 17.07.2019, upholding the petitioner's objections on ground of lack of jurisdiction, was passed.

16. Looking to the peculiar circumstances attending the impugned order and the *prima facie* gross usurpation of jurisdiction by the Labour Commissioner, U.P., Kanpur who virtually set aside a judicial order of the Labour Court by means of the impugned order, this Court required the then incumbent Labour Commissioner, U.P. to file his personal affidavit explaining circumstances in which he acted in the manner that he did. A personal affidavit dated 07.12.2020 was filed by Mr. S.M. Bobde, the then Labour Commissioner, U.P. and presently Member (Judicial), Board of Revenue, Lucknow. He did not at all show in that affidavit as to how he got jurisdiction to undo a judicial determination of the Labour Court, in the exercise of his administrative powers on behalf of the State Government to make a reference. The explanation being *prima facie* not found satisfactory, further opportunity was granted to Mr. Bobde to file a better affidavit. He came up with a better affidavit dated 16th December, 2020 (sworn on 10.12.2020) filed in Court on 17.12.2020, where he accepted that he had passed the impugned order dated 05.05.2020 inadvertently, under some misconception and wrong advice. He said that, now that he has been transferred to the Board of Revenue, he cannot recall/withdraw the impugned order.

17. This Court has considered the matter in substantial detail, though without the assistance of respondent no. 4, who have chosen not to appear. The issue here is whether the Labour Commissioner, who exercises delegated powers of the State Government to refer a dispute under Section 4-K of the U.P. Industrial Disputes Act, or, in the present case, under Section 10(1)(c) of the Central Act, could undo a judicial determination of the Labour Court, holding that the reference made to it by the State Government was incompetent. This Court does not think so.

18. A perusal of the impugned order shows that the Labour Commissioner, U.P., Kanpur has held a judicial order of the Labour Court to be flawed. He has sent back the matter to the Labour Court to decide the reference on merits. The Labour Commissioner has decided that the reference is competent. He has done so on the basis of an opinion of the District Government Counsel, Kanpur Nagar. The Labour Commissioner is not a Court. He exercises the powers of the State Government to make a reference that is not a judicial power of any kind. All that he can exercise is an administrative or executive power conferred on the Government. Now, if there were a delegation in his favour under Section 39, assuming that he had the necessary delegation, the delegation of powers under Section 39 of the Central Act made by the Central Government is to exercise the administrative power of making a reference to the competent Court. It is in no way a judicial authority of supervision over the Labour Court, conferred on the Commissioner. In case, any party was aggrieved by the order dated 17.09.2019 passed by the Presiding Officer, Labour Court (3), U.P., Kanpur in Adjudication Case No. 115 of 2010, it was open to that party to approach this Court under Article 226 or 227 of the Constitution, for those are the only remedies that are open, apart from Article 136 of the Constitution, to challenge a judicial determination of the Labour Court, be it an order or an award. There is no principle known to law which permits an administrative review of judicial action. The law envisages judicial review of administrative action, and in some cases,

legislative action also. But there is no concept known to law that permits an administrative review. Judicial orders can be undone by invoking the appellate, revisional or supervisory procedures by approaching a higher judicial forum. It cannot be done by an executive or administrative action. The impugned order is also bad, for another reason. It has proceeded substantially, if not entirely, on the opinion of the District Government Counsel. Even if an opinion were sought by the Labour Commissioner, who is presumably a layman (as opposed to a legally trained mind) ought not have referred to the legal opinion received by him. In fact, he should not have acted on any legal opinion at all. This is so because an order founded on legal opinion is not one where the Authority making the order, has done an independent application of mind. Rather, he has gone by the opinion of another, may be a legal expert. This in itself would vitiate the impugned order. In any view of the matter, this Court is of clear opinion that the impugned order undoing a judicial order by an administrative determination is ultra vires and without jurisdiction. Though, Mr. Diptiman Singh sought to justify the order dated 17.07.2019 passed by the Presiding Officer, Labour Court (3), U.P., Kanpur in Adjudication Case No. 115 of 2010, this Court is not minded to examine that question in the absence of a challenge to the order dated 17.07.2019 by a party who is aggrieved. It is also made clear that if any party, including the fourth respondent, is aggrieved by the order dated 17.07.2019, it would be open to them to challenge the said order through competent proceedings, as advised.

19. In the result, this writ petition succeeds and is **allowed**. The impugned order dated 05.05.2020, passed by the Labour Commissioner, U.P., Kanpur insofar as it relates to Adjudication Case No. 115 of 2010, is hereby **quashed**. The consequential notice issued by the Labour Court (3) U.P., Kanpur dated 03.07.2020 in Adjudication Case No. 115 of 2010 is also **quashed**.

20. There shall, however, be no order as to costs.

(2021)01ILR A305
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 19885 of 2020

The C/M, Maharshi Kapil Muni Shiksha Samiti, District Mainpuri & Anr.
...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ved Prakash Shukla

Counsel for the Respondents:
C.S.C.

(A) Civil Law - voluntary dissolution - Societies Registration Act, 1960 - Section 13 - Provision for dissolution of societies and adjustment of their affairs - Section 13A - Power of Registrar to apply for dissolution , Section 13B - Dissolution by court - voluntary dissolution under Section 13 - simply requires the passing of a resolution by the members of the society no being less than three-fourth of the total members of the society - Once the said condition is

met, no sanction is required from anyone and the Assistant Registrar need not be approached for giving a seal of approval to the resolution of dissolving the society.(Para -10,16)

Petitioners have dissolved their society by Resolution passed unanimously i.e., by more than three-fifth members of the society - accordance with the scheme of Societies Registration Act, 1960 - transferred assets and liabilities to the newly created trust - claim of petitioner - application moved before the Respondent No. 2 for approval of the resolution is pending consideration. (Para - 1,2,3)

HELD: - No seal of approval is required for dissolving the society as has been done in the present case, a writ, as prayed for cannot be granted, however, petitioners are directed to give an information in writing along with the copy of Resolution to the Assistant Registrar of Societies who shall record the same in his records. (Para - 17)

Writ petition disposed off. (E-6)

List of Cases cited :-

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Present writ petition was filed alleging that the petitioners have dissolved their society by Resolution dated 1.4.2011 in accordance with the scheme of Societies Registration Act, 1960 (in short 'the Act') and have transferred assets and liabilities to the newly created trust in the name of Maharshi Kapil Muni Shiksha Trust.

2. Petitioner claims that in terms of the resolution passed, an application was moved before the Respondent No. 2 for approval of the resolution.

3. Counsel for the petitioner argues that the application filed before the Respondent No. 2 for approval of the resolution dated 1.4.2011 is pending consideration, as such, he prays that a suitable writ, order or direction be issued to the Respondent No. 2 to take a decision on the said application.

4. This Court raised a pointed query to the counsel for the petitioner as to where is the provision prescribed under the Act conferring the power on the Assistant Registrar to approve the resolution passed by the society for its dissolution.

5. Counsel for the petitioner has relied upon the provisions of Section 13 of the Act. There appears to be no such provision, as such, I consider it appropriate to discuss the scope of Section 13 containing a provision for dissolution of societies and adjustment of their affairs. The provision for dissolution of societies and adjustment of their affairs is contained in Section 13, which is as under:

"13. Provision for dissolution of societies and adjustment of their affairs.?Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the rules of the said society applicable thereto, if any, and if not, then as the governing body shall find expedient, provided that, in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the 'registered office of the society'* (* as amended vide Uttar

Pradesh Act 52 of 1975 w.e.f. 10.10.1975) is situate; and the Court shall make such order in the matter as it shall deem requisite:

Provided that no society shall be dissolved unless three-fifths of the members shall have expressed a wish for such dissolution by their votes delivered in person, or by proxy, at a general meeting convened for the purpose:

Provided that [whenever any Government] is a member of, or a contributor to, or otherwise interested in any society registered under this Act, such society shall not be dissolved [without the consent of the Government of the [State] of registration.]"

6. The State of Uttar Pradesh has amended the Societies Registration Act insofar its applicability in the State of Uttar Pradesh is concerned and Section 13A and Section 13B have been incorporated in the Act providing for dissolution of the society in manner other than a voluntary dissolution as provided under Section 13 of the Act, which is quoted hereinabove.

7. Section 13A and 13B amended by virtue of U.P. Act No. 52 of 1975 are quoted as under:-

"13A. Power of Registrar to apply for dissolution:- (1) Where in the opinion of Registrar, there are reasonable ground to believe in respect of a society registered under this Act that any of the grounds mentioned in clauses (a) to (e) of sub-section (1) of Section 13B exists he shall send to the society, a notice calling upon it to show cause within such time as may be specified in the notice why the society be not dissolved.

(2) if on or before the date specified in the notice or within such extended period as the Registrar may allow, the society fails to show any cause or if the cause shown is considered by the Registrar to be unsatisfactory, the Registrar, may move the Court referred to in section 13 for making an order of the dissolution of the society.

13B. Dissolution by court:- (1) On the application of the Registrar under section 13 A or under section 24 or on an application made by not less than one tenth of the members of a society registered under this Act, the Court referred to in section 13 may make an order for the dissolution of the society on any of the following grounds, namely:-

(a) that the society has contravened any provision of this Act or of any other law for the time being in force and it is just and equitable that the society should be dissolved:

(b) that the number of the members of the society is reduced below seven;

(c) that the society has ceased to function for more than three years preceding the date of such application;

(d)that the society is unable to pay its debts or meet its liabilities; or

(e) that the registration of the society has been cancelled under Section 12 D on the ground that its activities or proposed activities have been or will be opposed to public policy.

(2) Without prejudice to the provisions of sub-section (1) or of Section 12D, the Court may on an application of the District Magistrate in this behalf make an order for the dissolution of a society on the ground that the activities of the society constitute a public nuisance or are other wise opposed to public policy.

(3). When an order for the dissolution of a society is made under sub-section (1) or sub-section (2), all necessary

steps for the disposal and the settlement of the property of the society, its claims and liabilities and any other adjustment of its affairs take place in manner as the Court may direct."

8. Thus, in the scheme of the Act with regard to dissolution, it is clear that the dissolution of a society can take place by three modes, the first being a voluntary dissolution as provided under Section 13, wherein the requirement is that there has to be a resolution passed by number of members, who are not less than three-fifth of the member of any society and as soon as such resolution is passed, the dissolution happens forthwith or at any time i.e. agreed upon in the resolution. After the dissolution which happens on the passing of the resolution further steps are required to be taken for disposal and settlement of the property of the society, its claims and liabilities according to the Rules of the said society applicable thereto.

9. A perusal of Section 13 of the Act also makes it clear that an inbuilt mechanism is provided for contingencies that may arise in the event of any dispute arising among the said governing body or the members of the society or with regard to the affairs which have to be referred to the Principal Court of original civil jurisdiction of the district in which the registered office of the society is situate and such, Court is empowered to pass requisite orders.

10. A plain reading of the said section makes it clear that no sanction is required from anyone and the Assistant Registrar need not be approached for giving a seal of approval to the resolution of dissolving the society.

11. In addition to the voluntary resolution as provided under Section 13, two other modes of dissolution have also been provided in the State of Uttar Pradesh by incorporation of Section 13A and Section 13B in the Act.

12. Section 13A confers power on the Registrar to apply for the dissolution in the event of contingencies which are enumerated under Section 13A (1) of the Act.

13. Section 13B provides for yet another manner of dissolution by the Court on an application of the Registrar under Section 13A or Section 24 or on an application made by not less than one-tenth of the members of the society registered under this Act and the Court is empowered to pass orders for the dissolution of the society on the happening of any of the grounds as enumerated in Clause (a) to (e) of Section 13B (1) of the Act.

14. Curiously enough Section 13(B) (2) provides yet another mode of dissolution of the society by the Court on an application of the District Magistrate on the limited grounds enumerated therein.

15. Thus, under scheme of the Act, three modes of dissolution are prescribed, first one being voluntary dissolution under Section 13, second being dissolution at the instance of the Registrar and the third being dissolution under the orders of the Court.

16. In the present case, we are concerned with the voluntary dissolution under Section 13, which simply requires the passing of a resolution by the members of the society no being less than three-forth of the total members of the society. Once the said condition is met, no other

condition is required to be fulfilled and the same does not require a seal of approval by any officer or authority. In the present case, it is alleged that by a resolution passed unanimously i.e. by more than three-fifth members of the society on 1.4.2011, the society has been dissolved, as such, no further approval is required and the dissolution would be deemed to be effective from the date of its passing i.e. 1.4.2011.

17. As I have recorded above that no seal of approval is required for dissolving the society as has been done in the present case, a writ, as prayed for cannot be granted, however, petitioners are directed to give an information in writing along with the copy of Resolution to the Assistant Registrar of Societies who shall record the same in his records.

18. The writ is disposed off.

18. The writ petition is disposed off.

(2021)01ILR A309
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2020

BEFORE

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

Writ C No. 20773 of 2020

Mohar Singh ...Petitioner
Versus
Presiding Officer, Labour Court, U.P., Agra & Anr. ...Respondents

Counsel for the Petitioner:
Sri Alok Krishan Tripathi

Counsel for the Respondents:
C.S.C.

(A) Labour Law - The Uttar Pradesh Industrial Disputes Act, 1947 - Section 4-K - Reference of disputes to labour court or Tribunal - Termination of services - Labour Court is a Court of referred jurisdiction - Labour Court, unlike a court of general jurisdiction, cannot answer anything, but what has been referred to it - impugned award is not liable to be disturbed and is upheld. (Para -15,16)

Petitioner is a workman, whose services have been terminated by the Employers - reference made to the Labour Court, under Section 4-K of the Uttar Pradesh Industrial Disputes Act, 1947 - reference has been answered against the workman and in favour of the Employers - What has been referred to the Labour Court, is a dispute about the validity of the termination of the workman's services w.e.f. 20.02.2004 by the Employers, whereas the dispute is one about his transfer on that date.(Para - 2,3,4,15)

HELD:-Workman's services being never terminated, the Labour Court could not have decided the validity of the transfer on a reference made about termination of his services. The reference made certainly does not clothe the Labour Court with jurisdiction to decide upon the validity of the transfer order dated 20.02.2004. It is, however, ordered that the Deputy Labour Commissioner/ State Government, whoever is competent, shall make a fresh reference, under Section 4-K of the Act of 1947 in appropriate terms, referring the dispute that arises between parties, bearing in mind what has been said in this judgment. (Para - 15,16)

Writ petition disposed off. (E-6)

List of Cases cited :-

M/S Super Cassettes Industries Pvt. Ltd. Vs St. Of U.P. & 2 ors. , WRIT - C No.52897 of 2017, decided on 05.02.2020

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

1. Heard Mr. Alok Krishan Tripathi, learned Counsel for the petitioner and the learned Standing Counsel appearing on behalf of respondent no.1.

2. The petitioner is a workman, whose services have been terminated by the Employers, the second respondent.

3. The following reference was made to the Labour Court, under Section 4-K of the Uttar Pradesh Industrial Disputes Act, 1947 (for short, "the Act of 1947'):

"क्या सेवायोजक पक्ष द्वारा श्रमिक श्री मोहर सिंह पुत्र श्री स्व0 विजय सिंह की सेवायें दिनांक 20.02.2004 से समाप्त किया जाना उचित अथवा वैधानिक है? यदि नहीं, तो संबंधित श्रमिक क्या लाभ/ रिलीफ पाने का अधिकारी है, तथा अन्य किस विवरण सहित?"

4. The said reference has been answered against the workman and in favour of the Employers.

5. The workman's case elaborately set out in his written statement dated 19.04.2007 filed before the Labour Court is this: He was appointed as a peon at the Hindustan College of Science and Technology, Farah, District Mathura (for short, "the College') on 03.07.1998. The said College are the Employers. They are a unit of the Sharda Educational Trust. The Employers are recognized by the Uttar Pradesh Technical University, Lucknow. The workman discharged his assigned duties with devotion and sincerity with no cause of complaint ever to the Employers. In the year 2003, the workman was drawing a salary of Rs.2100/- per mensem. These emoluments, looking to the dearness, were far from adequate compensation. As such, the workman, along with other similarly circumstanced workmen, put forth their demand to the Employers for a raise. The Employers said that they would consider it in the next month. In the month of July, 2003, the demand was reiterated and led to the same response that the demand would be considered during the following month. The Employers instead of considering the workman's demand, acting on a stratagem, suspended him pending inquiry by an order dated 28.08.2003.

6. It was mentioned incorrectly in the suspension order that the workman was transferred to the Agra Headquarters by an order dated 21.08.2003, but he did not join in compliance with that order. It was indicated in the suspension order that since the workman did not comply with the transfer order, he was involved in activities against the Employers. The workman by a letter dated 01.09.2003, sent by registered post to the Employers, disputed the aforesaid allegations as incorrect and made up. However, the Employers without considering the workman's letter of 1st September, served him with a charge sheet dated 03.09.2003. The workman submitted his written statement to the charge sheet on 04.09.2003. The charges against the workman were of disobeying the transfer order and being involved in activities against the interest of the Employers, both of which are asserted to be false and made up. These charges had been brought in order to harass the workman with an object to suppress the just demand for a raise made by him and other similarly circumstanced workmen. It was a measure of reprisal and to make an example out of the workman, lost the others come up with a demand for a raise. The workman was not given any appointment letter or was there

any condition carried in terms of appointment that he could be transferred. In addition, the workman was never served with the so called transfer order, the disobedience of which he was charged.

7. An inquiry was held into charges by one Sukhveer Singh, an Inquiry Officer, appointed by the Employers. The Inquiry Officer did not conclude the inquiry, but the suspension was withdrawn by a letter dated 19.02.2004. The letter said that the workman should go and join the Agra office on 28.02.2004. This shows that in the past, there was no transfer order and to fill up that lacuna, the letter dated 19.02.2004 was issued. The letter dated 19.02.2004 was again issued to harass the workman. The Employers did not intend to take him back in employment. On the one hand, the Employers initiated a departmental inquiry, suspending him from service, and on the other they withdrew the suspension order, requiring the workman to join at the Agra office, both of which are stances that are inconsistent action.

8. In answer to the letter dated 19.02.2004, the workman made an application dated 20.02.2004, pointing out the inconsistency in the Employers' stand, attended with a request to reinstate him with back-wages. The Employers refused to accept the workman's application dated 20.02.2004. Instead, they sent a copy of the letter dated 19.02.2004, again, to the workman by fax. The workman's services were terminated by an oral order on 20.02.2004, without serving him with a charge sheet or undertaking disciplinary proceedings or retrenching him in accordance with the law. Dispensation of the workman's services w.e.f. 20.02.2004 constitutes unlawful retrenchment. The workman is going without gainful employment. He is entitled to be reinstated with back-wages.

9. The Employers filed a detailed written statement on 24.01.2008 before the Labour Court. Their written statement carries a detailed defence and many facts about the dealings and actions between the workman and the Employers, that has led to the industrial dispute. What stands out in the Employers defence is the fact that the workman was transferred by an order dated 20.08.2003 to their Agra office, located at 10, Jawahar Nagar, Khandari, Agra. The workman never complied with the transfer order, last mentioned. Instead, he indulged in false propaganda against the Employers and presented a complaint against them to the Uttar Pradesh Technical University. He was, therefore, charge-sheeted on 28.08.2003 and placed under suspension, pending inquiry. During the course of inquiry, the workman disclosed to the Inquiry Officer that he had no knowledge about the transfer order. Therefore, concluding the inquiry, the Employers directed the workman by their order dated 19.02.2004 to join at Agra, granting him time until 28.02.2004, for the purpose. This transfer order was put to challenge in a Civil Suit instituted by the workman before the learned Civil Judge, Mathura and he also approached the Assistant Labour Commissioner, Mathura, with the same grievance.

10. Shorn of unnecessary details, it must be recorded that the stand of the Employers is that they never terminated the workman's services. To them, he is still in service. The reference has been secured to forestall any action that the Employers may take against the workman for his continuing disobedience of the order of transfer.

11. The Labour Court has considered the case of the parties and the evidence on record, led on both sides. He has recorded a finding to the effect that the services of the workman have not been terminated, but the dispute appears to be that the workman wants to serve at Mathura, and not at Agra. The dispute involved, therefore, is not at all about termination, but the validity of the transfer order dated 20.02.2004, which the workman has characterized as termination of his services, which in fact it is not. The Labour Court has held that if the validity of the transfer order dated 20.02.2004 is to be judged, a reference in appropriate terms is to be made. The reference here being about termination of the workman's services from 20.02.2004, the validity of the workman's transfer w.e.f. 20.02.2004, cannot be answered by the Labour Court on a reference cast in those terms. It is on this account that the Labour Court has answered the reference against the workman in terms that his services have not been terminated w.e.f. 20.02.2004.

12. This Court has carefully perused the record and heard Mr. Alok Kumar Tripathi in considerable detail in support of the motion to admit this petition to hearing. The learned Standing Counsel has opposed that motion.

13. A perusal of the material on record and the case of parties does indicate that the substance of the dispute between them is whether the workman can be transferred from the Employers' establishment at Mathura to their establishment at Agra. The stand of the Employers is clear that they never terminated the workman's services. Rather, they have transferred him out of Mathura and posted him at Agra. The workman assails that right of the Employers to transfer him out of Mathura. He wants to continue serving them at Mathura. The essence of the dispute between parties, therefore, appears to be whether the Employers can validly transfer the workman from Mathura to Agra. It is not at all about termination of the workman's service. The order dated 20.02.2004 is also an order requiring the workman to join at Agra. It is a transfer order in substance and not an order of termination of services. The reference made in this case, however, proceeds on the basis that the workman's services have been terminated w.e.f. 20.02.2004.

14. The Labour Court, on the basis of the respective case of parties and the evidence on record, found that the workman's services have never been terminated. That conclusion is not incorrect, particularly, in the face of the Employers' categorical stand that they have never terminated the workman's services and still would treat him to be part of their establishment. The reference, therefore, in the opinion of this Court ought to have been about the validity of the transfer order dated 20.02.2004.

15. The Labour Court is a Court of referred jurisdiction. It can decide what is referred to it. It cannot decided something else. What has been referred to the Labour Court, is a dispute about the validity of the termination of the workman's services w.e.f. 20.02.2004 by the Employers, whereas the dispute is one about his transfer on that date. The workman's services being never terminated, the Labour Court could not have decided the validity of the transfer on a reference made about termination of his services. It has to be remembered that the Labour Court, unlike a court of general jurisdiction, cannot answer

anything, but what has been referred to it. In this connection, reference may be made to the decision of this Court in **M/S Super Cassettes Industries Pvt. Ltd. vs. State Of U.P. And 2 Others, WRIT - C No.52897 of 2017, decided on 05.02.2020.** In M/S Super Cassettes Industrial Pvt. Ltd. (supra), I had occasion to consider this question, where it was held:

"38. It may be true or otherwise that under the Certified Standing Orders, the Employers have power to transfer the workman away to the unit at Mumbai. The Model Standing Orders, 1991, if they apply in preference to the Certified Standing Orders, may or may not permit a transfer for the workman outside the State without his consent. This Court, however, would refrain from expressing any opinion about the issue. The reason is that the Labour Court is a Court of referred jurisdiction and a creature of the statute. Its jurisdiction is limited to answering questions that are expressly referred to it under Section 2-K of the Act. It may, however, go into incidental questions while answering the reference.

39. The very persuasive submission of Sri Shekhar Srivastava urging this Court to take the view that the order of transfer, dated 10.06.1996 is in fact an order of termination, that is camouflaged as a transfer order, cannot be regarded as an incidental issue to the reference made. The reference is express in its terms and speaks about an order of termination dated 10.02.1996. It does not speak about the validity of the transfer order, dated 10.02.1996. In fact, there is no order of termination from service passed on 10.02.1996. Even if the order of transfer were a camouflage to terminate the workman's services, and that too unlawful, consistent judicial opinion confines the Labour Court in its jurisdiction to answer whatever is referred to it by the appropriate Government. Unlike a Court of general jurisdiction or a Court of superior jurisdiction, it does not have authority to determine its own jurisdiction. Its jurisdiction flows from the terms of the order of reference, and in no way can the Labour Court travel beyond its terms. Incidental questions are quite different and these could be like the date from which wages are to be granted in the case of termination, that is declared unlawful, but would not include the rate of wages in a case where the reference is against the validity of an order of termination. Rate of wages can be decided if that is the subject matter of reference to the Labour Court; not otherwise. This would well illustrate the difference between incidental questions and those that are substantial, but not referred to adjudication. This principle is most eloquently expressed in the decision of their Lordships in Tata Iron and Steel Company Limited (supra) and also by this Court in M/s Triveni Engineering and Industrial Ltd. (supra).

45. Unfortunately for the workman here, the reference in the terms made does not clothe the Labour Court with jurisdiction to look into the validity of the order of transfer, dated 10.02.1996. The industrial dispute here has been referred in most callously worded terms dubbing a transfer order as one of termination, rendering the entire exercise before the Labour Court a nullity, whatever be the merits of the parties' case. Here, the Authority empowered under Section 4-K of the Act has utterly failed to refer what on its plain terms was an industrial dispute, relating to the validity of the transfer order dated 10.02.1996. If the dispute that actually arose between the parties were referred, depending upon the finding of the

Labour Court about the validity of the order of transfer, the logical incidents of it would flow, to whichever parties' gain or prejudice it might have been. About this reference, this Court has no hesitation to hold that it is without any basis, and on the date it was made or with reference to the Employers' order that it was made, there was no termination of services for the workman. The industrial dispute in the terms it was referred was completely non-existent. The Labour Court being a Court of referred jurisdiction, could not have gone beyond or behind the terms of reference in which the industrial dispute sent to it was cast."

16. In view of the clear position of the law and the nature of dispute, that is involved here between the workman and the Employers, the reference made certainly does not clothe the Labour Court with jurisdiction to decide upon the validity of the transfer order dated 20.02.2004. Accordingly, the impugned award is not liable to be disturbed and is **upheld**. It is, however, ordered that the Deputy Labour Commissioner/ State Government, whoever is competent, shall make a fresh reference, under Section 4-K of the Act of 1947 in appropriate terms, referring the dispute that arises between parties, bearing in mind what has been said in this judgment.

17. This writ petition is **disposed of** in terms of the aforesaid orders. There shall be no order as to costs.

18. Let this order be communicated to the Deputy Labour Commissioner, Agra Region, Agra, U.P. by the Joint Registrar (Compliance).

(2021)01ILR A314
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 25.01.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 21066 of 2020

Oriental Insurance Company Ltd. ...Petitioner
Versus
Smt. Uma Devi & Ors. ...Respondents

Counsel for the Petitioner:
Sri Parv Agarwal

Counsel for the Respondents:
C.S.C.

(A) Civil law - General Insurance Business (Nationalization) Act, 1972 - Section 9 & Section 16 - petitioner - insurance company is fully owned subsidiary of the General Insurance Corporation of India - a Government Company - State within the meaning of Article 12 of the Constitution of India - National Litigation Policy - Government should be a responsible litigant - should not involve in frivolous litigation - Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority - In contract of insurance, rights and obligations are strictly governed by the policy of insurance - terms of the insurance policy have to be strictly construed in order to determine the extent of the liability of the insurer.(Para - 17,19,27,29)

Respondent No.1 is widow whose husband **(**petty farmer**)** and head of the family/ bread earner - died in an accident - covered under the Kisan Bima Yojna - filed an insurance claim with the petitioner - Aggrieved with the rejection of her claim by the petitioner - filed an application before the District Review Committee headed by the District Magistrate - passed the impugned "binding order" under the Kisan Bima Yojna - awarded the claim of Rs.5 lacs to the respondent No.1. - Committee allowed the insurance claim - recorded a findings of fact directed that in the event, the amount awarded is not paid by the petitioner - insurance company within one month, then penalty in terms of the Kisan Bima Yojna shall be paid to the respondent No.1 @ Rs.1,000/- per week - Aggrieved with this order, the petitioner insurance company has filed the present writ petition.(Para - 3,4,5)

HELD:-The petitioner insurance company not being an ordinary litigant and more particularly bound by the insurance contract should not have filed the present frivolous writ petition to challenge the impugned contractually "binding order". The conduct of the petitioner in filing the present writ petition deserves to be condemned inasmuch as a frivolous writ petition has been filed to drag in litigation the respondent No.1 who is a widow and belongs to economically weaker and socially and educationally disadvantageous section of the society - As per terms of contract of insurance, the petitioner is bound by the order of the respondent No.3 and was also bound to make payment within the time specified failing which penalty of Rs.2,500/- per week is payable to the claimant.(Para - 25,30)

Writ Petition dismissed. (E-6)

List of Cases cited :-

1. Biman Krishna Bose Vs United India Insurance Company Ltd., (2001) 6 SCC 477 (para-3)

2. United India Insurance Co. Ltd. Vs Manubhai Dharmasinhbhai Gajera, (2008) 10 SCC 404 (Paras-25 and 26)

3. Dilbagh Rai Jerry Vs U.O.I. & ors., (1974) 3 SCC 554

4. Mundrika Prasad Singh Vs St. of Bihar, (1979) 4 SCC 701 (para-5, 6, 7)

5. Urban Improvement Trust, Bikaner Vs Mohan Lal, (2010) 1 SCC 512 (paras-10,11, 12)

6. Gurgaon Gramin Bank Vs Khajani, (2012) 8 SCC 781 (para-2)

7. Punjab State Power Corporation Ltd. Vs Atma Singh Grewal, (2014) 13 SCC 666 (paras 8 to 14)

8. Deokar Export (P) Ltd. Vs New India Assurance Co. Ltd., (2008) 14 SCC 598 (para-14)

9. Export Credit Guarantee Corporation Vs M/S. Garg Sons International (2014) 1 SCC 686 (Paras-10 to 13)

10. Industrial Promotion and Investment Corporation of Orrisa Vs New India Assurance Co. Ltd. (2016) 15 SCC 315 (paras-9 to 13)

11. General Assurance Society Ltd. Vs Chandumull Jain & anr., 1966 SC 1644 (para-11)

12. Suraj Mal Ram Niwas Oil Mills Pvt. Ltd. Vs United India Insurance Co. Ltd., (2010) 10 SCC 567 (paras- 23 to 26)

13. M/S Sumitomo Heavy Industries Ltd Vs Oil & Natural Gas Company, (2010) 11 SCC 296 (para-36)

14. Vikram Greentech (I) Ltd. & anr. Vs New India Assurance Co. Ltd. (2009) 5 SCC 599 (para-17)

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

1. **The petitioner has challenged the binding order dated 20.12.2019 passed by the District Review Committee, Jhansi (respondent No.3) awarding insurance claim to the respondent No.1**

under the "Mukhya Mantri Kisan Evam Sarvahit Bima Yojna" (in short "Kisan Bima Yojna").

2. Heard Sri Parv Agarwal, learned counsel for the petitioner and Sri Manoj Kumar Kuswaha, learned standing counsel for the State-respondents.

Facts:-

3. Briefly stated facts of the present case are that the respondent No.1 is widow whose husband and head of the family/ bread earner, namely late Pramod Kori aged about 25 years died on 20.06.2019 in an accident caused by a vehicle "Tavera". He was a petty farmer who owned one sixth share out of total area of 0.882 hectare of agricultural land. He was covered under the aforesaid Kisan Bima Yojna. After the death of her husband, the respondent No.1 filed an insurance claim with the petitioner under the Kisan Bima Yojna. She obtained an income certificate dated 29.08.2019 issued by the competent authority/ Tehsildar, Garautha, Jhansi, certifying income from all sources to be Rs.2,500/- per month, i.e. Rs.30,000/- per annum. The petitioner rejected the claim of the respondent No.1 by order dated 26.11.2019, observing as under:

"मृतक/ परिवार की वार्षिक आय का प्रमाणपत्र मृत्यु के 45 दिन बाद का बना है। जो योजना में मान्य नहीं है।"

4. Aggrieved with the rejection of her claim by the petitioner, the respondent No.1 filed an application before the District Review Committee headed by the District Magistrate Jhansi who passed the impugned "binding order" dated 20.12.2019 under the Kisan Bima Yojna and awarded the claim of Rs.5 lacs to the respondent No.1.

5. In the impugned order, the respondent No.3 has recorded a findings of fact that the deceased owned agricultural land as aforementioned, deceased was head of the family/ bread earner and income of the family was Rs.30,000/- per annum. The Committee allowed the insurance claim and directed that in the event, the amount awarded is not paid by the petitioner - insurance company within one month, then penalty in terms of the Kisan Bima Yojna shall be paid to the respondent No.1 @ Rs.1,000/- per week. Aggrieved with this order, the petitioner insurance company has filed the present writ petition.

6. This Court heard at length, the learned counsels for the parties on 10.12.2020 and directed the petitioner to file a supplementary affidavit annexing therewith complete scheme "Mukhya Mantri Kisan Evam Sarvhit Bima Yojna" and a copy of contract of insurance of the petitioner with the State Government. In compliance to the aforesaid order, the petitioner has filed a supplementary affidavit dated 15.12.2020. The scheme "Mukhya Mantri Kisan Evam Sarvhit Bima Yojna" as amended, is part and parcel of the agreement/ insurance contract dated 13.09.2018 between the petitioner and the Governor of Uttar Pradesh.

Submissions:-

7. Learned counsel for the petitioner has referred to the averments made in paragraphs-10, 19 and 20 of the writ petition, which are reproduced below:

"10. That to substantiate the claim, the claimant submitted an income certificate dated 29.08.2019 showing her annual income as Rs.30,000/-. The said income certificate was prepared after 45 days of the death. A True copy of the claim petition along with the income certificate is being filed here with and is marked as ***Annexure no.3*** *to this writ petition.*

19. That it would be worth the mention here that the claimant has filed her claim under the scheme on the strength of the income certificate issued beyond the period prescribed under the MOU.

20. That it is categorically submitted that at the time of the renewal of the policy in 2018 the State has agreed to the term that the income certificate has to be issued within 45 days and not beyond that and as such the income certificate issued on 29.08.2019 was fatal for the claimant, for which the petitioner cannot be saddled with the liability."

8. Learned standing counsel supports the impugned order.

Discussion and Findings:-

9. Kisan Bima Yojna has been enacted by the State Government with the following object and benefit to the State as mentioned in the scheme, which is reproduced below:

"योजना का नाम– ''मुख्यमंत्री किसान एवं सर्वहित बीमा योजना''

योजना का उद्देश्य– *विभिन्न प्रकार की अनिश्चित दुर्भाग्यपूर्ण घटनायें जिससे परिवार के मुखिया की मृत्यु हो सकती है/विकलांग बना सकती है जो पूरे परिवार के लिये असुरक्षा/विपत्तियां ला सकती हैं, की सहायता हेतु।"*

10. Mainly, the Kisan Bima Yojna is in two parts as mentioned in the scheme, as under:

"इस पालिसी के दो मुख्य भाग हैः–

1– **व्यक्तिगत दुर्घटना बीमा** (First part)

2– **दुर्घटना के उपरान्त चिकित्सा सुविधा एवं आवश्यकतानुसार कृत्रिम अंग।** (Second part)

भाग–1 **व्यक्तिगत दुर्घटना बीमाः–** परिवार के मुखिया/रोटी अर्जक की रेल/रोड/वायुयान से दुर्घटना, किसी भी टकराव, गिरने के कारण चोट, गैस रिसाव, सर्प काटने बिच्छू, नेवला, छिपकली काटने से मरना, सिलेण्डर फटने के कारण विकलांगता या मृत्यु, विस्फोट, कुत्ता काटने, जंगली जानवर के काटने से मरना, जलना, डूबना, बाढ़ में बह जाना, किसी भी प्रकार से हाथ–पैर कट जाना एवं विषाक्ता आदि दुर्घटना में शामिल हैं।

व्यक्तिगत दुर्घटना बीमा के अन्तर्गत केवल परिवार का मुखिया/रोटी अर्जक आच्छादित हैं।

– **दुर्घटना में मृत्यु–** यदि दुर्घटना के कारण परिवार के मुखिया/रोटी अर्जक की मृत्यु बीमा अवधि के दौरान हो जाती है तो बीमा कम्पनी सम्पूर्ण **बीमित राशि रू0 5-00 लाख** का भुगतान नामिनी/कानूनी वारिश को करेगी।

– **दुर्घटना में विकलांगता**– दुर्घटना में परिवार के मुखिया/रोटी अर्जक की विकलांगता की स्थिति में बीमा कम्पनी पीड़ित मुखिया/रोटी अर्जक को निम्नानुसार भुगतान करेगीः–

व्यक्तिगत दुर्घटना आवरण	अभिव्यक्त मुआवजा कुल बीमित राशि का प्रतिशत में
स्थायी पूर्ण विकलांगता	100 प्रतिशत
स्थायी और लाईलाज पागलपन	100 प्रतिशत
कुल दो अंगो के स्थायी नुकसान	100 प्रतिशत
दोनों आंखों में स्थायी दृष्टि का नुकसान	100 प्रतिशत
एक अंग और एक आंख की दृष्टि का स्थायी नुकसान	100 प्रतिशत
वाक् का स्थायी नुकसान	100 प्रतिशत
निचले जबड़े की पूरी हानि	100 प्रतिशत
चबाने की स्थिति का	100 प्रतिशत

स्थायी नुकसान	
दोनों कानों से बहरेपन की स्थिति	75 प्रतिशत
एक अंग का स्थायी नुकसान	50 प्रतिशत
एक आंख की दृष्टि हानि का स्थायी नुकसान	50 प्रतिशत

भाग–2 दुर्घटना के उपरान्त चिकित्सा सुविधा एवं आवश्यकतानुसार कृत्रिम अंग की उपलब्धता–

परिवार के मुखिया/रोटी अर्जक तथा परिवार के सदस्य प्राथमिक उपचार एवं बड़े चिकित्सालय/ट्रामा सेन्टर में बीमित अवधि के दौरान दुर्घटना के उपरान्त चिकित्सा सुविधा एवं आवश्यकतानुसार कृत्रिम अंग प्राप्त कर सकेंगे।

इसके अन्तर्गत परिवार का मुखिया/रोटी अर्जक/परिवार का सदस्य आच्छादित है।

दुर्घटना के उपरान्त कवर

कवरेज	लाभार्थी	बीमित राशि (रू0)
दुर्घटना के उपरान्त प्राथमिक चिकित्सा	परिवार का मुखिया/रोटी अर्जक/सदस्य	0-25 लाख
प्रथमिक चिकित्सा के उपरान्त बड़े चिकित्सालय/ट्राम ा सेन्टर में चिकित्सा सुविधा।	परिवार का मुखिया/रोटी अर्जक/सदस्य	2-25 लाख
आवश्यकतानुसार कृत्रिम अंग	परिवार का मुखिया/रोटी अर्जक/सदस्य	1-00 लाख

11. The beneficiaries under the Scheme, eligibility, features of the Yojna and Insurance Coverage are provided in the Kisan Bima Yojna, as under:

"लाभार्थी– यह योजना उत्तर प्रदेश के निवासियों के लिये हैं।

पात्रता– उत्तर प्रदेश राज्य के समस्त कृषक (असीमित आय सीमा), भूमिहीन कृषक, कृषि से संबंधित क्रियाकलाप करने वाले, (मत्स्य पालक, दुग्ध उत्पादक, सूकर पालक, बकरी पालक, मधुमक्खी पालक इत्यादि) धुमन्तू परिवार, व्यापारी (जो कि किसी शासन योजना से आच्छादित नहीं है), वन श्रमिक, दुकानदार, फुटकर कार्य करने वाले, रिक्शा चालक, कुली एवं अन्य कार्य करने वाले ग्रामीण क्षेत्रों अथवा शहरी क्षेत्रों के निवासी जिनकी पारिवारिक आय रू0 75,000/– प्रति वर्ष से कम हो एवं जिनकी आयु 18 वर्ष से 70 वर्ष के मध्य है, पात्र होंगें। इसमें राज्य सरकार एवं भारत सरकार तथा राज्य एवं केन्द्र सरकार के पी0एस0यू के, वित्तीय सहायता प्राप्त संस्थानों के, निजी क्षेत्र के तथा स्वशासी निकायों/ सार्वजनिक उपक्रमों/निगमों/बोर्ड एवं प्राधिकरणों के कर्मचारी जो किसी बीमा कम्पनी की बीमा योजना से लाभान्वित हो रहे है, शामिल नहीं होगे। बीमा आवरण की अवधि में 18 वर्ष की आयु पूर्ण करने वाले उक्त सभी योजना के अन्तर्गत पात्रता की परिधि में आयेगें। इसी प्रकार बीमा आवरण अवधि में 70 वर्ष पूर्ण हो जाने पर उक्त सभी पात्रता श्रेणी में माने जायेगें।

कृषक– कृषक का तात्पर्य राजस्व अभिलेखों अर्थात् खतौनी में दर्ज खातेदार/सहखातेदार से हैं, जिसकी आयु न्यूनतम 18 वर्ष तथा अधिकतम 70 वर्ष हो।

भूमिहीन कृषक एवं कृषि से संबंधित क्रियाकलाप– ऐसे ग्रामीण भूमिहीन परिवार जो प्रत्यक्ष या अप्रत्यक्ष रूप से कृषि कार्य से जुड़े हुए हों।

अन्य– कृषकों के अतिरिक्त जिनकी आयु 18 वर्ष से 70 वर्ष के मध्य है तथा पारिवारिक आय रू0 75,000/– प्रति वर्ष से कम हो, योजनान्तर्गत पात्र होंगे। इसमें राज्य सरकार एवं भारत सरकार तथा राज्य एवं केन्द्र सरकार के पी0एस0यू के, वित्तीय सहायता प्राप्त संस्थानों के, निजी खेत्र के तथा स्वशासी निकायों/सार्वजनिक उपक्रमों/निगमों/बोर्ड एवं प्राधिकरणों के कर्मचारी जो किसी बीमा कम्पनी की बीमा योजना से लाभान्वित हो रहे हैं, शामिल नहीं होंगे।

प्रदेश सरकार के किसी भी विभाग द्वारा संचालित किसी भी दुर्घटना बीमा योजना में आच्छादित लाभार्थी मुख्यमंत्री किसान एवं सर्वहित योजना के लिए पात्र नहीं होंगे।

परिवार आच्छादन– आच्छादित परिवार का मुखिया/रोटी अर्जक (बीमा धारक) रू0 5-00 लाख तक का व्यक्तिगत दुर्घटना बीमा लाभ एवं मुखिया/रोटी अर्जक/परिवार के सदस्य दुर्घटना के उपरान्त रू0 25,000/– तक प्राथमिक चिकित्सा एवं रू0 2-25 लाख तक वृहद्ध चिकित्सा लाभ तथा आवश्यकतानुसार अधिकतम रू0 1-00 लाख तक का कृत्रिम अंग प्राप्त कर सकेंगे।

बीमा आवरण की अवधि– बीमा आवरण की अवधि संस्थागत वित्त, बीमा एवं वाह्य सहायतित परियोजना महानिदेशालय, उ0प्र0 एवं बीमा कम्पनी के मध्य मेमोरेण्डम आफ अण्डरस्टैंडिंग (एम0ओ0यू0) हस्ताक्षरित होने की तिथि से एक वर्ष के लिए मान्य होगी तदोपरान्त् इसे वर्षवार बढ़ाया जायेगा। यह योजना 03 वर्ष. 03 वर्ष से अधिक नहीं होगी।

परिवार निर्धारण– परिवार के अन्तर्गत परिवार का मुखिया/रोटी अर्जक (पुरूष/स्त्री) उसकी पत्नी/पति, अविवाहित पुत्री, आश्रित पुत्र, मुखिया पति एवं अविवाहित पुरूष के आश्रित माता–पिता बीमा का लाभ प्राप्त करने हेतु आवृत्त होगें।

लाभार्थी की पात्रता निम्न दस्तावेजों द्वारा निर्धारित की जायेगीः–

1- भू–राजस्व अभिलेख (खसरा/खतौनी कृषकों के मामलों में सहखातेदार सहित), **(किसी भी कृषक को आय प्रमाण–पत्र की आवश्यकता नहीं है)**

2- तहसीलदार से प्राप्त आय प्रमाण पत्र (अन्य के मामलों में)।

3- परिवार विवरण प्रमाण पत्र (कोई एक)

- परिवार रजिस्टर की प्रति।
- राशन कार्ड।
- उप जिलाधिकारी/प्रथम श्रेणी मजिस्ट्रेट द्वारा जारी प्रमाण–पत्र

4- आयु प्रमाण–पत्र (कोई एक)

- हाईस्कूल प्रमाण–पत्र।
- बैंक खाते की पासबुक।
- वोटर आई0डी0 कार्ड/वोटर लिस्ट की प्रति।
- नगर निगम/खण्ड विकास कार्यालय द्वारा जारी आयु प्रमाण–पत्र।
- पासपोर्ट।
- ड्राईविंग लाइसेन्स।
- आधार कार्ड।
- राशन कार्ड।

5- निवास प्रमाण–पत्र (इस योजना हेतु निवास प्रमाण–पत्र का निर्धारण) उ0प्र0 के निवासियों हेतु निम्न से कोई एक जिसमें नाम, पता दर्ज होः

- पासपोर्ट
- ड्राइविंग लाइसेंस
- राशन कार्ड
- बैंक खाते की पासबुक
- वोटर आई0डी0कार्ड
- आधार कार्ड।
- उप जिलाधिकारी द्वारा जारी निवास प्रमाण–पत्र।

योजना की विशेषताएं–

1– नगद रहित सुविधायुक्त।

2– व्यक्तिगत दुर्घटना बीमा–परिवार के मुखिया/रोटी अर्जक की दुर्घटना में मृत्यु/स्थाई पूर्ण विकलांगता/स्थायी और लाईलाज पागलपन/कुल दो अंगों के स्थायी नुकसान/दोनों आंखों में स्थायी नुकसान /दोनों आंखों में स्थायी दृष्टि का नुकसान/वाक् का स्थायी नुकासान/निचलें जबड़े की पूरी हानि/चबाने की स्थिति का स्थायी नुकसान पर बीमित राशि रू0 5-00 लाख, दोनों कानों से बहरेपन की स्थिति में बीमित राशि रू0 5-00 लाख का 75 प्रतिशत तथा एक अंग का स्थायी नुकसान या एक आंख की दृष्टि हानि के स्थायी नुकसान पर बीमित राशि रू0 5-00 लाख का 50 प्रतिशत लाभ दिया जायेगा।

3– दुर्घटना के उपरान्त परिवार के मुखिया/रोटी अर्जक/परिवार के सदस्य के लिए लाभ–

मुखिया/सदस्य की दुर्घटना के उपरान्त चिकित्सा के लिये–रू0 2-50 लाख

मुखिया/सदस्य आवश्यकतानुसार रू0 1-00 लाख तक का कृत्रिम अंग

बीमा आवरण– यह योजना परिवार के मुखिया/रोटी अर्जक को व्यक्तिगत दुघर्टना एवं परिवार के मुखिया/रोटी अर्जक तथा परिवार के सदस्यों को दुर्घटना के उपरान्त चिकित्सा सुविधा एवं आवश्यकतानुसार कृत्रिम अंग की सुविधा प्रदान करेगी।"

12. Detailed and unambiguous procedure for lodging claims, awarding claims and review in the event of rejection of claim by the insurance company and other relevant matters including payment of claims and penalty of Rs.2,500/- per week for non-payment by the petitioner - Insurance Company, has been provided in the Kisan Bima Yojna, which is part of the contract between the petitioner and the State Government. The Scheme further provides the binding effect of the order passed by the District Review Committee headed by the District Magistrate. The relevant portion of the Kisan Bima Yojna with respect to rejection of claims, is reproduced below:

"गतिरोध का निपटान– दावे के अपर्याप्त अथवा अनौचित्य पूर्ण आधारों पर अस्वीकृत करने तथा चिकित्सालयों को बीमा कम्पनी द्वारा ससमय भुगतान न

करने पर संबधित **जिलाधिकारी की अध्यक्षता में गठित समिति का निर्णय बीमा कम्पनी पर बाध्यकारी होगा। "**

Claim process for Person Accidental Insurance

m) In case any discrepancies are found in the claim or if any controversy arises, the claim shall be investigated and the investigation report shall be presented to the concerned committee (headed by District Magistrate). The Committee shall include:

a. District Magistrate

b. Chief Development Officer

c. Chief Medical Officer

d. Sub- Divisional Magistrate

Representatives of the Insurance Company shall also be invited. ***The Committee shall take decision on all the discrepant/Controversial claims. The Insurance Company shall be bound to adhere to the decision taken by the Committee and make the payment within one month. In such cases. Insurance Company shall submit a cheque of amount payable to the District Magistrate who will hand over the cheque to the concerned Head of the family/ bread winner/nominee/ legal heir (as applicable) within 15 days."***

13. The aforesaid Kisan Bima Yojna was amended and the amendment also forms part of the Insurance Contract between the petitioner and the State Government. Amendments include that income certificate is not required for B.P.L. card holders, beneficiaries of Samajwadi Pension and farmers, khatedar/ sah-khatedar. For the purposes of the aforesaid Kisan Bima Yojna under the agreement, the State Government as per clause (1) of the agreement, has paid annual insurance premium to the petitioner for **Agra Cluster** - Rs. 105,93,81,344/-, **Meerut Cluster** - Rs. 54,03,58,132/-, **Bareilly Cluster** - Rs. 74,22,45,091/-, **Kanpur Cluster** - Rs. 76,09,84,705/- and **Basti Cluster** - Rs.25,74,05,500/-.

14. From the facts as briefly noted above and the relevant portion of Kisan Bima Yojna, it is evident that the Yojna, which is part of insurance contract between the petitioner and the State Government; is **an ambitious insurance for poor people,** which has been launched with the **pious object of welfare of the economically weaker, neglected and disadvantageous section of the society so as to provide them protection of medical/ treatment facility and to ensure medical facility and economic security to them in the event of disability or death of the head of the family or bread earner.**

15. Undisputedly, the husband of the respondent No.1 i.e. the deceased was the head of the family/ bread earner. He was a small farmer and as such in terms of the Kisan Bima Yojna scheme (as amended), no income certificate was even required. The award made by the respondent No.3, i.e. the District Review Committee is binding in terms of the afore-quoted clause (m) of the contract. In terms of the contract, the petitioner was bound to adhere to the decision of the Committee and make the payment within one month. But instead of making the payment, the petitioner, as an "ordinary litigant" has filed the present writ petition on frivolous grounds to drag in litigation the respondent No.1 who is a widow and belongs to socially, economically and educationally disadvantageous section of the society.

Plight of small farmers/ neglected/ disadvantageous section of the society:-

16. In **Bhusawal Municipal Council Vs Nivrutti Ramchandra Phalak and others, 2014(2) AWC 1407 (SC) (paras 16,17,18),** Hon'ble Supreme Court made certain observations in a land acquisition matter with reference to the plight of farmers and poor persons of the society. It was observed, as under:

"16. The judicial process of the court cannot subvert justice for the reason that the court exercises its jurisdiction only in furtherance of justice. ***The State/authority often drags poor uprooted claimants even for payment of a paltry amount upto this Court, wasting the public money in such luxury litigation without realising that poor citizens cannot afford the exorbitant costs of litigation and, unfortunately, no superior officer of the State is accountable for such unreasonable conduct.*** *It would be apt to quote the well known words of Justice Brennan:*

"Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. ***When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."***

17. ***The fundamental right of a farmer to cultivate his land is a part of right to livelihood*** *"Agricultural land is the foundation for a sense of security and freedom from fear. Assured possession is a lasting source for peace and prosperity." India being predominantly an agricultural society, there is a "strong linkage between the land and the person's status in the social system." "A blinkered vision of development, complete apathy towards those who are highly adversely affected by the development process and a cynical unconcern for the enforcement or the laws lead to a situation where the rights and benefits promised and guaranteed under the Constitution hardly ever reach the most marginalised citizens. For people whose lives and livelihoods are intrinsically connected to the land. the economic and cultural shift to a market economy can be traumatic." (Vide: Mahanadi Coal Fields Ltd. & Anr. v. Mathias Oram & Ors., (2010) 11 SCC 269; and Narmada Bachao Andolan v. State of Madhya Pradesh & Anr., AIR 2011 SC 1989)*

18. ***A farmer's life is a tale of continuous experimentation and struggle for existence.*** *Mere words or a visual can never convey what it means to live a life as an Indian farmer.* ***Unless one experiences their struggle, that headache he will never know how it feels.*** *The risks faced by the farming community are many; they relate to natural calamities such as drought and floods; high fluctuation in the prices of input as well as output, over which he has no control whatsoever; a credit system which never extends a helping hand to the neediest; domination by middlemen who enjoy the fruits of a farmer's hard work; spurious inputs, and the recent phenomenon of labour shortages, which can be conveniently added to his tale of woes. Of late, there have been many cases of desperate farmers ending their lives in different parts of the country.* ***The Principles of Economics provides for the producer of a commodity to determine his prices but an Indian farmer perhaps is the only exception to this principle of***

economics, for even getting a decent price for their produce is difficult for them. *Economic growth through the 1990's had made India a more market- oriented economy, but had failed to benefit all Indians equally. The problems that plagued the farmers several decades ago are still glaringly present today; there is little credit available. What is available is very expensive. There is no advice on best practice in conducting agriculture operations. Income through farming is not enough to meet even the minimum needs of a farming family. Support systems like free health facilities from the government are virtually non-existent. The drama of millions leaving their homes in search of jobs, which are non existent of villages swiftly losing able-bodies of adults, leaving behind the old, hungry and vulnerable. Families break up as their members head in diverse directions.*

(Emphasis supplied by me)"

Government Insurance Company - whether an ordinary litigant?

17. Prior to independence, insurance business in India was owned and operated by private entities. The governing law of insurance in India was still the Insurance Act, 1938. Post independence, by the Industrial Policy Resolution 1956, the life insurance industry in India was to be nationalized. The Life Insurance Corporation Act, 1956 was passed creating Life Insurance Corporation as a statutory corporation and the assets of all the private Life Insurance Companies were transferred to L.I.C. Thereafter, the General Insurance (Emergency Provisions) Act, 1971 was passed by parliament which provided for taking over the management of general insurance business. Initially, the Central Government assumed management of general insurance business as an initial step towards nationalization. Thereafter, the General Insurance Business (Nationalization) Act, 1972, was passed. Section 16 of the Act, 1972 contemplated merger of the private insurance companies into four insurance companies namely, (a) National Insurance Company Ltd. (b) New India Assurance Co. Ltd. (c) **Oriental Insurance Co. Ltd.** and (d) United India Insurance Co. Ltd. These four insurance companies are fully owned subsidiaries of General Insurance Corporation of India, which is a Government company registered under the Companies Act but incorporated as mandated under Section 9 of the aforesaid Nationalization Act. Thus, the **petitioner - insurance company is fully owned subsidiary of the General Insurance Corporation of India.**

18. **Petitioner is a Government Insurance Company.** In the case of **Biman Krishna Bose vs. United India Insurance Company Ltd., (2001) 6 SCC 477 (para-3)**, Hon'ble Supreme Court considered a similar insurance company, namely United India Insurance Co. Ltd. and held that **it is a State within the meaning of Article 12 of the Constitution of India.** It was further observed that even, in an area of contractual relations, the State and its instrumentalities are enjoined with the obligations to act with fairness and must not take any irrelevant and extraneous consideration while arriving at a decision. Arbitrariness should not appear in their actions or decisions. In **United India Insurance Co. Ltd. Vs. Manubhai Dharmasinhbhai Gajera, (2008) 10 SCC 404 (Paras-25 and 26),** Hon'ble Supreme Court held United India Insurance Company to be State within the meaning of Article 12 of the Constitution of India and observed that it has been created under the

General Insurance Business Nationalization Act, 1972 and preamble thereof shows that it was enacted for achieving certain purposes; economic benefit of the people and/or group of people, being one of it. It was further observed that there **existed a distinction** between **a private player** in the field and **a public sector insurance company.** Whereas a private player in the field is only bound by the statutory regulations operating in the field, **the public sector insurance companies are also bound by the directions issued by the General Insurance Corporation as also the Central Government. Public sector insurance companies being State have a different role to play.** It is not to say that as a matter of policy, statutory or otherwise, the insurance companies are bound to regulate all contracts of insurance having the statement of **Directive Principles** in mind but there cannot be any doubt whatsoever that **fairness or reasonableness on the part of the insurance companies must appear in all of its dealings.**

19. Thus, the petitioner Insurance Company being a Government Company is not an ordinary litigant. It is State within the meaning of Article 12 of the Constitution of India.

20. In **Dilbagh Rai Jerry Vs. Union of India and others, (1974) 3 SCC 554,** Hon'ble Krishna Iyer J. (concurring) considered that what should be the approach of Government in litigation and observed as under:

"The judgment just delivered has my full concurrence but I feel impelled to make a few observations not on the merits but on governmental disposition to litigation, the present case being symptomatic of a serious deficiency. ***In this country the State is the largest litigant to-day and the huge expenditure involved makes a big draft on the public exchequer. In the context of expanding dimensions of State activity and responsibility, is it unfair to expect finer sense and sensibility in its litigation policy, the absence of which, in the present case, has led the Railway callously and cantankerously to resist an action by its own employee, a small man,*** *by urging a mere technical plea which has been pursued right up to the summit court here and has been negatived in the judgment just pronounced.* ***Instances of this type are legion*** *as is evidenced by the fact that the Law Commission of India in a recent report on amendments to the Civil Procedure Code has suggested the deletion of Section 80, finding that wholesome provision hardly ever utilised by Government, and has gone further to provide a special procedure for government litigation to highlight the need for an activist policy of just settlement of claims where the State is a party.* ***It is not right for a welfare' State like ours to be Janus-faced, and while formulating the humanist project of legal aid to the poor, contest the claims of poor employees under it pleading limitation and the like.*** *That the tendency is chronic flows from certain observations I had made in a Kerala High Court decision which I may usefully excerpt here "The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals.* ***But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical***

point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move, private parties to fight in court. The lay-out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf. I am not indulging in any judicial homily but only echoing the dynamic national policy on State litigation evolved at a Conference of Law Ministers of India way back in 1957. This second appeal strikes me as an instance of disregard of that policy."

(Emphasis supplied by me)

21. In the case of **Mundrika Prasad Singh Vs. State of Bihar, (1979) 4 SCC 701 (para-5, 6, 7),** Hon'ble Supreme Court held as under:

"5. The State of Bihar, like many other States in the country, has an enormous volume of litigation. Government litigation policy is vital for any State if resources are to be husbanded to reduce rather than increase its involvement in court proceedings. ***It is lamentable that despite a national litigation policy for the States having been evolved at an all-India Law Ministers' Conference way back in 1957 and despite the recommendations of the Central Law Commission to promote settlement of disputes where Government is a party what we find in actual practice is a proliferation of government cases in courts uninformed by any such policy.*** *Indeed, in this country where government litigation constitutes a sizeable bulk of the total volume, it is important that the* ***State should be a model litigant with accent on settlement. The Central Law Commission, recalling a Kerala decision, emphasised this aspect in 1973 and went to the extent of recommending a new provision to be read as Order 27 Rule 5B. The Commission observed:***

27.9. We are of the view that there should be some provision emphasising the need for positive efforts at settlement, in suits to which the Government is a party.

27.10. With the above end in view, we recommend the insertion of the following rule :-

5-B(1) In every suit or proceeding to which the Government is a party or a public officer acting in his official capacity is a party, it shall be the duty of the Court in the first instance, in every case where it is possible to do so consistently with the nature of the circumstances of the case, to make every endeavour to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceeding for such period as it thinks fit, to enable attempts to be made to effect such a settlement.

(3) The power conferred by Sub-rule (2) is in addition to any other power of the court to adjourn the proceedings.

6. ***The relevance of these wider observations is that avoidable litigation holds out money by way of fees*** *and more fees if they are contested cases and this lures a lawyer, like any other homo economicus, to calculate income on a speculative basis, as this Government Pleader has done in hoping for a lakh of rupees.*

7. We have been taken through the Bihar Government's rubs for fees of Government Pleaders in subordinate courts. Rule 115 appetises and is unrelated to the quantum or quality of work involved nor the time spent. Ad valorem calculation in fixing fees for land acquisition cases has a tendency to promote unearned income for lawyers. The petitioner here has presumably fallen victim to this proclivity. The time has come for State Governments to have a second economic look not only at litigation policy but lawyer's fees rules (like Rule 115 in the Bihar instance) especially in mass litigation involving ad valorem enormity and mechanical professionalism. Even a ceiling on income from public sector sources may be a healthy contribution to toning up the moral level of the professional system. ***After all, the cost of justice is the ultimate measure of the rule of law for a groaning people.*** *Government and other public sector undertakings should not pamper and thereby inflate the system of costs. May be, this petition would not have been filed had the prospect of income without effort not been offered by Government Rules."*

(Emphasis supplied by me)

22. In the case of **Urban Improvement Trust, Bikaner Vs. Mohan Lal, (2010) 1 SCC 512** (paras-10,11, 12), Hon'ble Supreme Court took notice of unwarranted litigation by Governments and State authorities and held as under:

"10. Unwarranted litigation by governments and statutory authorities basically stem from the two general baseless assumptions by their officers. They are:

(i) All claims against the government/statutory authorities should be viewed as illegal and should be resisted and fought up to the highest court of the land.

(ii) If taking a decision on an issue could be avoided, then it is prudent not to decide the issue and let the aggrieved party approach the Court and secures a decision.

The reluctance to take decisions, or tendency to challenge all orders against them, is not the policy of the governments or statutory authorities, but is attributable to some officers who are responsible for taking decisions and/or officers in charge of litigation. *Their reluctance arises from an instinctive tendency to protect themselves against any future accusations of wrong decision making, or worse, of improper motives for any decision making. Unless their insecurity and fear is addressed, officers will continue to pass on the responsibility of decision-making to courts and Tribunals.*

11. The Central Government is now attempting to deal with this issue by formulating realistic and practical norms for defending cases filed against the government and for filing appeals and revisions against adverse decisions, thereby, eliminating unnecessary litigation. ***But, it is not sufficient if the Central Government alone undertakes such an exercise. The State Governments and the statutory authorities, who have more***

litigations than the Central Government, should also make genuine efforts to eliminate unnecessary litigation. Vexatious and unnecessary litigations have been clogging the wheels of justice, for too long making it difficult for courts and Tribunals to provide easy and speedy access to justice to bona fide and needy litigants.

12. In this case, what is granted by the State Commission is the minimum relief in the facts and circumstances, that is to direct allotment of an alternative plot with a nominal compensation of Rs. 5000/- But instead of remedying the wrong, by complying with the decision of the Consumer fora, the Improvement Trust is trying to brazen out its illegal act by contending that the allottee should have been protested when it illegally laid the road in his plot. It has persisted with its unreasonable and unjust stand by indulging in unnecessary litigation by approaching the National Commission and then this Court. The Trust should sensitise its officers to serve the public rather than justify their dictatorial acts. It should avoid such an unnecessary litigation."

23. In the case of **Gurgaon Gramin Bank Vs. Khajani, (2012) 8 SCC 781** (para-2), Hon'ble Supreme Court considered the approach of Government to litigate in small and trivial matters and held as under:

"2. Number of litigations in our country is on the rise, for small and trivial matters, people and sometimes Central and State Governments and their instrumentalities Banks, nationalized or private, come to courts may be due to ego clash or to save the Officers' skin. Judicial system is over-burdened, naturally causes delay in adjudication of disputes. Mediation centers opened in various parts of our country have, to some extent, eased the burden of the courts but we are still in the tunnel and the light is far away. On more than one occasion, this Court has reminded the Central Government, State Governments and other instrumentalities as well as to the various banking institutions to take earnest efforts to resolve the disputes at their end. ***At times, some give and take attitude should be adopted or both will sink. Unless, serious questions of law of general importance arise for consideration or a question which affects a large number of persons or the stakes are very high, courts' jurisdiction cannot be invoked for resolution of small and trivial matters. We are really disturbed by the manner in which those types of matters are being brought to courts even at the level of Supreme Court of India*** *and this case falls in that category."*

(Emphasis supplied by me)

24. In the case of **Punjab State Power Corporation Ltd. Vs. Atma Singh Grewal, (2014) 13 SCC 666** (paras 8 to 14), Hon'ble Supreme Court noted the fact that courts are burdened with unnecessary litigation primarily for the reason that the Government or P.S.Us., etc. decide to file appeals even when there is absolutely no merit therein. Hon'ble Supreme Court further observed as under:

"8. It is not the first time that the Court had to express its anguish. We would like to observe that the mind set of the Government agencies/undertakings in filing unnecessarily appeals was taken note of by the Law Commission of India way back in 1973, in its 54th report. Taking cognizance of the aforesaid report of the Law Commission as well as National Litigation Policy for the States

which was evolved at an All India Law Ministers Conference in the year 1972, this Court had to emphasize that there should not be unnecessary litigation or appeals. It was so done in the case of Mundrika Prasad Singh v. State of Bihar, 1979 (4) SCC 701. *We would also like to reproduce the following words of wisdom expressed by Justice V.R. Krishna Iyer, who spoke for the Bench, in Dilbagh Rai Jarry v. Union of India and Ors. 1974 (3) SCC 554.:(SCC p.562, para 25).*

But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The lay out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf.

9. ***In its 126th Report (1988), the Law Commission of India adversely commented upon the reckless manner in which appeals are filed routinely. We quote hereunder the relevant passage therefrom:***

"2.5. The litigation is thus sometimes engendered by failing to perform duty as if discharging a trust. Power inheres a kind of trust. The State enjoys the power to deal with public property. That power has to be discharged like a trust keeping in view the interests of the cesti que trust. Failure on this front has been more often commented upon by the court which, if it was taken in the spirit in which it was made, would have long back energised the Government and the public sector to draw up its litigation policy. When entirely frivolous litigation reaches the doorsteps of the Supreme Court, one feels exasperated by the inaction and the policy of do nothingness evidenced by blindly following litigation from court to court. Dismissing a Special Leave Petition by the State of Punjab, the Court observed that the deserved defeat of the State in the courts below demonstrates the gross indifference of the administration towards litigative diligence. The court then suggested effective remedial measures. It may be extracted: (SCC p.69, para 4)

'4. We [would] like to emphasize that Government must be made accountable by parliamentary Social audit for wasteful litigative expenditure inflicted on the community by inaction. *A statutory notice of the proposed action under Section 80 CPC is intended to alert the state to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. Now Section 80 has become a ritual because the administration is often unresponsive and hardly lives up to parliament's expectation in continuing Section 80 in the Code despite the Central Law Commission's*

recommendations for its deletion. An opportunity for setting the dispute through arbitration was thrown away by sheer inaction. ***A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in court. We are constrained to make these observations because much of the litigation in which governments are involved adds to the case load accumulation in courts for which there is public criticism. We hope that a more responsive spirit will be brought to bear upon governmental litigation so as to avoid waste of public money and promote expeditious work in courts of cases which deserve to be attended to.***

Nearly a decade has passed since the observations but not a leaf has turned, not a step has been taken, and the Law Commission is asked to deal with the problem!

2.6. A little care, a touch of humanism, a dossier of constitutional philosophy and awareness of futility of public litigation would considerably improve the situation which today is distressing. More often it is found that utterly unsustainable contentions are taken on behalf of Government and public sector undertakings.

10. Even when Courts have, time and again, lamented about the frivolous appeals filed by the Government authorities, it has no effect on the bureaucratic psyche. It is not that there is no realisation at the level of policy makers to curtail unwanted Government litigation and there are deliberations in this behalf from time to time. Few years ago only, the Central Government formulated National Litigation Policy, 2010 with the "vision/mission" to transform the Government into an efficient and responsible litigant. This policy formulated by the Central Government is based on the recognition that it was its primary responsibility to protect the rights of citizens, and to respect their fundamental rights and in the process it should become "responsible litigant". The policy even defines the expression 'responsible litigant' as under:

"Responsible litigant" means-

(i) That litigation will not be resorted to for the sake of litigating.

(ii) That false pleas and technical points will not be taken and shall be discouraged.

(iii) Ensuring that the correct facts and all relevant documents will be placed before the Court.

(iv)That nothing will be suppressed from the Court and there will not attempt to mislead any court or tribunal.

2. That Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, "Let the Court decide", must be eschewed and condemned.

3. The purpose underlying this policy is also to reduce government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the goal in the national legal mission to reduce average pendency time from 15 years to 3 years. Litigators on behalf of the Government have to keep in mind the principles incorporated in the national mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be

concerned with and also removing unnecessary government cases.

Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority."

11. ***This policy recognises the fact that its success will depend upon its strict implementation. Pertinently there is even a provision of accountability on the part of the officers who have to take requisite steps in this behalf. The policy also contains the provision for filing of appeals indicating as to under what circumstances appeal should be filed.*** *In so far as service matters are concerned, this provision lays down that further proceedings will not be filed in service matters merely because the order of the Administrative Tribunal affects a number of employees. Also, appeals will not be filed to espouse the cause of one section of employees against another.*

12. The aforesaid litigation policy was seen as a silver living to club unnecessary and uncalled for litigation by this Court in the matter of Urban Improvement Trust, Bikaner v. Mohan Lal 2010 (1) SCC 512 in the following manner:(SCC p. 516, para 11)

"11. The Central Government is now attempting to deal with this issue by formulating realistic and practical norms for defending cases filed against the Government and for filing appeals and revisions against adverse decisions, thereby eliminating unnecessary litigation. But it is not sufficient if the Central Government alone undertakes such an exercise. The State Governments and the statutory authorities, who have more litigations than the Central Government, should also make genuine efforts to eliminate unnecessary litigations. Vexatious and unnecessary litigations have been clogging the wheels of justice for too long, making it difficult for courts and tribunals to provide easy and speedy access to justice to bona fide and needy litigants."

13. Alas, inspite of the Government's own policy and reprimand from this Court, on numerous occasions, there is no significant positive effect on various Government officials who continue to take decision to file frivolous and vexatious appeals. ***It imposes unnecessary burden on the Courts. The opposite party which has succeeded in the Court below is also made to incur avoidable expenditure.*** *Further, it causes delay in allowing the successful litigant to reap the fruits of the judgment rendered by the Court below.*

14. No doubt, when a case is decided in favour of a party, the Court can award cost as well in his favour. It is stressed by this Court that such cost should be in real and compensatory terms and not merely symbolic. There can be exemplary costs as well when the appeal is completely devoid of any merit. [See Rameshwari Devi v. Nirmala Devi (2011) 8 SCC 249]. However, ***the moot question is as to whether imposition of costs alone will prove deterrent? We do not think so. We are of the firm opinion that imposition of cost on the State/PSU's alone is not going to make much difference as the officers taking such irresponsible decisions to file appeals are not personally affected because of the reason that cost, if imposed, comes from the government's coffers. Time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals.*** *We clarify that such*

an order of recovery of cost from the officer concerned be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for."

(Emphasis supplied by me)

25. Thus, the petitioner insurance company not being an ordinary litigant and more particularly bound by the insurance contract (as briefly noted above) should not have filed the present frivolous writ petition to challenge the impugned contractually "binding order". The conduct of the petitioner in filing the present writ petition deserves to be condemned inasmuch as a frivolous writ petition has been filed to drag in litigation the respondent No.1 who is a widow and belongs to economically weaker and socially and educationally disadvantageous section of the society.

Applicability of National Litigation Policy:-

26. The petitioner being a subsidiary of the Central Government owned Corporation i.e. General Insurance Corporation of India and being State within the meaning of Article 12 of the Constitution of India, must adhere to the National Litigation Policy, 2009 formulated by the Central Government. The relevant portion of the National Litigation policy is reproduced below:

*"**National Litigation Policy***

'Introduction

Whereas at the National consultation for strengthening the judiciay toward reducing pendency and delays held on October 24/25, 2009, the Union Minister of Law and Justice, presented resolutions which were adopted by the entire conference unanimously.

*And wherein the said resolution acknowledged the initiative undertaken by the Government of India to frame the National Litigation Policy with a view to ensure conduct of **responsible litigation by the Central Government and urges every State Government to evolve similar policies.***

The National Litigation Policy is as follows:

The Vision/Mission

1. The National Litigation Policy is based on the recognition that the Government and its various agencies are the pre-dominant litigants in courts and Tribunals in the country. Its aim is to transform the Government into an efficient and responsible litigant. This policy is also based on the recognition that it is the responsibility of the Government to protect the rights of citizens, to respect fundamental rights and those in charge of the conduct of the Government litigation should never forget this basic principle.

*"**Efficient litigant**" means*

Focusing on the core issues involved in the litigation and addressing them squarely.

Managing and conducting litigation in a cohesive, co-ordinated and time-bound manner.

Ensuring that good cases are won and bad cases are not needlessly persevered with.

A litigant who is represented by competent and sensitive legal persons: competent in their skills and sensitive to the facts that the Government is not, an ordinary litigant and that a litigation does not have to be won at any cost.

*"**Responsible litigant**" means*

That litigation will not be resorted to for the sake of litigating.

That false pleas and technical points will not be taken and shall be discouraged.

Ensuring that the correct facts and all relevant documents will be placed before the court.

That nothing will be suppressed from the court and there will be no attempt to mislead any court or tribunal.

That nothing will be suppressed from the court and there will be no attempt to mislead any court or tribunal.

2. The Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, "Let the court decide" must be eschewed and condemned -

3. The purpose underlying this policy is also to reduce Government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the goal in the National Legal Mission to reduce the average pendency time from 15 years to 3 years. Litigators on behalf of the Government have to keep in mind the principles in corporated in the National mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary Government cases. Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority."

27. The aforesaid National Litigation Policy clearly provides that the Government should be a responsible litigant and should not involve in frivolous litigation. Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority.

28. Apart from the fact that the petitioner was bound by the impugned binding order under the terms of contract of insurance, the petitioner should also have adhered to the litigation policy and should have acted fairly and as a responsible litigant. The National Litigation Policy recognises that it is the responsibility of the Government to protect rights of citizens, to respect fundamental rights and those in-charge of the conduct of litigation should never forget this basic principle. Filing of the present writ petition shows that the petitioner has not only dis-respected the insurance contract between it and the State-Government but also acted unfairly against the rights of the claimant, i.e. respondent No.1.

Insurance Contract:-

29. In contract of insurance, rights and obligations are strictly governed by the policy of insurance, vide **Deokar Export (P) Ltd. Vs. New India Assurance Co. Ltd., (2008) 14 SCC 598** (para-14). While construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the Court to add, delete or substitute any words. It is also well settled that terms of the insurance policy have to be strictly construed in order to determine the extent of the liability of the insurer. The endeavour of the Court should always be to interpret the words used in the contract in the manner that will best express the intention of the parties. The contract must

be read as a whole. It is not permissible for the court to substitute the terms of the contract itself. No exceptions can be made on the ground of equity. These principles are well settled. Reference in this regard may be had to the judgments of Hon'ble Supreme Court in the case of **Export Credit Guarantee Corporation vs M/S. Garg Sons International (2014) 1 SCC 686 (Paras-10 to 13), Industrial Promotion and Investment Corporation of Orrisa vs. New India Assurance Co. Ltd. (2016) 15 SCC 315 (paras-9 to 13), General Assurance Society Ltd. vs Chandumull Jain And Anr, 1966 SC 1644 (para-11), Suraj Mal Ram Niwas Oil Mills Pvt. Ltd. Vs. United India Insurance Co. Ltd., (2010) 10 SCC 567 (paras- 23 to 26), M/S Sumitomo Heavy Industries Ltd vs Oil & Natural Gas Company, (2010) 11 SCC 296 (para-36) and Vikram Greentech (I) Ltd. & Anr. vs New India Assurance Co. Ltd. (2009) 5 SCC 599 (para-17).**

30. We have extracted certain relevant portion of the insurance contract between the petitioner and the State Government. As per terms of the afore-noted contract, income certificate in case of farmers, is not required. The husband of the respondent No.1 was a farmer. That apart, even if he is assumed as labourer, yet the income of the entire family had not exceeded Rs.75,000/- as per own report of the petitioner dated 04.10.2019 and the report of the investigator of the petitioner dated 25.11.2019 as noted in the impugned order. As per terms of contract of insurance, the petitioner is bound by the order of the respondent No.3 and was also bound to make payment within the time specified failing which penalty of Rs.2,500/- per week is payable to the claimant and yet the petitioner has filed the present writ petition instead of making the payment to the respondent No.1. Thus, the present writ petition is a frivolous writ petition. Consequently, it deserves to be dismissed with cost.

31. For all the reasons stated above, **the writ petition is dismissed with cost of Rs.5,000/-.** The petitioner shall comply with the impugned order and shall make the payment of awarded amount and the penalty to the respondent No.1 forthwith.

(2021)01ILR A332
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2020

BEFORE

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

Writ C No. 22240 of 2020

Vishal Vaibhav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anirudh Kumar Upadhyay

Counsel for the Respondents:
C.S.C., Sri Gagan Mehta

(A) Civil law - second re-evaluation of marks - No regulation that may permit a second re-evaluation - That apart, re-evaluation once done, ought to bring the grievance to an end - No candidate can claim the right to a successive re-evaluation until some Examiner is persuaded to agree with the Examinee about the assessment of his own merit. (Para -7)

Petitioner admitted to the Bachelor of Dental Surgery Course - asserts that he performed very well in the academic curriculum - petitioner

wanted a re-evaluation of his marks obtained - After re-evaluation, result - "No Change' in both the papers - petitioner's grievance has already been placed in a second instance before the Examiners, who have done a re-evaluation - award not disturbed made in the first instance - petitioner asks for a further re-evaluation - seeks virtually a second re-evaluation.(Para -1,2 6)

HELD:- This matter relates to assessment of a paper relating to a specialized branch of medicine. This Court has no means to ascertain nor the requisite expertise to determine if the petitioner is right or the Examiners are wrong. In a situation like this, the Examination Authority is to be trusted for their conclusions. It would be unwise for this Court to convert itself into an expert and set about the task of reopening an Examiner's award twice done.(Para -7)

Writ Petition dismissed. (E-6)

List of Cases cited :-

Ran Vijay Singh & ors. Vs St. of U.P. & ors., (2018) 2 SCC 357

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

1. The petitioner is a student of the Bachelor of Dental Surgery Course at the K.D. Dental College and Hospital, Mathura, an affiliate college of the Dr. Bhimrao Ambedkar University, Agra. The petitioner was admitted to the Bachelor of Dental Surgery Course during the Academic Year 2014-15. He asserts that he has performed very well in the academic curriculum. He has appeared in the final professional examination under Roll no. 178627762009 and Enrollment no. 13572. It is his case that he was declared "Failed' in two papers, to wit, Conservative Dentistry and Endodontics (Paper-4) and Prosthodontics and Crown & Bridge (Paper-7). The petitioner says that he wanted a re-evaluation of his marks obtained in each of these papers because "he believes that his answer scripts were not properly evaluated' to borrow the words of the petitioner's assertion in paragraph no.7 of the writ petition.

2. It is also pleaded by him that looking to his past academic record, he expected much higher marks than those that have been awarded. He has also asserted in paragraph no.8 that he has secured copies of the scripts relating to the two papers in question and found the answers not to be correctly evaluated by the Examiners. He has pleaded in paragraph no.12, the details of the errors, that are subject matter of action here. It is pointed out that the petitioner applied for an online re-evaluation of the two papers, paying the requisite fee. After re-evaluation, there was a result of "No Change' in both the papers. The petitioner thereupon moved an application to the Vice Chancellor and the Registrar of the Dr. Bhimrao Ambedkar University, Agra, seeking redress against the improperly done re-evaluation. No action being taken by the Vice Chancellor or the Registrar of the University, the petitioner has instituted this writ petition. He has prayed that a mandamus commanding the respondent University and the Vice Chancellor be issued to cause re-evaluation of the petitioner's answer book in the subject papers of Conservative Dentistry and Endodontics (Paper-4) and Prosthodontics and Crown & Bridge (Paper-7) of the B.D.S. Fourth Professional Examination, with a further direction that he be caused to be given correct marks after re-evaluation, within a period of time to be specified by this Court.

3. Heard Mr. Anirudh Kumar Upadhyay, learned Counsel for the

petitioner, Mr. Gagan Mehta, learned Counsel appearing on behalf of respondent nos.2, 3 and 4 and Mr. Sriprakash Singh, learned Standing Counsel appearing on behalf of respondent no.1.

4. Mr. Anirudh Kumar Upadhyay, learned Counsel for the petitioner submits that it is a case of inaction on the University's part, who are a statutory body. It is their duty to see that re-evaluation once undertaken, ought to be a *bona fide* exercise and not merely an eyewash. He urges that the original award as well as the result of re-evaluation, are both vitiated on account of grave irregularities committed by the two sets of Examiners. The petitioner has pleaded that he has correctly solved question no.2(a) and 3(d) in the paper relating to Prosthodontics and Crown & Bridge (B) part 2 (Paper no.7). The Examiners in both instances have not awarded correct marks. It is likewise argued that the question paper in the subject of Conservative Dentistry and Endodontics (Paper no.4) carries question no.1, which has two parts and question no.3, both of which have been correctly answered by the petitioner. He has also answered question no.5 correctly. It is pleaded and argued that question nos.(I) (both parts), 3 and 5 have not led to any marks being awarded by the Examiners in error.

5. Mr. Gagan Mehta, learned Counsel appearing for the University, on the other hand, submits that re-evaluation has been undertaken once and that has led to no change. This Court cannot convert itself into an expert to sit over the judgment of the Examiners, which is expressed in their award. He also submits that there cannot be a second re-evaluation, which is not contemplated under the Rules or the Regulations applicable. Mr. Gagan Mehta has, particularly, placed reliance on the decision of the Supreme Court in **Ran Vijay Singh and others vs. State of Uttar Pradesh and others, (2018) 2 SCC 357.** He has drawn the Court's attention to the following observations of their Lordships of the Supreme Court in **Ran Vijay Singh** *(supra):*

"30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The court should not at all re-evaluate or scrutinise the answer sheets of a candidate--it has no expertise in the matter and academic matters are best left to academics;

30.4. The court should presume the correctness of the key answers and proceed on that assumption; and

30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate.

31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not

directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse -- exclude the suspect or offending question.

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination -- whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."

6. This Court has carefully considered the matter in hand. The petitioner's grievance has already been placed in a second instance before the Examiners, who have done a re-evaluation. They have not disturbed the award made in the first instance. Now, the petitioner asks for a further re-evaluation. What he seeks is virtually a second re-evaluation.

7. Learned Counsel for the petitioner has not brought to this Court's attention any regulation that may permit a second re-evaluation. That apart, re-evaluation once done, ought to bring the grievance to an end. No candidate can claim the right to a successive re-evaluation until some Examiner is persuaded to agree with the Examinee about the assessment of his own merit. This matter relates to assessment of a paper relating to a specialized branch of medicine. This Court has no means to ascertain nor the requisite expertise to determine if the petitioner is right or the Examiners are wrong. In a situation like this, the Examination Authority is to be trusted for their conclusions. It would be unwise for this Court to convert itself into an expert and set about the task of reopening an Examiner's award twice done.

8. In the result, this writ petition fails and is **dismissed**. There shall be no order as to costs.

(2021)01ILR A336
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.01.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 181 of 1996

Kamlesh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Alok Kapoor, (Amicus Curiae), Indrajeet Shukla, Mohammad Mustafa Khan, Mohd. Shafiq

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Indian Penal Code – Section 392 & 397 – Robbery at Petrol pump – Attempt to cause death or grievous hurt – Test Identification Pared (T.I.P.) – Accused not named in F.I.R. – No recovery of looted property – Accused not known to the prosecution witnesses – Cashier, Manager and Truck Driver, who chased the accused, were not produced as witness, though they are important – None of the prosecution witnesses has stated that he had seen any special characteristics or appearance of any accused or any identification marks of their faces – Appellant is already acquitted under Arms Act – T.I. Pared delayed by 15 days – No explanation thereof – Held, the prosecution has miserably failed to prove its case beyond reasonable doubt, the appellant is entitled to be acquitted. (Para 31, 33, 34, 36 and 37)

B. Evidence Law - Evidence Act, 1872 – Section 9 – Test Identification Pared (T.I.P.) – Object and evidentiary value – Corroboratory value – Object of TIP is to find out whether the suspected offender arrested by police during investigation is real culprit or not – Evidence of TIP can be held as reliable and trustworthy only where the suspects were neither shown to the witnesses nor the witnesses had an opportunity to see them prior to TIP and the proceeding of TIP is not irregular – Evidence of TIP is very weak evidence, it has only the corroboratory value and where the offenders were unknown to the witnesses and the prosecution case is based only on the evidence of identification, prosecution has to prove that prosecution witnesses had proper and sufficient opportunity to see and identify the respondents and they had properly seen and identified them. (Para 26 and 28)

Appeal allowed. (E-1)

Cases relied on :-

1. Wakil Singh Vs St. of Bihar, AIR. 1981 S.C.1392

2. Shaikh Umar Shaikh & anr. Vs St. of Mah., 1998 SCC (Crl.) 1276

3. Mohd. Sajjad @ Raju @ Salim Vs St. of W.B. AIR 2017 SC 642

4. Lal Singh & ors. Vs St. of U.P., (2003) 12 SCC 554

5. Subash and Shiv Shankar Vs St. of U.P., (1987) 3 SCC 331

6. Musheer Khan @ Badshah Khan & anr. Vs St. of M.P., (2010) 2 SCC 748

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

1. The instant criminal appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code'), has been preferred against the

judgment and order dated 22.04.1996, passed by Ist Additional Sessions Judge, Unnao, in Sessions Trial No.191 of 1989, arising out of Case Crime No106 of 1988, P.S.-Achalganj, District-Unnao, whereby the appellant-Kamlesh (hereinafter referred to as appellant) has been convicted and sentenced for offence under Section 392 I.P.C. for seven years rigorous imprisonment and for offence under Section 397 I.P.C. for seven years rigorous imprisonment with further direction that both the sentences of the appellant shall run concurrently.

2. The prosecution case, in brief, is that Sakur Ahmad (P.W.-1) informant, was carrier of sales money from Kannaudia Petrol Pump, situated at Azad Marg Crossing, Kanpur, to the office of the firm where he was posted. On 21.07.1988, at about 8:30 a.m. he had come to the Kannaudia Petrol Pump by scooter Super Bajaj bearing registration No.UMO 257, provided by the said firm to collect the sales money and he received Rs.21,100/- from Ghanshyam Srivastava (Cashier), kept it in diggie (side luggage box) of scooter and locked it. As he started the scooter to proceed towards Kanpur, three unknown persons, who were carrying with countrymade pistol and bombs, appeared there. One of them fired by his countrymade pistol with shouting that if anybody will move, he will kill all the persons, present at the spot, including informant (P.W.-1). Ghanshyam Srivastava (Cashier), Jagdamba Prasad Yadav (Manager), Sukhram (Betel shopkeeper) (P.W.-3), Pramod Kumar Singh (Truck Driver) became afraid and maintained silence due to fear. One of the said person (criminal) started the scooter of the informant and rest persons (other criminals) rode on rear seat of the scooter and fled away with cash, kept in scooter, towards Lucknow.

3. Written information of the occurrence (Ext.-Ka-1), prepared by Ghanshyam Srivastava (cashier) on the dication of Sakur Ahmad (P.W.-1), was filed at P.S.-Achalganj on 21.07.1988, which was entered in G.D. report (Ext.-Ka-4) by Head Constable Purushotam Narayan Tandon (P.W.-7), who also prepared Chik F.I.R. (Ext.-Ka-3) and registered the case as case crime No.106 of 1988 under Sections 392 and 397 I.P.C. against three unknown persons. Investigation of the case was entrusted to S.I. S. B. Singh (P.W.-11), who reached at the place of occurrence, took into his custody blank cartridges, prepared a recovery memo (Ext.-Ka-2) and also prepared site plan (Ext.-ka-8). During investigation, he also recovered the scooter of the informant, lying in jungle in damaged condition, prepared recovery memo, handed over the scooter to the informant (P.W.-1) and also prepared site plan (Ext.-Ka-11) of recovery of said scooter. During investigation, he was in training from 06.09.1988 to 14.09.1988 and in the meantime, the appellant-Kamlesh along with co-accused-Krishna Kumar @ Munsi (since deceased) were arrested on 07.09.1988 and they were put in Identification Parade Test (T.I.P.) on 22.09.1988.

4. After conclusion of investigation, S.I., S. B. Singh (P.W.11) filed charge sheet (Ext.-Ka-14) against Hari Prasad (since acquitted), Krishna Kumar @ Munsi (since deceased) and the appellant-Kamlesh 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 copy of relevant police papers as required under

Section 207 of the Code, committed the case to the Court of Sessions, Unnao for trial.

5. The learned trial Court framed charges for the offence under Sections 392 & 397 I.P.C against the appellant and other co-accused to which they denied and claimed for trial.

6. The prosecution, in order to prove its case, examined Sakur Ahmad (P.W.-1), Ram Sajivan (P.W.-2), Sukhram Chaurasia (P.W.-3), Ikramool Haque (P.W.-4), Head Constable-Purushotam Naraian Tandon (P.W.-5), Gaya Bux Singh @ Gyari (P.W.-6), Sri Janardhan Prasad (P.W.-7), Constable-Hari Shankar (P.W.-8), Constable-R. K. Sachan (P.W.-9), Constable-Chandra Bhan Singh (P.W.10) and S. I., S. B. Singh (P.W.-11).

7. During trial, co-accused Krishna Kumar had died and the trial against him was abated by the trial Court. The statement of appellant-Kamlesh and co-accused-Hari Prasad (since acquitted) were recorded under Section 313 of the Code wherein they denied the prosecution story and alleged that they were falsely implicated. The appellant-Kamlesh further stated that he was caught by police of Police Station-Achalganj two days prior to his arrest and after his photography, he was also shown to the witnesses.

8. The appellant, to controvert the prosecution story, had filed certified copy of judgment dated 26.09.1989, passed in Criminal Case No.1667A of 1989 (State vs. Kamlesh), P.S.-Achalganj, District-Unnao, whereby he was acquitted by concerned Magistrate, from the offence under Section 25 of Arms Act.

9. After conclusion of the trial, learned trial Court acquitted the co-accused-Hari Prasad, but convicted the appellant-Kamlesh as above by the impugned judgment and order. Aggrieved by the impugned judgment and order, the appellant has preferred this appeal.

10. Heard Sri Mohd. Mustafa, learned counsel for the appellant and Sri Hansraj Verma, learned A.G.A. for the State.

11. Learned counsel for the appellant has submitted that the appellant is innocent and has been falsely implicated by the concerned police. Learned counsel further submitted that the appellant is neither named in the F.I.R. nor anything was recovered from his possession. Learned counsel further submitted that no special characteristics or identification marks of any accused person, involved in the said occurrence were either mentioned in the F.I.R. or stated by the prosecution witnesses. Learned counsel further submitted that according to prosecution witnesses, one of co-accused-Hari Prasad was employee of Kannaudia Petrol Pump firm but his name was neither shown in the F.I.R. nor stated by any witness. Learned counsel further submitted that arrest of the appellant as well as test identification parade are highly doubtful as the arrest of the appellant-Kamlesh and recovery of countrymade pistol have already been held doubtful and appellant has been acquitted. Learned counsel further submitted that the trial Court, without considering the material available on record, acquitted one co-accused-Hari Prasad and convicted the appellant-Kamlesh only on the basis of doubtful evidence of Identification Test, which is against settled provision of criminal jurisprudence and the impugned judgment is liable to be set aside.

12. Per contra, learned A.G.A., vehemently opposing the submission made

by learned counsel for the appellant, submitted that the appellant has been identified in T.I.P. and also before the trial Court by the prosecution witnesses. Learned A.G.A. further submitted that the appellant was kept in *baparda* from the date of his arrest till the identification proceeding and there was no chance of the photography of the appellant as well as showing him to prosecution witnesses. Learned A.G.A. further submitted that the statement of prosecution witnesses is reliable and trustworthy ; the impugned judgment and order requires no interference and the appeal is liable to be dismissed.

13. I have considered the rival submissions made by learned counsel for both the parties and perused the record.

14. Admittedly, the appellant is not named in the F.I.R., although, the occurrence took place in broad day light i.e. 21.07.1988 at 8:30 a.m. and the prosecution witnesses had full opportunity to see and identify the accused persons including the appellant, but no identification marks of any accused was mentioned in the F.I.R. In the F.I.R., lodged by P.W.-1, it has been mentioned that he (P.W.-1) and all witnesses, present on the sport, had seen properly the accused persons and can identify if they would come before him.

15. Sakur Ahmad (P.W.-1) has stated that he was employee of firm of Kannaudia Petrol Pump and used to come by scooter Super Bajaj bearing registration No.UMO 257, provided by the firm. Stating that on 21.07.1988 at about 8:30 a.m., he had come on petrol pump to collect the sales money and parked his scooter near the northern door of the cash counter, he further stated that he received Rs.21,100/- from Ghanshyam Srivastava (Cashier) and kept it in diggie (side luggage box) of scooter along with relevant papers and also locked it. Stating that as he started his scooter, three unknown persons, carrying countrymade pistol and bomb (*hathgola*), came there and one of them made air fire and threatened him (P.W.-1) not to move from his place, otherwise, they would kill him, he further stated that Ghanshyam Srivastava (Cashier), Jagdamba Prasad Yadav (Manager), Ram Sajivan (P.W.-2) Sukhram Chaurasia (P.W.-3), Pramod Kumar Singh (Truck Driver) and so many people, present on the spot, became afraid. He further stated that one of the accused started the scooter and rest two accused rode on rear seat of the scooter. Stating further that at starting point, the scooter was unbalanced but later on, the accused persons fled away on that scooter with looted money and relevant papers, he further stated that they could not chased the accused persons due to fear but Pramod Kumar Singh (Truck driver) chased them by truck and returned thereafter. Stating further that he had seen the faces of all accused persons to whom he did not know earlier, he further stated that he got report (Ext.-Ka-1) written by Ghanshyam Srivastava (Cashier) and lodged the same at P.S.-Achalganj at about 10:00 a.m. Stating further that he had also attended T.I.P. at Jail, Unnao, he pointed out the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) and said that he had identified them in District Jail, Unnao. Stating further that he had seen the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) at the time of occurrence, who committed the loot of sales money and thereafter, identified them in T.I.P., he further stated that he had not seen them in

between and also did not know them prior to the occurrence.

16. Ram Sajivan (P.W.-2) has stated that he was posted at Kannaudia Petrol Pump since 7-8 years and was present at the time of occurrence. Corroborating the prosecution story as stated by Sakur Ahmad (P.W.-1), he also stated that at the time of occurrence, Ghanshyam Srivastava (Cashier), Jagdamba Prasad Yadav (Manager), Sukhram Chaurasia (P.W.-3) and Pramod Kumar Singh (Truck Driver) were present at the place of occurrence when the accused persons, carrying the countrymade pistol and bomb (*hathgola*), looted the sales money and fled away with scooter Super Bajaj bearing registration No.UMO 257 from there and they could not chase the accused persons due to fear ; Pramod Kumar Singh (Truck Driver) chased them but returned thereafter. Stating further that he had seen the faces of the accused persons, who were unknown to him, he further stated that he had attended T.I.P. in Unnao Jail and identified the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) to whom he had not seen after the occurrence and before T.I.P.. He further stated that the police, during investigation, recovered blank cartridges and prepared recovery memo (Ext.-ka-2).

17. Sukhram Chaurasia (P.W.-3) has stated that at the time of occurrence, his betel shop was situated near Kannaudia Petrol Pump prior to 12-13 years of the occurrence and he knew the employees of said petrol pump. Corroborating the prosecution story and stating that Sakur Ahmad (P.W.-1) took Rs.21,100/- (sales money) from Ghanshyam Srivastava (Cashier) and kept it in diggie (side luggage box) of scooter, he further stated that as Sakur Ahmad (P.W.-1) started the scooter, he fell down and Ramashrey also fell down and thereafter they balanced the scooter and fled away to northern side with all accused persons. He further stated that the accused persons, carrying countrymade pistol and bomb (*hathgola*), threatened them not to move from their place, Ghanshyam Srivastava (Cashier), Jagdamba Prasad Yadav (Manager), Sakur Ahmad (P.W.-1), Ram Sajivan (P.W.-2), Sukhram Chaurasia (P.W.-3) and Pramod Kumar Singh (Truck Driver) were also present on the spot and Pramod Kumar Singh chased the accused persons but returned thereafter. Pointing out the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased), he further stated that he had seen the faces of all three accused persons to whom he did not know earlier but had identified the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) in T.I.P. at Unnao Jail.

18. Ikramool Haque (P.W.-4), tyre tube repairing mechanic, has stated that his repairing shop was situated near the Kannaudia Petrol Pump since 12-13 years prior to the occurrence. He further stated that at the time of occurrence, he was taking bath and on hearing the gun sound, he reached at the place of occurrence and saw that the accused persons were fleeing away with scooter from the place of occurrence. Stating that two old cycles were parked near by his shop and co-accused, Hari Prasad (since acquitted), took away one of cycle just after the occurrence, he further stated that since Hari Prasad was employee of the said petrol pump, one and half year prior to the occurrence, he knew him very well. He also stated that another cycle was taken into custody by

Investigating Officer and recovery memo (Ext.-Ka-2) was prepared by him.

19. Purushotam Narain Tandon (P.W.-5) has stated that he had preapred Chik-F.I.R. (Ext.-Ka-3) and G.D. report (Ext.-Ka-4).

20. Gaya Bux Singh @ Gyari (P.W.-6) has stated that on 29.07.1988, co-accused, Hari Prasad (since acquitted) had met with him and said that Ramashrey had enquired him regarding the daily transaction of Kannaudia Petrol Pump. He further stated that co-accused, Hari Prasad (since acquitted) also told him that he had accompanied Ramashrey to petrol pump at the time of occurrence and parked his cycle behind the truck and when Ramashrey and other accused persons, after looting the sales money, fled away with scooter, co-accused, Hari Prasad (since acquitted) also fled away with his cycle.

21. Janardhan Prasad (P.W.-7), retired Special Executive Magistrate, has stated that he had conducted T.I.P. of appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased). He further stated that Sakur Ahmad (P.W.-1), Ram Sajivan (P.W.-2) and Sukhram Chaurasia (P.W.-3) had identified the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased), Ghanshyam Srivastava (Cashier) had identified co-accused-Krishna Kumar @ Munsi (since deceased) and Jagdamba Prasad Yadav (Manager) had identified the appellant-Kamlesh. Stating that he had prepared identification memo (Ext.-Ka-5), he further stated that the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) were identified by four persons each.

22. Constable Hari Shankar (P.W.-8) has stated that on 07.09.1988, he was posted as constable at P.S.-Achalganj. He further stated that on that day, S.H.O., P. K. Mishra, S.I., J. P. Singh along with other police personnel came at police station with the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) in *baparda* and put them in lock up. He further stated that he was on *pahra* (guard) duty from 6:00 p.m. to 9:00 p.m., he had not allowed any person to see the said arrestees. Verifying the relevant G.D. (Ext.-Ka-6), he further stated that he had handed over charge to one Constable Chandra Bhan Singh (P.W.-10). Stating that on 08.09.1988, he produced the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) before concerned Magistrate in *baparda* and thereafter, carried them to jail in *baparda*, and verifying the relevant G.D. (Ext.-Ka-7) of 08.09.1988, he further stated that during the period of journey from police station lock up to jail, no person was given opportunity to see the said arrestees.

23. Constable R. K. Sachan (P.W.-9) has stated that on 07.09.1988, he was posted at P.S.-Achalganj, where the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) were detained in lock up. Stating that he was on *pahra* (Guard) duty from 12:00 a.m. to 3:00 a.m. in the night and thereafter, handed over the charge to Constable, Hari Shankar (P.W.-8), he further stated that during that period, he had not allowed to any person to see the said accused persons.

24. Chandra Bhan Singh (P.W.-10) has stated that on 07.09.1988, he was posted at P.S.-Achalganj and took charge (*pahra*) from Constable-Hari Shankar (P.W.-8) and when he was on *pahra*

(Guard) duty from 9:00 p.m. to 12:00 a.m. (night), he had not allowed to any one to see the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased), who were detained as *baparda* in lock up.

25. S.I., S. B. Singh (P.W.-11) has stated that on 21.07.1988, he was posted at P.S.-Achalganj and was deputed as Investigating Officer of Case Crime No.106 of 1988. He further stated that during investigation, he recorded the statement of witnesses, inspected the place of occurrence and prepared site plan (Ext.-Ka-8). Stating that he also recovered blank cartridges from the place of occurrence and prepared recovery memo (Ext.-Ka-2), he further stated that he also recovered a scooter, used in the occurrence, in damaged condition, prepared a recovery memo (Ext.-ka-10) and site plan (Ext.-ka-11) and handed over the scooter to the informant (P.W.-1). He further stated that during investigation, on 22.09.1988, he also recorded the statement of S.H.O., P. K. Mishra, Constables-Bhagwati Prasad, Moti Lal and Lal Mohammad and on 29.09.1988, statement of S.I., J. P. Singh, Constable-Ramashrey and Constable-Umanath. Stating that from 06.09.1988 to 14.09.1988, he was in training and investigation was carried by S.I., S. N. Singh, he further stated that after investigation, he had submitted charge sheet (Ext.-Ka-12) against the appellant-Kamlesh and other co-accused.

26. It is settled principal of law that if the accused were not known to the prosecution witnesses and prosecution case is based only on the identification of the accused (T.I.P.) or on the identification produced before the Court, the prosecution must prove that the accused were not known to the prosecution witnesses prior to the occurrence and they had sufficient opportunity to see the special characteristics as well as identification marks on the person of the accused, committing the crime including identification marks on their faces. In addition to above, the prosecution also has to produce a link evidence to rule out of all the possibilities of opportunity of seeing the accused persons by the prosecution witnesses. Further, It is also settled principle of criminal jurisprudence that identification of accused by the witnesses before the Court is substantive piece of evidence whereas evidence of TIP is very weak evidence,it has only the corroboratory value and where the offenders were unknown to the witnesses and the prosecution case is based only on the evidence of identification, prosecution has to prove that prosecution witnesses had proper and sufficient opportunity to see and identify the respondents and they had properly seen and identified them.

27. In the case of ***Wakil Singh vs. State of Bihar, AIR. 1981 S.C.1392***, where judgment and order of acquittal, passed by trial Court as the evidence of identification was doubtful, was reversed in appeal by the High Court in appeal, Hon'ble Supreme Court, setting aside the judgment of the High Court, has held as under :

"2. In the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour*. In absence of any such description, it will be impossible for us to convict any accused on*

*the basis of a single identification, in which case the reasonable possibility of mistake in identification could not be excluded. For these reasons, therefore, the trial Court was right in not relying on the evidence of witnesses and not convicting the accused who are identified by only one witness, apart from the reasons that were given by the trial Court. The High Court, however has chosen to rely on the evidence of a single witness, completely over-looking the facts and circumstances mentioned above. The High Court also ignored the fact that the identification was made at the T.I. parade about 3 1/2 months after the dacoity and in view of such a long lapse of time it is not possible for any human being to remember, the features of the accused and he is, therefore, very likely to commit mistakes. In these circumstances unless the evidence is absolutely clear, it would be unsafe to convict an accused for such a serious offence on the testimony of a single witness."**(Emphasis supplied)***

28. The object of TIP is to find out whether the suspected offender arrested by police during investigation is real culprit or not. Evidence of TIP can be held as reliable and trustworthy only where the the suspects were neither shown to the witnesses nor the witnesses had an opportunity to see them prior to TIP and the proceeding of TIP is not irregular. Thus if evidence of TIP is shaky and doubt due to aforesaid reason, the evidence of identification before the court can not be relied upon.

29. In ***Shaikh Umar Shaikh and another v. State of Maharashtra 1998 SCC (Crl.) 1276***, wherein the trial Court ,after rejecting the evidence of identification parade on the ground that suspects were shown the witnesses prior to identification parade, relied on the evidence of identification before it and convicted the appellant, Hon'ble Supreme Court while allowing the appeal has held as under :

"The Designated Court after having rejected the evidence of identification parade on the ground that the suspects were possible shown to the witnesses, relied upon the evidence of identification of the accused in the Court by the two witnesses and on that evidence recorded conviction against the appellants. ***No doubt, the evidence of identification parade is not a substantive evidence, but its utility is for purpose of corroboration. In other words, it is utilised for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them. The real and substantive evidence of the identity of the accused comes when witnesses give statement in the Court, identifying the accused.*** *It is true that in the present case, PW-2 and PW-11 identified the two accused who are the appellants before us in the Court.* ***But, the question arises; what value could be attached to the evidence of identity of accused by the witnesses in the Court when the accused were possibly shown to the witnesses before the identification parade in the police station. The Designated Court has already recorded a finding that there was strong possibility that the suspects were shown to the witnesses. Under such circumstances, when the accused were already shown to the witnesses, their identification in the Court by the witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made basis for recording conviction against the accused.*** *The reliance of evidence of identification of the accused in the Court by*

*PW-2 and PW-11 by the Designated Court, was an erroneous way of dealing with the evidence of identification of the accused in the Court by the two eye-witnesses and had caused failure of justice. Since conviction of the appellants have been recorded by the Designated Court on wholly unreliable evidence, the same deserves to be set aside."**(Emphasis supplied)***

30. Now, coming to the facts of this case, in F.I.R., it has been specifically mentioned that the said scooter, which was being used by Sakur Ahmad (P.W.-1), was also used by the accused persons including appellant-Kamlesh for fleeing away from the place of occurrence, and was in working condition. Sakur Ahmad (P.W.-1), in examination-in-chief, had not stated that the said scooter was recovered by the Investigating Officer in his presence or on the recovery memo prepared by I.O., he had put his signature. He had not stated that the said scooter was handed over to him by the I.O. (P.W.-11) whereas P.W.-11 had stated that the said scooter, lying in jungle in damaged condition, was recovered by him. P.W.-11 had specifically stated that after preparing the recovery memo of said scooter (Ext.-Ka-10), he had handed over it to the informant. *("Mukadma se sambandhit scooter jungle me khada mila jise kabje me liya | kharab dasha me tha | supurd wadi kiya |")*

31. In addition to above, the prosecution has also not produced the Ghanshyam Srivastava (Cashier), Jagdamba Prasad Yadav (Manager) and Pramod Kumar Singh (Truck Driver). These witnesses were very important for the prosecution story because Ghanshyam Srivastava (Cashier) was witness of fact, who can depose as to whether he had given Rs.21,100/- to Sakur Ahmad (P.W.-1) or not. Similarly, Jagdamba Prasad Yadav (Manager), who was responsible for whole transaction of petrol pump and Pramod Kumar Singh (Truck Driver), who had not only seen the occurrence but also chased the accused persons. Prosecution has not placed any explanation or justification as to why it withhold the said important witnesses. Non producing of the said important witnesses creates a doubt in the prosecution story.

32. Further, according to prosecution story, the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) were arrested on 07.09.1988 at about 14:45 p.m. by S.H.O., P. K. Mishra and S.I., J. B. Singh and were brought at police station-Achalganj at about 8:00 p.m. on same day. The prosecution has produced Constable-Hari Shankar (P.W.-8), Constable-R. K. Sachan (P.W.-9) and Constable-Chandra Bhan Singh (P.W.10), who were on *pahra* (guard) duty at P.S.-Achalganj and had deposed that they had not allowed to any person to see the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) but the prosecution had failed to produce the S.H.O., P. K. Mishra and S.I., J. B. Singh and other police personnel, who had arrested the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) on 07.09.1988 at about 14:45 p.m. and in whose custody, they were kept for more than six hours, to prove that the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) were not shown to any person during that period. Failure of the prosecution to produce these police personnels further creates a doubt in the prosecution story because there may be possibility that the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) were shown to the witnesses.

33. Further, in addition to above, in F.I.R., no identification marks or special characteristics of any accused have been mentioned by Sakur Ahmad (P.W.-1) and none of the prosecution witnesses has stated that he had seen any special characteristics or appearance of any accused or any identification marks of their faces. Sakur Ahmad (P.W.-1), in cross-examination, has specifically stated that after firing, no one dared to see towards any of the accused and when accused persons had fled away from the place of occurrence, Ghanshyam Srivastava (Cashier) and Jagdamba Prasad (P.W.-7) came out from the cabin. *(fire hone par kisi ki badmasho ki aur dekhne ki bhi himmat kisi ki bhi nahi hui jab badmash chale gaye tab ghanshyam va jagdamba cabin se nikle.)* Sukhram Chaurasia (P.W.-3), in cross-examination, has admitted that at the time of occurrence, he was behind the boundary wall which was six feets in height. Furthermore, from perusal of T.I.P. report (Ext.-Ka-5), it appears that there were 7-8 identification marks on the faces of the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) and Janardhan Prasad (P.W.-7) has stated that he had pasted paper-sticker *(kagaj ki chippi)* on each identification marks of accused persons but Sukhram Chaurasia (P.W.-3), in his cross-examination, has specifically stated that no paper-sticker was pasted on the faces of the accused persons at the time of T.I.P. *(shinakht ke samay mulzim ke chehre par koi chippi nahi thi.)*. Thus, in view of the above, where the appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) were having sufficient identification marks on their faces but none of the identification marks and their special characteristics were either mentioned in the F.I.R. or stated by the prosecution witnesses and in view of statement of Sukhram Chaurasia (P.W.-3) that identification marks of appellant-Kamlesh and co-accused-Krishna Kumar @ Munsi (since deceased) were not concealed, the prosecution story becomes further doubtful.

34. Furthermore, appellant-Kamlesh, who was arrested with other co-accused-Krishna Kumar @ Munsi (since deceased) on 07.09.1988 at 14:45 p.m. with countrymade pistol and was also put on trial for offence under Section 25 of Arms Act but he was acquitted for the said offence by concerned Magistrate on 26.09.1989. In addition to above, no incriminating articles pertaining to this case i.e. looted properties were recovered from their possession. Non recovery of incriminating articles pertaining to this case and acquittal of the appellant-Kamlesh from the offence under Section 25 of Arms Act, further creates doubt in the prosecution version regarding his arrest on 07.09.1988 and also makes the prosecution story doubtful.

35. In ***Mohd. Sajjad @ Raju @ Salim vs. State of West Bengal, AIR 2017 SC 642***, Hon'ble Supreme Court, relying on the judgment passed by Hon'ble Supreme Court in the cases of ***Lal Singh and others vs. State of U.P., (2003) 12 SCC 554, Subash and Shiv Shankar vs. State of U.P., (1987) 3 SCC 331*** and ***Musheer Khan @ Badshah Khan and another vs. State of Madhya Pradesh, (2010) 2 SCC 748***, expressing its concerned of delay on conducting the identification proceeding (T.I.P.) after arresting the accused persons, has held as under :

"In the instant case none of the witnesses had disclosed any features for identification which would lend some

corroboration. The identification parade itself was held 25 days after the arrest. Their chance meeting was also in the night without there being any special occasion for them to notice the features of any of the accused which would then register in their minds so as to enable them to identify them on a future date. The chance meeting was also for few minutes. In the circumstances, in our considered view such identification simpliciter cannot form the basis or be taken as the fulcrum for the entire case of prosecution. The suspicion expressed by PW 8 Saraswati Singh was also not enough to record the finding of guilt against the appellant. We therefore grant benefit of doubt to the appellant and hold that the prosecution has failed to establish its case against the appellant."

36. Coming to the present case again, the appellant-Kamlesh was arrested on 07.09.1988 and was produced before the concerned Magistrate on 08.09.1988 but his identification proceeding along with co-accused-Krishna Kumar @ Munsi (since deceased) was conducted on 22.09.1988. The prosecution had not produced any explanation as to why identification proceeding was conducted after delay of 15 days. It has also not produced any evidence whether it (T.I.P.) was conducted after second remand of accused persons under Section 167 of the Code or during first remand of accused persons. Causing delay in holding T.I.P further creates doubt in the prosecution story. In addition to above, according to Gaya Bux Singh @ Gyari (P.W.-6), co-accused-Hari Prasad (since acquitted) had made before him extra judicial confession that one Ramashrey had come to him with two persons and had made enquiry regarding the cash of petrol pump to whom he (Hari Prasad) told everything ; he (Hari Prasad) also confessed that he (Hari Prasad) went with the said Ramashrey at the place of occurrence and was present behind the truck and he (Hari Prasad) further confessed that as Ramashrey and other co-accused looted the sales money and fled away from the place of occurrence with the said scooter, he (Hari Prasad) escaped there from by his cycle. Sukhram Chaurasia (P.W.-3) has also stated that one Ramashrey fell down at the time of occurrence. Thus, the presence of Ramashrey, at the time of occurrence, and his involvement have been alleged by these witnesses, but Investigating Officer had exonerated him and he was not placed in trial whereas the appellant-Kamlesh, who was neither named in the F.I.R. nor named by any witnesses and whose involvement in the said occurrence is doubtful, has been convicted in this case.

37. In the light of above discussion, I am of the considered opinion that the prosecution has miserably failed to prove its case beyond reasonable doubt. Learned trial Court, without considering the aforesaid fact of the prosecution story, passed the impugned judgment and order in cursory manner. The impugned judgment and order passed by trial Court is liable to be set aside and the appellant is entitled to be acquitted.

38. I am, therefore, unable to uphold the conviction and sentence of the appellant. The impugned judgment and order, passed by the Trial Court, is accordingly set aside. The appellant is acquitted. Consequently appeal is ***allowed***.

39. The appellant is on bail, his bail bond is cancelled and sureties are discharged.

40. Keeping in view the provision of Section 437-A of the Code, appellant 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, appellant on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

41. A copy of this judgment along with lower court record be sent to Trial Court by FAX for immediate compliance.

(2021)01ILR A347
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 800 of 2018

Furkan Ahamad ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ashwini Kumar, Sri Ashwini Kumar, Sri Ganesh Shanker Srivastava, Sri Girish Kumar Singh

Counsel for the Opposite Party:
A.G.A., Sri Ram Dular, Sri Ram Surat Patel

Criminal Law - Indian Penal Code, 1860- Section 326-A - Conviction- Sentence of ten years rigorous imprisonment with fine- Appeal pressed only on the quantum of sentence.

Quantum of Sentence- "Proper Sentence"- While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric.Criminal jurisprudence in our country is reformative and corrective and not retributive.

The question of awarding proper sentence is based upon the doctrine of proportionality whereby sentence should be commensurate to the gravity of the offence, the impact upon the victim and the society at large and should be reformative and corrective instead of retributive.

Criminal Law - Indian Penal Code, 1860- Sections 326-A,326-B- Keeping in view the opinion of the Doctor that the injuries were not grievous or dangerous to life and body of the injured was not deformed or maimed. This Court, therefore, considers it a fit case to alter the conviction and sentence of appellant awarded under Section 326-A I.P.C. to Section 326-B I.P.C. This Court, therefore, considers to impose six years imprisonment to the accused and a fine of Rs. 5000 and in default of payment of fine the accused will have to serve out three months imprisonment.

As the act of the accused had not resulted in any permanent or partial damage or deformity to the victim, who is his wife, instead of Section 326-A of the IPC, the offence u/s 326-B of the IPC is made out. Accordingly, conviction altered to Section 326-A, IPC and sentence modified to 6 years with fine. (Para 10, 11, 13, 14, 16)

Criminal Appeal partly allowed.(E-2)

Case Law/ Judgements relied upon :-

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

2. Sham Sunder Vs Puran, (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan, (2013) 9 SCC 509

4. Jameel Vs St. of U.P .(2010) 12 SCC 532

5. Guru Basavraj Vs St. of Kar., (2012) 8 SCC 734

6. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257

7. Shyam Narain Vs St. (NCT of Delhi), (2013) 7 SCC 77

8. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

9. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

10. Raj Bala Vs St. of Har., (2016) 1 SCC 463

11. Kokaiyabai Yadav Vs St. of Chhattis..(2017) 13 SCC 449

12. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

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

1. This criminal appeal has been filed against the judgment and order dated 20.2.2016 passed by the Additional Sessions Judge, Nagina, district-Bijnor in S.T. No. 422 of 2015 (State vs. Furkan Ahmad), arising out of Case Crime no. 356 of 2013, under Sections 326A I.P.C., P.S. Kotwali Dehat, district-Bijnor, convicting and sentencing the appellant under Section 326-A I.P.C. for 10 years rigorous imprisonment with fine of Rs.15,000/- and in case of default of payment of fine, he shall further undergo six months imprisonment.

2. The brief facts of this case are that the father of the complainant is a Rickshaw puller in Delhi. On 21.12.2013, the present accused who is the father of the complainant came back to his house at Islampur Bishnoiwala from Delhi and started quarreling with his wife Meena, aged about 50 years and thereafter went out from the house. On 22.12.2013 at about 5:00 O'clock in the morning when mother of the complainant had gone to the toilet to attend the call of nature, father of the complainant, who was already hiding there, poured acid on her mother, as a result of which she sustained serious burn injuries on her head, face and other parts of the body. Upon hearing the hue and cry, the complainant reached at the spot, then the accused-appellant fled away from the spot. The complainant had rushed her mother to the hospital in Ambulance 108.

3. Learned counsel for the appellant submits that offence under Section 326-A I.P.C. is not made out against the accused-appellant as the victim has not received any fatal injuries on her person. Neither there was any permanent/ partial damage nor there was any deformity on the person of the victim. The victim was having superficial burn injuries on her face and back. The Doctor has opined that the injuries were caused by some chemical and the same were not grievous or dangerous to life and the conviction and sentence imposed under Section 326-A I.P.C. is not in consonance with the medical evidence, at the most offences can go upto the limit of under Section 326-B I.P.C.

4. Learned counsel further submits that the accused-appellant is the only bread earning member in the family. He further submits that the appellant is in jail since 17.11.2014 and the impugned order of conviction and sentence was passed on 20.02.2016, thus, by now, the accused appellant has been languishing in jail for more than six years. He lastly submits that

on the question of legality of conviction he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed that lenient view be taken considering the condition of family of the present accused.

5. Learned counsel appearing on behalf of injured Meena submits that the accused is the husband of the injured, and he is in jail since 17.11.2014 and the accused is now regretting for the acid injury caused by him to his wife and the victim is staying alone at her home, if the accused is released, then the victim will not feel any problem to live with him.

6. I have perused the entire material available on record and the evidence as well as judgment of the trial court. The learned counsel for the accused-appellant does not want to press the appeal on its merit and requests to take a lenient view of the matter.

7. In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization.Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

8. In ***Sham Sunder vs Puran, (1990) 4 SCC 731***, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

9. In ***State of MP vs Najab Khan, (2013) 9 SCC 509***, the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734***, the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was

planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

10. Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

11. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77***, it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.***

12. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449***, it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

13. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, the Supreme Court referred the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of

consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

14. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive. This Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

15. Since the learned counsel for appellant has not pressed the appeal on merits, however, this Court after perusal of the entire evidence on record and judgment of the learned Trial Court considers that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is upheld.

16. After considering the rival submissions made by learned counsel for the appellant, considering the facts and circumstance of the case and specially keeping in view the opinion of the Doctor that the injuries were not grievous or dangerous to life and body of the injured was not deformed or maimed. This Court, therefore, considers it a fit case to alter the conviction and sentence of appellant awarded under Section 326-A I.P.C. to Section 326-B I.P.C.

17. On the question of sentence this Court after considering the rival submissions made by learned counsel for the parties, considering the facts and circumstance of the case and specially keeping in view the opinion of the Doctor that the injuries were not grievous or dangerous to life. This Court, therefore, considers to impose six years imprisonment to the accused and a fine of Rs. 5000 and in default of payment of fine the accused will have to serve out three months imprisonment.

18. Accordingly, the conviction is upheld. The appeal is **partly allowed** with the modification of the sentence as aforesaid. The appellant be released from the jail on deposit of the fine as the accused had served more than six years in prison.

19. Office is directed to transmit the lower court record along with a copy of this

judgment to the learned court below for information and necessary compliance as warranted.

(2021)01ILR A352
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SUBHASH CHAND, J.

Criminal Appeal No. 1615 of 2006

Pawan Kumar Mishra ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sarvesh, Sri Suneel Kumar Mishra

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

Evidence Law - Indian Evidence Act, 1872- Section 6- Res Gestae- Admissibility of Evidence- Accused was also identified by her during her examination before the court and she further stated that accused Pawan Kumar Mishra present in the court had committed rape to her.- PW-3 - She also during her examination corroborated the statement of victim.- PW-1 Virendra Kumar Agnihotri, the father of the victim is also the informant also corroborated the statement of victim in regard to occurrence as was told by victim to her parents respectively- The statement of PW-3 and PW-1 who are parents of the victim though are not the eye-witness, yet their evidence is admissible under Section 6 of the Evidence Act. which corroborates the substantive evidence of the testimony of PW-2 .- The conviction of the accused for the charge under section 376 and 506 I.P.C., is proved beyond the reasonable doubt and the same is affirmed in view of the appreciation of the evidence.

Where the testimony of the witnesses corroborates the substantive evidence and form a part of the same transaction, then such evidence would be admissible.

Criminal Law - Indian Penal Code, 1860- Section 376- Section 506- Quantum of sentence- The objective of criminal law in imposing appropriate sentence must be judged commensurate with nature of gravity of the crime and the manner in which the crime is committed. The twin objective of sentencing policy is deterrence or correction depends upon the facts and circumstances of each case to meet the ends of justice. The court should take into consideration the nature of the offence, gravity of the crime and other attending circumstances. The offence of rape is a social stigma and rape with a tender age of child is very heinous crime than that of other adult female.

Settled law that sentence is awarded on the considerations of the gravity of the offence, manner of its commission and its impact on the society. In the facts of the case, as the offence involves the rape of a minor, hence no interference in the quantum of sentence awarded by the trial court is warranted. (Para 17, 20, 22, 27, 31, 32)

Criminal appeal accordingly rejected. (E-2)

Judgements/ Case law relied upon:-

1. St. of U.P. Vs Ramesh (2001) 2 SCC 493

2. Mukhtiyar Singh Vs St. of Punj. AIR 2009 SC 1854

3. S. Ram Krishna Vs St. Rep. by PP, A.P Hyderabad (2008) 8 SCC 617

4. St. of M.P. Vs Bala @ Bala Ram AIR 2005 SC 3567

5. St. of Karnataka Vs Raju (2007) 11 SCC 490

(Delivered by Hon'ble Subhash Chand, J.)

1. The instant Criminal Appeal has been preferred on behalf of the appellant-convict Pawan Kumar Mishra against the State of U.P., against the judgment and order dated 18.2.2006 passed by the Additional Sessions Judge, Court No. 3, Fatehpur in Sessions Trial No. 251 of 2005 (State Vs. Pawan Kumar Mishra) arising out of Case Crime No. 75 of 2004 under Sections 376 and 506 I.P.C., P.S. Jafarganj, District Fatehpur whereby the appellant had been convicted and sentenced to life imprisonment and a fine of Rs. 10,000/- was also ordered to undergo further imprisonment of two years in default of payment of fine and further convicted and sentenced for the offence under section 506 I.P.C with imprisonment of 3 years and a fine of Rs. 1,000/- was also ordered to to undergo further imprisonment of two months in default of payment of fine. All the sentences were to run concurrently.

2. The facts giving rise to this appeal in brief are that the informant Virendra Kumar, son of Jagdev Prasad Agnihotri, resident of village Kamasin, P.S. Jafarganj, District Fatehpur lodged F.I.R. with the concerned police station with these allegations that on 24.10.2004 at 5 p.m., his daughter Luxmi Devi 6 years old was playing under the Plum Tree nearby the house of Uma Shankar, son of Mahabir Pandey and was plucking plums; at the same time Pawan Kumar Mishra, son of Devi Prasad Mishra, 22 years old of the village attracted there and enticed away his daughter in a dilapidated house of Uma Shankar and committed rape to her whereby the blood was also oozing and his weeping daughter came to the house and told in regard to woe-tale to her mother. On this information he also reached to the place of occurrence and found blood there. There may, persons of the village also witnessed the place of occurrence along with him. His daughter was also criminally intimidated by Pawan Kumar Mishra if she disclosed in regard to occurrence. He and persons of the village made search of Pawan Kumar Mishra but he fled away. On this report the Case Crime No. 75 of 2004 was registered against Pawan Kumar Mishra under Section 376 and 506 I.P.C., with the police station concerned.

3. The Investigating Officer after concluding the investigation filed the charge sheet against the accused Pawan Kumar Misrha under Sections 376 and 506 IPC before the court of Chief Judicial Magistrate, Fatehpur who after taking cognizance of the same committed the case to the Court of Sessions for trial which was in turn transferred to the court of Additional Sessions Judge, Court No. 3, Fatehpur.

4. The trial court framed the charge against the accused under sections 376 and 506 I.P.C., and the charge was read over and explained to the accused which was denied by him and claimed for trial.

5. On behalf of prosecution to prove the charge against the accused in documentary evidence filed the written information Exhibit Ka-1 Radiological examination report in regard to age of victim, Exhibit Ka-2, Medical Examination report of victim, Exhibit Ka-3 and Ka-4, Chik F.I.R. Exhibit Ka-5, G.D. Entry, Exhibit Ka-6, Site plan of the place of occurrence Exhibit Ka-7 charge sheet Exhibit Ka-8, Recovery Memo in regard to blood stained clay and plain clay, Exhibit Ka-9, Recovery Memo in regard to taking in possession blood stained panty of the

victim, Exhibit Ka-10 and in oral evidence examined PW-1 Virendra Kumar Agnihotri-informant, PW-2 Luxmi Devi, PW-3 Sarojani Devi, PW-4 Dr. M.C. Tiwari, PW-5 Doctor B.K. Sharma, PW-6 Doctor Sudha Kashmiri, PW-7 Head Constable Ishwar Chand and PW-8, Sub-Inspector Sheshmani.

6. The statement of accused under section 313 Cr.P.C., was recorded in which he denied the incriminating circumstances in the evidence against him. No defence evidence was filed on behalf of the accused.

7. The learned trial court after hearing the contentions of the rival parties convicted the accused for the offence under section 376 and 506 IPC and sentenced as said above vide judgment dated 18.2.2006.

8. Aggrieved by the impugned judgment dated 18.2.2006 this criminal appeal has been preferred on behalf of the appellant-convict Pawan Kumar Mishra on the ground that the conviction of the appellant is against the weight of the evidence on record. The sentence awarded to the appellant is very severe. In Medical Examination Report neither dead or alive supurmetoza was found and there was no injury in the private part of the victim. There was also dispute of the property between informant and the appellant's father. Accordingly, prayed to allow the appeal and set-aside the conviction and sentence by the trial court.

9. We have heard Sri Suneel Kumar Mishra, learned counsel for the appellant, Sri Gaurav Pratap Singh, learned A.G.A., and perused the materials brought on record.

10. Learned counsel for the appellant has submitted that this appeal has been preferred challenging the order of conviction and sentence on merits; but he is arguing this appeal only on reduction of quantum of sentence. The appellant-convict has served out sentence about 16 years. The appellant was 22 years of old at time of occurrence and keeping in view the future prospect of being reformed his sentence may be reduced.

11. Learned A.G.A., vehemently opposed the contentions made on behalf of learned counsel for the appellant and contended that the victim was below 12 years of age at the time of occurrence and keeping in view the nature of the offence which is social stigma contended to uphold the sentence passed by the trial court and to dismiss this appeal.

12. Though this appeal has been preferred challenging the impugned judgment on merits, yet the learned counsel for the appellant argued only on the point of reduction of quantum of sentence. **However, keeping in view the grounds taken in this appeal, it will be appropriate to decide this appeal on merits also.**

13. On behalf of the prosecution to prove the prosecution examined **PW-2 Luxmi** who is victim of the occurrence. As per prosecution case victim was 6 years old at the time of occurrence. During her examination she has stated that at the time of occurrence she was plucking plum. Accused was also identified by her during her examination before the court and she further stated that accused Pawan Kumar Mishra present in the court had committed rape to her. The blood was oozing from her

private parts. She reached her house and narrated the whole episode to her mother.

14. **PW-3 Sarojani Devi** is the mother of the victim. She also during her examination corroborated the statement of victim. **PW-1 Virendra Kumar Agnihotri**, the father of the victim is also the informant proved the written information Exhibit Ka-1 and has stated that on coming to know from her daughter in regard to occurrence he immediately reached to the place of occurrence and saw blood there and also corroborated the statement of victim in regard to occurrence as was told by victim to her parents respectively.

15. This ocular evidence adduced on behalf of the prosecution was also corroborated with medical evidence. **PW-4 Doctor M.C. Tiwari, Radiologist** proved the radio-logical report Exhibit Ka-2 in regard to ossification test pertaining to age of victim in which age of victim was opined to be 9 years. **PW-5 Doctor B.K. Sharma** proved the medical examination and referal slip of the victim's examination by lady doctor, Exhibit Ka-3. During examination he found the number of intact RBC Cells and occasional pus cells present in the vagina. **PW-6 Doctor Sudha Kashimiri** proved the medical examination report of the victim Exhibit Ka-4 and found the breast not developed, **blood dried discharge in the valva was seen and also stated that this bloody dried discharge in the valva can be caused due to insertion of hard object, it may be by sexual intercourse also**. Therefore, the medical evidence also corroborates the ocular evidence in regard to commission of the rape with the victim.

16. Moreover, as corroborative evidence on behalf of the prosecution also examined **PW-8, Investigating Officer Sheshmani** who after recording statement of witness and concluding the evidence filed charge sheet. **This witness also proved the blood stained Panty of victim which was taken in possession** and the recovery memo of the same Exhibit Ka-10. The blood stained clay and plain clay was also taken in possession by the I.O., from the place of occurrence. The recovery memo of the same Exhibit Ka-9 is also proved by the witness.

17. The statement of prosecutrix who is victim of the occurrence is found trust worthy. The statement of PW-3 Sarojani Devi and PW-1 Virendra Kumar who are parents of the victim though are not the eye-witness, yet their evidence is admissible under Section 6 of the Evidence Act.

18. The Hon'ble Apex Court in **State of U.P. Vs. Ramesh (2001) 2 SCC 493** the *res gestate* is an exception to the general rule of hearsay evidence although not in issue directly, yet is so connected with the fact in issue as to form the part of the same transaction. PW-1 eye-witness immediately after the occurrence told to PW-2 in regard to occurrence. The statement of PW-10 is indicating that PW-2 had come to him and told in regard to occurrence is admissible.

19. The Hon'ble Apex Court held in ***Mukhtiyar Singh Vs. State of Punjab AIR 2009 SC 1854*** that the evidence of witnesses who came to the scene of occurrence immediately after the occurrence, though he did not saw the accused persons causing occurrence, but come to know about the same from the eye-witness. Although the information was

hearsay yet same corroborated the substantive evidence of eye-witness; therefore was admissible.

20. In view of the above case laws of the Hon'ble Apex Court the statement of PW-1 Virendra Kumar Agnihotri and PW-3 Sarojani Devi are admissible in evidence which corroborates the substantive evidence of the testimony of PW-2 Luxmi Devi.

21. The Hon'ble Apex Court also held in ***S. Ram Krishna Vs. State represented by PP, Andhra Pradesh Hyderabad (2008) 8 SCC 617*** the testimony of prosecutrix of sex offence can not be put at par that of accomplice and the same can be relied upon by the court unless and until she does not have any strong motive to false involvement of the accused.

22. Moreover, the criminally intimidation made by the accused is also proved from the statement of PW-2 victim and the same is also corroborated with the statement of PW-2 Virendra Kumar Agnihotri and PW-3 Luxmi.

23. **Therefore, the conviction of the accused for the charge under section 376 and 506 I.P.C., is proved beyond the reasonable doubt and the same is affirmed in view of the appreciation of the evidence.**

24. The next question which is to be considered by us is in regard to the reduction of quantum of sentence on which learned counsel for the appellant argued that the sentence awarded to the convict is too severe. The convict was 22 years of age at the time of occurrence and has been languishing in Jail for 16 years and further submitted to reduce the sentence of the convict to the extent which has been undergone by him.

25. The court while awarding sentence would take recourse to the principle of deterrence or reform or to invoke the doctrine of proportionality which depends upon the facts and circumstances of each case. Certain offences touch our social fabric. The sentence, which is the ultimate goal of justice delivery system, the purpose of imposing the same must be kept in mind.

26. In the present case the victim was 7 years of old and the accused/convict was 22 years old at time of occurrence. The convict being 22 years old at the time of occurrence was quite mature. His act of committing rape to 7 years baby is abhorrent.

27. The objective of criminal law in imposing appropriate sentence must be judged commensurate with nature of gravity of the crime and the manner in which the crime is committed. The twin objective of sentencing policy is deterrence or correction depends upon the facts and circumstances of each case to meet the ends of justice. The court should take into consideration the nature of the offence, gravity of the crime and other attending circumstances. The offence of rape is a social stigma and rape with a tender age of child is very heinous crime than that of other adult female.

28. The Hon'ble Apex Court held in **State of *M.P. Vs. Bala @ Bala Ram AIR 2005 SC 3567*** rape is a heinous crime which is against the society and against the human dignity, which reduces a man to an animal. Such an offence once it is proved, lightly is itself an affront to the society. For

reduction of the sentence, the reasons must be relevant to exercise the discretion by the court. The age of the offenders by itself is not the adequate reason. Long pendency of trial also can not be adequate reason. Under the guise of reform theory the court can not forget their duty to the society and to the victim as well. The court has to consider the plight of the victim and the social stigma that may follow the victim to grave and particularly ruins to the prospects of normal life of the victim.

29. In ***State of Karnataka Vs. Raju (2007) 11 SCC 490*** Honb'ble the Apex Court held that the physical scar may heal-up but the mental scar will always remain. When a women is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. The judicial response to human rights can not be blunted by legal jugglery.

30. Since the rape was committed to a baby being below the age of 12 years of age in the year 2004, in view of section 376(2) (F) of IPC prior substituted by Act 13 of 2013, section 9, for section 376 (w.r.e.f.3.2.2013) *the punishment for the same is rigorous imprisonment for a term which shall not be less than 10 years but it may be for life and shall also liable to fine.*

Provided that the court may for adequate special reasons to be mentioned in the judgment impose a sentence of imprisonment of either description for a term less than 10 years.

31. The learned trial court while sentencing the convict with life imprisonment for the charge under section 376 IPC has recorded a finding that the victim was of a tender age and the accused who also lived in the same vicinity and was also uncle in relation committed rape to the child of 7 years innocent girl was heinous and affront to the society.

32. Keeping in view the aforesaid case law of Hon'ble Apex Court and the facts and circumstances of this case, tender age of the victim and matured age of accused, the sentence awarded to the convict by the trial court does not bear any infirmity and same needs no interference.

33. Accordingly, this criminal appeal deserves to be dismissed.

34. This criminal appeal is hereby **dismissed**. The judgment of conviction and the sentence passed by the trial court in Sessions Trial No. 251 of 2005 (State Vs. Pawan Kumar Mishra) arising out of Case Crime No. 75 of 2004 under Sections 376 and 506 I.P.C., P.S. Jafarganj, District Fatehpur is confirmed. The Appellant/ convict shall serve out sentence as awarded by the trial court.

35. Let the copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

36. The party shall file computed generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked.

37. The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)01ILR A358
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 2183 of 2011

Kanti Lal ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Jai Singh, Anjum Vishakarma, Sri Lav Srivastava, Sri Rupak Chaubey, Sri Anshul Tiwari, Sri V.P. Srivastava

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

A. Criminal Law - Indian Penal Code – Section 302 – Murder of wife – No witnesses except Police and Doctor supported the prosecution – Recovery of bloodstained cloth – Not proved – Effect – Circumstantial evidence – Medical evidence rather the ocular version of the Doctor has been brushed aside by the learned Trial Judge – Doctor has categorically stated in his oral deposition that the injuries could have been caused not only by scissors but by other weapons also – Statement of the accused under Section 313 Cr.P.C. has not been considered by the Court below – No forensic expert's evidence – Evidence Act, 1872 – Ss. 27 and 114 – Presumption – Conviction order of life imprisonment set aside. (Para 15, 16, 19 and 23)

Criminal Appeal allowed. (E-1)

Cases relied on :-

1. Tarseem Kumar Vs Delhi Administration, 1994 SCC (Crl.) 1735

2. Joga Gola Vs St. of Guj., AIR 1982 SC 1227

3. Gambhir Vs St. of Mah., AIR 1982 SC 1157

4. Pulukuri Kottaya Vs King Emperor, Cr.L.J. 1947 (533)

5. Bakshish Singh Vs St. of Pun., AIR 1971 SC 2016

6. Union Territory of Goa Vs Boaventrua D'Souza & anr., 1993 Cri. L.J. 181

7. Criminal Appeal No. 437 of 2003, Chetankumar Dahyabhai Patel Vs St. of Gujarat decided by Gujarat High Court on 3.9.2013

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
& Hon'ble Gautam Chowdhary, J.)

1. Heard Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Anshul Tiwari, learned Advocate for the appellant and learned A.G.A. for the State.

2. At the outset, it is submitted that the accused-appellant is in jail. This appeal challenges the judgment and conviction dated 11.2.2011 passed by the Additional Sessions Judge, Court No.5, Varanasi in Sessions Trial No. 546 of 2009 convicting appellant under Sections 302 of Indian Penal Code, 1860 (hereinafter referred to as 'I.P.Code') for life imprisonment with fine of Rs.10,000/- and in default of payment of fine, to undergo further six months imprisonment.

3. Information came to be lodged on 14.7.2009 which was converted into investigative F.I.R. which was propelled by the father of the deceased. The accused is the husband of the deceased.

4. The case being triable by the Court of Sessions was committed to it after the charge-sheet was laid before it and accused was summoned. On the accused appearing before the Court of Sessions, he pleaded not guilty and, therefore, on 2.1.2010 charge was framed against him for commission of offence under Section 302 of I.P.Code alleging that on 14.7.2009 at about 8.00 am at the residence of Raja Ram, namely the father of the deceased, the accused, Kanti Lal, by inflicting several stab wounds by the Scissors, which was found near the dead body, has caused the death of deceased.

5. The prosecution examined, in all, eight witnesses of facts which are as under:

1	Deposition of Raja Ram	26.2.2010 13.5.2010 26.7.2010	PW1
2	Deposition of Pramila	28/07/10	PW2
3	Deposition of Maina Devi	18/08/10	PW3
4	Deposition of Vijai Kumar	19/08/10	PW4
5	Deposition of Kishori Lal	19/08/10	PW5
6	Deposition of Ghanshyam Sharma	06/09/10	PW6
7	Deposition of Swami Nath Prasad	15/12/10 23.12.2010	PW7
8	Deposition of Dr. Ghanshayam	23/12/10	PW8

6. Out of the said eight witnesses, except police and doctor, none supported the prosecution case. Raja Ram, father of deceased, started building a new story. Though he was not treated to be a hostile witness, his evidence has several facets of being hostile to prosecution.

7. The prosecution tried to prove the facts by producing several documentary evidence also which are as under:

1	Written Report	14/07/09	Ex.Ka.1
2	F.I.R	14/07/09	Ex.Ka.4
3	Recovery memo of bloodstained cloth	02/08/09	Ex.Ka.2
4	Recovery Memo of bloodstained scissors	14/07/09	Ex. Ka.3
5	Recovery Memo of bloodstained and plain earth	14/07/09	Ex. Ka.8
6	Postmortem Report	15/07/09	Ex.Ka.15

8. At the end, the accused was put to questions under Section 313 of Criminal Procedure Code, 1973 which were, in fact, mostly of negativity. According to the accused there was no dispute between him and his wife and that he was not perpetrator of his wife's death. In his statement, he has stated that the Gram Pradhan had roped him as they had inimical relation. He was staying at Surat and he was not having any relation with his brother's wife.

9. P.W.2, 3, 4 & 5, who were relatives of the deceased, have not supported the prosecution case. It is submitted by learned counsel for the appellant that this is a case of no evidence. According to him there are many missing chains as it can be said to be a case which hinges on circumstantial evidence.

10. He has further submitted that reliance by the Trial Court on the recovery of bloodstained clothes is bad in the eye of law. He has relied on judgments and has submitted that recovery memo of bloodstained clothes was though stated to be sent to the Forensic Science Laboratory, the same has not been proved before the Court below as the report has not been exhibited nor any witness has been examined. This shows the fallacy in the investigation also. According to the counsel for the appellant, the judgment impugned requires to be upturned as the decisions in **Tarseem Kumar Vs. Delhi Administration, 1994 SCC (Crl.) 1735, Joga Gola Vs. State of Gujarat, AIR 1982 SC 1227 and Gambhir Vs. State of Maharashtra, AIR 1982 SC 1157** which were cited by accused before the Trial Court have also not been properly appreciated and he places reliance again on the said judgments before this Court as they would apply to the facts of this case.

11. It is submitted that the main plank of argument is on the doctor's evidence who has orally testified that there were multiple injuries which could have been caused by an instrument which may not be scissors. The injuries could have been caused by several persons and it was not proved that only one person had inflicted the injuries. It is further submitted that the chain is broken as the scissors were not sent for Forensic Science Laboratory examination nor it bears the finger prints of the accused.

12. The judgment of the trial court has also been assailed by the learned counsel for the appellant and he has taken us through the judgment impugned wherein there is no finding of fact that the bloodstained clothes were never subjected to any forensic expert's examination.

13. Learned A.G.A. has heavily relied on the deposition of Police Officer and has contended that it was the accused and accused alone who was the perpetrator of crime. Learned A.G.A. has submitted that the factum that the accused having accepted his guilt, is writ large which has come on record; the record also goes to show that it was the accused who volunteered to bear testimony against himself by producing bloodstained clothes. He further heavily relied on Sections 114 and 27 of the Evidence Act, 1872 which read as under:

"27. How much of information received from accused may be proved.-- *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.*

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."*

14. The aforesaid proposition of learned A.G.A. has been rightly controverted by learned counsel for the appellant who has submitted that even if the recovery is at the behest of the appellant herein, presumption neither under Section 114 nor under Section 27 of the Indian Evidence Act, 1872 can aid prosecution as it has failed to prove that it was voluntary disclosure of place which was in the knowledge of appellant alone. In support of arguments, learned counsel for the appellant has relied on the decisions in **(a) Pulukuri Kottaya Vs. King Emperor, Cr.L.J. 1947 (533), (b) Bakshish Singh Vs. State of Punjab, AIR 1971 SC 2016, (c) Union Territory of Goa Vs. Boaventrua D'Souza and another, 1993 Cri. L.J. 181** so as to contend that chain is snapped at several places.

15. This is a case which hinges on circumstantial evidence as well as the oral testimony. The death of the deceased can be said to be homicidal death which was proved by the medical evidence and there is no doubt in our mind that the weapon used was scissor which was found near the dead body. Having answered the first question in favour of the prosecution, we would now venture on the other two questions namely (a) whether it was the accused and accused alone who by chain of circumstances is proved to have committed the murder and (b) can we hold the accused guilty only on the basis of suspicion? It is on record that P.W.2 to P.W.5, who are family members of deceased and in-laws of the appellant, have not supported the prosecution evidence and they have been declared hostile. It is rightly submitted by learned A.G.A. that the evidence of hostile witnesses as far as it supports prosecution can be looked into. From the depositions of the prosecution witnesses who are hostile and that of P.W.1 who takes different stand even before the Court below, only one thing emerges that the accused was found at the house of deceased which was the house of his in-laws but would that be sufficient to convict him? The other chain of evidence is absent. We are unable to persuade ourselves that the finding of fact recorded by the Court below that the accused was the only person who was concerned with the crime and the chain of circumstances unequivocally points at him and him alone, is correct. Statement of the accused under Section 313 Cr.P.C. has also not been considered by the Court below.

16. The bloodstained clothes whether contained blood of the deceased or that of the accused himself is the main missing chain in the prosecution version. Just because the appellant is said to have run away from the place of incident can it be said that it was he who was culprit? The medical evidence vis-a-vis ocular version will also have to be looked into. The witnesses would have heard the shouts of the lady who is said to have been brutely done to death by stab wounds which were seven in number. The medical evidence rather the ocular version of the Doctor has been brushed aside by the learned Trial Judge. The doctor has categorically stated in his oral deposition that the injuries could have been caused not only by scissors but by other weapons also.

17. Learned Trial Judge in paragraph 44 of the impugned judgment tried to show that the chain was complete but we are of the view that it is not a complete chain which would permit us to concur with the learned Trial Judge in holding the accused guilty.

18. 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."

19. One more aspect which goes to the root of the matter is that there is no forensic expert's evidence which would show that the scissors was used by the accused and accused alone.

20. In this case there is no eye witness, rather, P.W.1 nowhere states in his deposition that the appellant had run away with the bloodstained clothes from the residence of P.W.1. The reliance by Trial Court on the judgment in **Salim Vs. State of U.P., J.I.C. 2010 (1) (Alld.) 44** is also bad in eye of law as, in the case in hand, no one has seen the appellant to have fled away with bloodstained clothes.

21. We are also fortified in our view by the latest decision of the Apex Court in **Mohd. Younus Ali Tarafdar Vs. State of West Bengal, (2020) 3 SCC 747.**

22. In view of the above, we are satisfied that the judgment of the learned Trial Judge cannot be upheld and it has to be quashed.

23. The appeal is allowed. Judgment and order impugned is set aside. The accused, if not required in any other offence, be set free by the police authority and if he has paid the fine, the same be refunded to him.

24. The record and proceedings of the Court below be sent to it forthwith.

25. This Court is thankful to both Sri V.P. Srivastava, learned Senior Advocate and learned A.G.A for ably assisting the Court.

(2021)01ILR A363
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Appeal No. 2571 of 2014

Ravi & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Lav Srivastava, Sri Amber Khanna, Sri Raj Kumar Khanna, Sri V.P. Srivastava

Counsel for the Opposite Party:
A.G.A., Govind Saran Hajela, Sri K.D. Tiwari

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860- Section 304-B, 498-A, 302 & ¾ D. P. Act, 1961-challenge to-conviction-deceased died within 7 months of her marriage-she was subjected to cruelty and harassment at the hands of the appellants-on the eve of Karwachauth, her mother-in-law tried to strangulate her with chunni over trivial issues-Later, she was giving poison (insecticide)-sentence of appellants maintained u/s 304 B-conviction u/s 302 set aside-Learned Trial court not justified in imposing the harshest penalty of life imprisonment upon the appellants.(Para 2 to 72)

The appeal is disposed of. (E-5)

List of Cases Cited:

1. Mustafa Shahadal Shaikh Vs St. of Mah.,(2013) AIR SC 851

2. Kashmir Kaur Vs St. of Punj.,(2013) AIR SC 1039

3. Anil Rai Vs St. of Bih.,(2001) 7 SCC 318

4. St. of U.P. Vs Jagdeo Singh,(2003) 1 SCC 456

5. Bhagalool Lodh & anr. Vs St. of U.P.,(2011) 13 SCC 206

6. Dahari & ors. Vs St. of U.P.,(2012) 10 SCC 256

7. Raju @ Balachandran & ors. Vs St. of T.N.,(2012) 12 SCC 701

8. Ganga bhavani Vs Rayapati Venkat Reddy & ors.,(2013) 15 SCC 298

9. Jodhan Vs St. of M.P.,(2015) 11 SCC 52

10. Maqsoodan Vs St. of U.P. (1983) AIR 126

11. Sucha Singh Vs St. of Punj. (2001) SC 1436

12. Raj Kumar Prasad Tamarkar Vs St. of Bih.,(2007) 10 SCC 403

13. PrithPal Singh Vs St. of Punj. & ors.,(2012) 1 SCC 10

14. Harijan Bhala Teja Vs St. of Guj. (2016) 12 SCC 665

15. Rajbir Vs St. of Har.,(2010) 15 SCC 116

16. Jasvinder Saini & ors. Vs St.(Govt. of NCT of Delhi) (2013) 7 SCC 256

17. Sharad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 116

18. Hem Chand Vs St. of Har.,(1994) 6 SCC 727

19. Smt. Shanti & anr. Vs St. of Har.,(1991) AIR SC 1226

20. Salamat Ali Vs St. of Bih., (1995) AIR SC 1863

21. Mohd. Hoshan Vs St. of A.P.,(2002) SCC (Crl.) 1765

22. Devi Ram Vs St. of Har.,(2002) 10 SCC 76

23. Satvir Singh Vs St. of Punj.,(2001) 8 SCC 633

24. Kansraj Vs St. of Punj.,(2000) 5 SCC 207

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. The present Criminal Appeal is directed against the conviction and sentence dated 07.06.2014 passed by Addl. District and Sessions Judge, Court No. 9, Moradabad in Sessions Trial No. 666 of 2004 (State Vs Ravi and others), whereby the appellants, namely, Ravi, Chhajju and Smt Premwati were convicted under Sections 498-A, 304-B, 302 I.P.C. and Section 3/4 of Dowry Prohibition Act. They were sentenced for life imprisonment

under section 304-B I.P.C. The appellants were also sentenced for life imprisonment under Section 302 I.P.C. along with fine of Rs. 10,000/- each with default stipulation and further all the appellants were also sentenced for three years rigorous imprisonment under Section 498-A I.P.C. along with fine of Rs. 2000/- each with default stipulation and under Section 3/4 of the Dowry Prohibition Act, they were sentenced for one year rigorous imprisonment along with fine of Rs. 1000/- each with default stipulation. All the sentences were directed to run concurrently.

2. Adumbrated facts, as per the prosecution version are that the complainant Mahendra Singh (P.W.-1) submitted a written report (Ex-Ka-1) on 25.10.2003 at P.S. Mainather, District Moradabad to the effect that marriage of his sister, namely, Meena was solemnised with appellant no. 1 Ravi seven months ago. Her sister was at her parental home on the eve of *Karwachauth*, and at that time she narrated that she had some altercation with her mother-in-law and her mother-in-law tried to strangulate her with the help of her *chunni*; and when her husband came on *Karwachauth* to take her back then the said fact was complained to him, on which he said that they must come to his residence, next day after Deepawali, and then he would talk on the matter, and, thereafter, he is said to have taken his wife Meena with him. It is further alleged that on 25.10.2003 at about 7.30 in the morning, it was informed on telephone by appellant no. 1 Ravi that Meena is unwell and on getting this information, the complainant is said to have contacted the appellant no. 1 Ravi, thereafter, to know the situation, and Ravi (appellant no. 1) then told the informant that Meena has died, and, thereafter, the complainant along with other family members reached at his sister's matrimonial home, where he found his sister lying dead. It is further alleged in the report that the complainant suspects that her death was committed by her husband Ravi (appellant no. 1), her father-in-law Chhajju (appellant no. 2), her mother-in-law Smt Premwati (appellant no. 3) and her brother-in-law. It is further alleged that father of the appellant no. 1 used to demand dowry and on his demand a motorcycle was given at the time of marriage.

3. On the basis of the said written report, the FIR (Ex-Ka-6) was lodged on 25.10.2003 at 15.45 p.m vide Case Crime No. 276 of 2003, under Sections 498A, 304-B IPC and Section 3/4 of D. P. Act by Constable Clerk 279 Ramprakash Singh (P.W.-6). Investigation ensued. The post-mortem was conducted and on completion of the investigation a charge sheet (Ex-Ka-5) under Section 498-A, 304 B IPC and Section 3/4 of D. P. Act was submitted against the present appellants. Charges were framed against all the accused appellants under Sections 498-A, 304-B IPC and Section ¾ of Dowry Prohibition Act on 8.12.2004. Additional charge under Section 302 IPC was framed against the appellants, namely Ravi (appellant no. 1/Husband), Chhajju (appellant no. 2/father-in-law) and Smt Premwati (appellant no. 3/mother-in-law) on 29.05.2012. The trial of accused- appellant Sanjay (brother in law of deceased) was separated on account of his being a Juvenile and he has been tried by Juvenile Justice Board.

4. During course of trial of these three accused appellants, as many as eleven witnesses were produced by the prosecution, namely, Mahendra Singh

(P.W.1-brother of deceased/complainant), Smt Somati Devi (P.W.-2 mother of deceased), Dr. A. K. Jain (P.W.-3 who conducted postmortem), Smt Beena Rajkumari (P.W.4), S.I. Sunder Lal (P.W.-4), Dr S. P. Singh (P.W.-5), Constable Ram Prakash Sharma (P.W.-6-prepared check report and made G.D. entry), Shyamlal-Tehsildar (P.W.-7 conducted inquest), S.I. Ramveer Singh (P.W.-8-first Investigating Officer), Constable Naeem Abbas (P.W.-9), Constable Veerendra Singh (P.W.-10), and Constable Mehar Singh (P.W.-11).

5. The appellants abjured all the allegations against them in their statement under Section 313 Cr.P.C. and contended that they have been falsely implicated on account of enmity, and, thereafter, as many as four witnesses were produced by the defence, namely, Dr J. K. Jain, (D.W.-1), Jai Gopal (D.W.-2), Ganpat (D.W.-3), and Dr. Vinay Kumar, Radiologist (D.W.-4).

6. Learned Trial Court after analysing all the evidences available on record pronounced its judgement of conviction on 7.6.2014 and sentenced all the appellants as aforesaid.

7. We have heard Sri R. K. Khanna, learned counsel assisted by Sri Amber Khanna, learned counsel for the appellants, Sri Ratan Singh, learned AGA and have perused the material on record.

8. Learned counsel for the appellants has submitted that there is no evidence on record to demonstrate that dowry was ever demanded or that the deceased was harassed or subjected to cruelty mental or physical, soon before her death in connection with demand of dowry. It is also argued that necessary ingredients of Section 304B IPC are not made out. It is also argued that Section 302 IPC is also not made out in the facts & circumstances of the present case. It is further submitted that mere fact that a married woman committed suicide within a period of seven years of her marriage would not directly attract the presumption under Section 113 B of the Indian Evidence Act. The important ingredient of showing that she had been subjected to cruelty had to be shown to exist. He further submitted that there is no automatic presumption that Section 113 A of the Indian Evidence Act would apply unless it is shown that the suicide was abetted by the accused.

9. It was next contended that the evidence produced by the prosecution to prove the offence under the Dowry Prohibition Act was inconsistent and unreliable, because the material prosecution witnesses - P.W.1 (brother of deceased) & P.W.-2 (Mother of deceased) are closely related to one another and no independent witness was examined in proof of demand of dowry by the prosecution, therefore, it is not safe to rely on the testimony of interested and related witnesses in absence of there being independent witness to corroborate their testimonies.

10. The submission of learned counsel further is that only on the basis of the fact that "Aluminium Phosphide' has been found in her viscera report, it cannot be assumed that poison was administered to her by her husband or her in-laws, and there is no evidence on record that under what circumstances or mental state, she consumed poison. It is further submitted that there may be possibility of death of deceased, who was having 32 weeks foetus, due to "Amniotic Fluid Embolism', i.e. to say that when the amniotic fluid entered into the bloodstream of the mother, it

toxifies the mother's blood, which might result in her death.

11. On the other hand, learned A.G.A. appearing for the State opposed the appeal and argued that the deceased died in the house of the appellants under abnormal circumstances within seven months of her marriage. The evidence adduced on behalf of the prosecution is sufficient for drawing inference that soon before her death she was subjected to cruelty and torture in connection with the demand of dowry. The conviction and sentenced awarded to the appellants are based on reliable and clinching evidence.

12. Learned AGA has further submitted that the unfortunate death of deceased was certainly an unnatural death as the viscera report itself reveals that the poison *''Aluminium Phosphide'* was found during its examination, which is evident from the report of the Forensic Science Laboratory (Ex-Ka-4), available on record. There is also no dispute that the death was caused within seven months of the marriage. Further submission of learned counsel for the State is that under these circumstances the presumption under Section 113-B and 113-A of the Evidence Act would arise and the burden would shift on the appellants to prove their innocence but they have failed to do so.

13. It is also submitted that the deceased had met her unnatural death inside her matrimonial home, therefore, under Section 106 of the Indian Evidence Act too, the burden is on the appellants to explain under what circumstances the deceased chose to end her life. The submission further is that even assuming that it was a case of suicide, it will not make any difference because suicide is also an unnatural death and suicidal cases are also covered under Section 304-B of I.P.C. The defence has failed to discharge the onus that has shifted on it or to rebut the presumption by any cogent, reliable and trustworthy evidence as to what was the immediate reason/cause that led the deceased to take such drastic step of consuming poison. Therefore, the court below has rightly convicted the appellants and there is no need to interfere in the impugned judgment.

14. At the outset, we deem it appropriate to discuss the testimonies of material witnesses of the prosecution, more particularly the testimonies of P.W.-1 and P.W.- 2, who are brother and mother of the deceased respectively, who have levelled categorical allegations of cruelty and harassment, being meted to the deceased Meena by her husband (appellant no. 1) and his other family members.

15. P.W.-1, brother of deceased deposed before the court below as under:-

" मेरी बहन करवा चौथ पर हमारे यहां आई हुई थी उसने मुझे व परिवार वालों को बताया था कि इस घटना से कुछ दिन पहले किसी बात पर उसकी सास श्रीमती प्रेमवती से कुछ कहा सुनी हो गई थी तथा सास ने मीना का गला चुनरी से दबा दिया था।

जब रवि करवा चौथ पर मेरी बहन मीना को लेने हमारे घर पर आया तब हमने उससे इस घटना की शिकायत की तो उसने कहा कि दीपावली में अगले दिन आना बात कर लेंगें। रवि के कहने पर हमने अपनी बहन मीना को रवि के साथ ससुराल भेज दिया।

दिनांक 25/10/2003 को सुबह करीब 730 बजे हमारे घर मीना के पति रवि का फोन आया कि मीना की तबियत खराब है। सूचना मिलने पर मैनें रवि को मोबाईल पर फोन किया और मीना की स्थिति जाननी चाही तब रवि ने फोन पर बताया कि मीना मर गई है। सूचना मिलते ही मै अपने

परिवार के लोगों को लेकर जटपुरा पहुंचा जहां मीना मरी पड़ी थी।

हमें उसकी हत्या की इसलिए सन्देह हुआ कि मीना की ससुराल वाले मुल्जिमान बीच बीच में दहेज की मांग में 50000/ व अन्य सामान की मांग करते थे। उन्हीं की मांग पर हमने मोटर साईकिल लेकर दी थी लेकिन फिर भी दहेज के रूप में अन्य सामान की मांग करते रहते थे जिसकी शिकायत मीना हमसे बार बार करती थी। दहेज के कारण मीना की हत्या उसके पति रवि, ससुर छजजू सिंह, सास श्रीमती प्रेमवती व देवर संजय ने मिलकर की है। शादी के 7 माह के अन्दर ही इन लोगों ने उसकी हत्या दहेज के लिए कर दी।

मै अपने परिवार वालों को मीना की लाश के पास छोड़कर थाना मैनाठेर गया, वहां मैनें अपने हाथ से लिखकर तहरीर दी।——————————————

मीना की पोस्टमार्टम के बाद लाश हमारे सुपुर्द कर दी गई और हमने मीना का संस्कार विधि पूर्वकर कर दिया। हमारे पहुंचने पर मीना की ससुराल वाले घटना स्थल से भाग गये थे।"

16. P.W.-2, mother of deceased deposed before the court below as under:-

" मीना की शादी में एक मोटर साईकिल व 31000 रूपये नगद उनकी मांग पर दिये थे। मैनें अपनी लड़की की शादी में करीब एक लाख तिरपन हजार रूपये खर्च किये थे। मेरी लडकी मीना की ससुराल वाले इतना शादी के खर्च करने के बाद भी और दहेज की मांग करते रहते थे तथा उसके दहेज के लिए तंग व परेशान करते थे। मीना की ससुराल वालों ने मोबाईल तथा 50000/ की मांग की मैनें मोबाईल फोन उनको दे दिया था। लेकिन 50000/ रूपये नहीं दे पाई थी।

करवाचौथ से पहले मेरी लड़की मीना मेरे घर आई थी। उसने मुझे बताया था कि मेरी सास प्रेमवती मुझसे 50000/— रूपये की मांग करी थी। मेरे मना करने पर मेरी सास ने चुनरी से मेरा गला दबा कर मारने की कोशिश करी। करवा चौथ के दिन मेरा दमाद रवि मेरे घर आया तो मैनें इस बात की शिकायत रवि से करी तब रवि ने कहा कि इस समय मीना को मेरे साथ भेज दो दिपावली के अगले दिन आकर बात चीत कर लेंगे।

दिनांक 25/10/2003 को चारो मुलजिमान रवि, छज्जू, प्रेमवती व संजय ने एक राय होकर मेरी लड़की मीना को जहर देकर उसकी हत्या कर दी। मेरे पास दि0 25/10/2003 को सुबह 7:30 बजे फोन आया। इस पर मै, मेरा लड़का महेन्द्र व परिवार के व मिलने वाले कई लोग मीना की ससुराल गये। वहां पहुंच कर हमने देखा कि मीना की लाश बरामदी में पड़ी थी। और उसके पति रवि व ससुर छजजू से पूछने पर उन्होंने कोई संतोषजनक जबाब नहीं दिया और वहां से भाग गये।"

17. A close scrutiny of the testimonies of PW-1 and P.W-2, brother and mother of the deceased respectively, abundantly reveals that the deceased was subjected to cruelty on account of demand of dowry. Death of the deceased Meena occurred within seven months of her marriage. It is also not disputed that the deceased died in her matrimonial home otherwise than under normal circumstances, where she was living with her husband. Death of deceased was not under natural circumstances as the death of Meena could be said to be certainly an unnatural death on the evidence adduced by the prosecution.

18. In the light of the aforesaid evidence, it would be relevant to discuss as to whether the appellants have been rightly convicted under Section 304-B IPC ?

Section 304-B IPC reads as under:-

(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 extent to imprisonment for life."

19. Thus, Section 304-B IPC provides for a statutory compulsion merely on the establishment of two conditions that (i) death of a wife should have occurred otherwise than under normal circumstances within seven years of her marriage; (ii) soon before her death, she should have been subjected to cruelty or harassment by the accused in connection with demand of dowry. If these two factual positions are established then, the court has to presume that the accused has committed dowry death. If any accused wants to escape the rigour of Section 304-B IPC, the burden is on him to disprove it. If he fails to rebut the presumption, the court is bound to act on it.

20. Section 304-B IPC is coupled with Section 113 B of the Indian Evidence Act. Section 113-B of the Indian Evidence Act reads as under:-

*"**113-B. Presumption as to dowry death.**- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court **shall presume** that such person had caused the dowry death.*

Explanation.-For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860)."

21. Section 113-B of the Indian Evidence Act, 1872 also provides that once it is shown that soon before her death a 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. The expression **"shall presume"** has been defined in Section 4 of the Indian Evidence Act, 1872, relevant part of which is extracted here in below:

*"'**Shall presume**'.- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."*

22. Thus, Section 113-B read with Section 4 of the Indian Evidence Act, 1872 would mean that unless and until it is proved otherwise, the Court shall hold that a person has caused dowry death of a woman, if it is established before the Court that soon before her death such woman was subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry. Section 3 of the Indian Evidence Act, 1872 states that unless a contrary intention appears from the context, the word "disproved" would mean a fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exit.

23. It is, thus clear that irrespective of the fact that whether the accused has any direct connection with the death or not, he shall be presumed to commit dowry death provided the other requirements encapsulated in the Section are satisfied. It is not necessary for attracting the provisions of Section 304-B IPC that apart from showing that the death has occurred in unnatural circumstances within seven years of her marriage and that soon before her death and the woman was subjected to cruelty or harassment by the accused for, or in connection with, any demand for dowry, it must also be shown that the accused had any direct nexus with the death.

24. The term **"soon before her death"** used in Section 304-B IPC and Section 113-B of the Indian Evidence Act connote a sense of proximity of time between the dowry related maltreatment amounting to cruelty and the incident of death. Therefore, an isolated incident of dowry related ill-treatment amounting to cruelty meted out to the woman in the past may not be independently relevant but it may be relevant if it forms a chain of continuous incidents of maltreatment amounting to cruelty.

25. Thus, in case of dowry death, prosecution is not obliged to establish that the accused persons were directly involved in the death of deceased in terms of inflicting physical injuries. If the ingredients of Section 304-B IPC are established by the prosecution, then the court would have no option but to **presume** that the accused has committed dowry death unless of course, accused or accused persons are able to successfully rebut the presumption.

26. Coming back to the facts of the present case, we find the following undisputed facts:-

(a) Death of deceased Meena occurred within seven months of her marriage thereby the main condition prescribed under Section 304-B IPC namely **"within seven years of marriage"** was fulfilled.

(b) Death of deceased was not normal as the unfortunate death of Meena was certainly an unnatural death as the viscera report itself reveals that the poison 'Aluminum Phosphide' was found during its examination, which is evident from the report of the Forensic Science Laboratory, Agra, available on record (Ex-Ka-4). It is, therefore, clear that **her death was unnatural within seven** months of her marriage.

27. It is also not disputed that the deceased died in the house of her matrimonial home where she was living with her husband and in-laws, and the deceased died in the circumstances which can never be said to be normal, therefore, it can safely be concluded that the second condition of Section 304-B IPC is also fulfilled and the appellants have rightly been convicted for the said offence. The testimonies of prosecution witnesses P.W.-1 Mahendra Singh, who is brother of deceased and P.W.-2 Smt Somati Devi, the mother of the deceased respectively also lends credibility to this conclusion.

28. Now, the second question is as to whether any dowry demands were made from the deceased or her parents ? and whether the deceased was tortured and subjected to cruelty on non fulfilment of these dowry demands and whether the

appellants have rightly been convicted under Section 498-A IPC ?

29. In this regard, the prosecution has adduced and further relied upon the testimonies of two persons namely P.W.-1 & P.W.-2, the brother and mother of the deceased, which may be seen from the relevant extract of their testimonies, as under:

30. P.W.-1 has testified that " मीना की ससुराल वाले मुल्जिमान बीच बीच में दहेज की मांग में 50,000 व अन्य सामान की मांग करते थे। उन्हीं की मांग पर हमने मोटर साईकिल लेकर दी थी लेकिन फिर भी दहेज के रूप में अन्य सामान की मांग करते रहते थे जिसकी शिकायत मीना हमसे बार बार करती थी।". He has also testified that his sister came to her parental home two-three days prior to Karwachauth and at that point of time she disclosed the fact that some altercation took place with her mother-in-law on account of demand of dowry and at that time her mother-in-law also tried to press her neck with the help of her chunni. The relevant extract of testimony is "मेरी सगी बहन मीना की शादी रवि के साथ हुई थी। शादी 18/02/2003 को हुई थी मेरी बहिन करवाचौथ पर हमारे घर आयी थी उसने मेरी मां को बताया था कि दहेज मांगने के उपर सास से कहा सुनी हो गयी तो सास ने चुन्नी से गला दबा दिया था। इसकी सूचना उसने हम लोगों को दी थी, रवि करवाचौथ पर मेरी बहिन मीना को लेने आया तब इस बात की शिकायत रवि से की थी, उसने बोला दीपावली के अगले दिन आ जाना बात कर लेगें और बहिन को अपने साथ ले गया। मेरी बहिन ने ही बताया था कि दहेज के लिए मेरी ससुराल के सब मुझे प्रताड़ित करते है।" Similar statement has been made by P.W.-2 Smt Somati Devi, mother of the deceased. The testimonies rendered by these witnesses are sufficient to show that deceased was subjected to cruelty in terms of Section 498-A IPC explanation (a) which talks of mental cruelty as well. Both of these witnesses have been extensively cross examined where they have reiterated that the deceased was subjected to torture and cruelty on account of non fulfilment of dowry demand. We have carefully examined their testimonies and believe that they are trust worthy and reliable witnesses. There is absolutely no reason to disbelieve their testimonies especially in the light of dowry demand made directly to deceased, her brother and mother. It would not be out of place to mention that after the death of bride the details of harassment & torture is also not possible, but it may be inferred from the evidence of parents & other relatives of the deceased and the circumstances that the deceased was subjected to harassment & torture.

31. Hon'ble Apex Court in **Mustafa Shahadal Shaikh Vs State of Maharashtra, AIR, 2013 SC 851** relied on the testimonies of parents of deceased and other witnesses, who in turn narrated the story of torture communicated to them by the deceased. In **Kashmir Kaur Vs State of Punjab AIR 2013, SC 1039**, Hon'ble Apex Court accepted the story of torture communicated by the deceased to her parents.

32. We have examined the testimonies of P.W-1 and P.W.-2, brother and mother of the deceased. Their testimonies can be accepted for establishing two other ingredients of Section 304-B IPC i.e. the demand of dowry and acts of cruelty on non fulfilment of such dowry demand soon before the death of deceased.

33. Further, as far as the stand taken by learned counsel for the appellants that P. W.-1 and P. W.-2 are interested witnesses and closely related to each other and hence their testimonies cannot be relied upon, is

also not tenable in the eyes of law. Hon'ble Apex Court in a catena of decisions has held that the evidence of a closely related witness/s is required to be carefully scrutinized and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case and their evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. **(Ref: Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju@Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Ganga bhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52).**

34. In the present case, nothing has been brought on record to prove that the evidence of PW- 1 and P.W-2 cannot be believed and relied upon or they have falsely implicated the appellants due to some personal vengeance or have implicated the appellants in the present case at the instance of the prosecution. Therefore, aforesaid testimonies cannot be rejected on the mere ground of their relationship because relationship by itself is not a sufficient ground to discard the evidence of the witnesses and label it as inappropriate for credence and hence the argument of the counsel for the appellants with regard to interested witnesses and minor contradictions in the statements of prosecution witnesses holds no ground.

35. So far as the submission of the learned counsel for the appellants that no independent witness was examined to prove the demand of dowry by the prosecution itself renders the entire prosecution case doubtful, also cannot be accepted. There is no doubt that the P.W.-1 and P.W.-2 are closely related to each other but on that count their testimonies cannot be said to be unreliable in absence of any independent witness. Deceased would be the best person to speak about demand of dowry but where she is no more, then the only remaining evidence can be that of the parents of the deceased to whom she would be expected to confide and mention about such demands made time to time in order to ascertain if they could meet the same. The death of the deceased within seven months of her marriage is not disputed. We believe the testimonies of P.W.-1 & P.W.-2 with regard to the demand of dowry and torture of deceased with a view to coercing her to bring more dowry is also not disputed. Therefore, the prosecution story cannot be thrown away merely on the basis of not producing any independent witnesses to support the version of P.W.-1 and P.W.-2.

36. The law is settled on the point that in case the sole testimony of the prosecution witness is trustworthy, the same can be relied upon and it is the quality of the witness and not the quantity, which is relevant. Section 134 of the Evidence Act is also relevant to be referred to in the present case, which prescribes that no particular number of witnesses shall in any case be required for the proof of any fact. The Hon'ble Supreme Court in **Maqsoodan Vs State of UP, 1983 AIR 126** has held that it is not the number of witnesses but the quality of evidence that counts.

37. The statements of PW-1 and P.W.-2 are sufficient to prove the demand of dowry against the appellants, as their statements are trustworthy and there is no reason to disbelieve their testimony.

38. We also find from the record that in this case deceased died in her matrimonial home on account of the poison "Aluminium Phosphide' and the medical/scientific evidence corroborating the testimonies of the prosecution witnesses shifts the burden of proof on to the accused to prove the facts and circumstances, which are within their special knowledge and conscience. Initially the burden to establish the case would undoubtedly rest upon the prosecution, but in our view, the initial burden has been discharged by the prosecution on the basis of the evidence on record, which establishes the fact that the deceased was subjected to cruelty on account of dowry demand. Accordingly, by virtue of Section 106 of the Indian Evidence Act, the burden lay on the appellants to have explained the incriminating circumstances pointing against them. In the present case, harassment is caused within four corners of the matrimonial house of the deceased which is house of the appellants. When any harassment is committed in secrecy of four corners of the house, it is difficult to collect direct evidence against the perpetrators of the crime because either they are members of family or they assist in harassment, therefore, explanation is sought against presumption from the appellants, but no explanation was given by them and their version is plain denial which is without any merit. In these circumstances, it was the appellants who could give some plausible explanation as to how and in what manner the incident in question occurred and as the appellants have failed to discharge the burden under Section 106 of the Evidence Act not only by giving evasive answers but also by making an unsuccessful claim that the deceased died of some disease without any basis and evidence on record, in our opinion, this fictitious story cannot be believed.

39. It is also a settled legal position that Section 106 the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond any shadow of reasonable doubt. It is only, when such a burden is discharged by the prosecution that the onus eventually shifts on to the accused to prove any fact within his special knowledge, to establish that he/she/they is/are not guilty of the aforesaid alleged offence. We may refer to the following Para, from the judgment of the Apex court in **Sucha Singh VS State of Punjab, reported in AIR 2001 SC 1436** as under:

"We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to Offer any explanation which might drive the court to draw different inference."

40. In the case of **Raj Kumar Prasad Tamarkar Vs. State of Bihar (2007) 10 SCC 403** the Apex Court held that "if some occurrence happens inside the residential portion of the accused, where he was also available, at or about the time of the incident, he is bound to offer his version as

to how the occurrence had taken place. The only other person who can speak about the occurrence will be the deceased and now that she is dead, if at all, the accused alone can offer an explanation. Section 106 of the Indian Evidence Act states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It is true that this section cannot be used, so as to shift the onus of proving the offence, from the prosecution to the accused. However, in the present, there is satisfactory evidence, which fastens or conclusively fixes the liability, for the death of Gandhimathi, on the inmate of the house, present therein at the relevant time. So, in the absence of any other explanation, the only possible inference is that the accused participated in the act. If he claims contrary, under Section 106 of the Evidence Act, the burden of proving that fact is upon him, since that is within his special knowledge."

41. In the case of **Prithpal Singh Vs State of Punjab and others, reported in (2012) 1 SCC 10**, the Apex Court in the following Para has held as under:

"... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

42. In the case of **Harijan Bhala Teja vs State Of Gujarat, (2016) 12 SCC 665**, it has been held as follows:-

"Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Since it is proved on the record that it was only the appellant who was staying with his wife at the time of her death, it is for him to show as to in what manner she died, particularly, when the prosecution has successfully proved that she died homicidal death. "

43. Now the next argument of learned counsel for the appellants that charge under Section 304-B IPC and Section 302 IPC cannot go simultaneously, and all the appellants have wrongly been convicted under Section 302 IPC is required to be examined.

44. So far as the submission that charge under Section 304-B IPC and Section 302 IPC cannot be simultaneously prosecuted is concerned, the Apex Court in the case of **Rajbir Vs State of Haryana, (2010) 15 SCC 116**, has issued directions to all the trial Courts in India to ordinarily add Section 302 IPC to the charge of Section 304-B IPC, so that death sentence could be imposed in such heinous and barbaric crimes against women.

45. Subsequently, Hon'ble the Apex Court in **Jasvinder Saini and others Vs.**

State (Government of NCT of Delhi) reported in (2013) 7 SCC 256, observed that direction issued in Rajbir (supra) was not mean to be followed mechanically and without due regard to the nature of the evidence available in the case. It was clarified that Hon'ble the Apex Court in that case meant to say that in a case where a charge alleging dowry death is framed, a charge under Section 302 IPC can also be framed, if the evidence otherwise permits. The observations of Hon'ble the Apex Court in Jasvinder Saini (supra) read as follows: -

"14. Be that as it may, the common thread running through both the orders is that this Court had in Rajbir case directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court.

46. Now, the next argument of the appellants that merely because "Aluminium Phosphide' has been found in her viscera report, it cannot be assumed that poison was administered to her by her husband or by her in-laws, and there was no motive to commit the murder of the deceased.

47. It would not be out of context to quote the deposition of P.W.-3 Dr. A. K. Jain, who is said to have conducted the postmortem on the person of deceased. The deposition of P.W.-3 is as under:-

" दिनांक 26/10/2003 को मैनें केन्द्रीय पुलिस चिकित्सालय, मोरादाबाद में सर्जन के पद पर कार्यरत रहते हुए 1:45 पी0एम0 पर मृतका मीना के शव का पोस्टमार्टम किया था जिसे सी0पी0नं 397 मेहर सिंह व सी0पी0 नं0 1455 वीरेन्द्र सिंह थाना मैनेाठेर सीलबन्द अवस्था में लाये थे। मृतका की उम्र लगभग 22 वर्ष थी तथा दरमियाना कद की थी। मृत्यु के बाद की अकड़न शरीर से पास हो चुकी थी। चेहरा छाती का उपरी हिस्सा और नखून पर नीलापन था। शरीर पर कोई जाहिरा चोट नहीं थी। आन्तरिक परीक्षण पर मस्तिष्क व उसकी झिल्लिया कन्जस्टड थी। दोनो फेफड़े व उनकी झिल्लियां कन्जस्टेड थी। पेट की झिल्ली कन्जस्टेड थीं आमाशय की mucosa कन्जस्टेड थी आमाशय में 500 मिल0 भूरा पदार्थ था। पूरा अमाश मय पदार्थ के जार नं0 1 में सील किया गया। पेट की कैविटी में पीलापन लिये हुए द्रव्य पदार्थ था। फेलेक्स मौजूद थें होठ और जीभ का रंग नीलापन लिये हुए था छोटी आंत में द्रव्य व गैस थी। स्पलीन का एक टुकड़ा जार नं0 2 में सील किया गया था । जीगर, स्पलीन और गुर्दें कन्जस्टेड थे। जिगर का एक टुकड़ा, स्पलीन पूरी और बाया गुर्दा पूरा जान नं0 2 में सील किया गया था । बच्चे दानी बढ़ी हुई थी जिसमें लगभग पूरी समय का बच्चा था। मेरी राय में मृत्यु का कारण ठीक प्रकार से निश्चित नहीं किया जा सका था इसलिए उपरोक्त अंग आगे जांच करने हेतु सील किये गये थे।"

48. The F.S.L. report (Ex-Ka-4) clearly indicates that "Aluminium Phosphide' was found in the intestine, liver, kidney and spleen of deceased.

49. Learned counsel in support of his argument has further submitted that the deceased died due to "Aluminium Phosphide' produced because of "Amniotic Fluid Embolism' and also relied upon "Modi Medical Jurisprudence & Toxicology (Twenty-third Edition) (at pp.201-202)' and seeks to contend that

Aluminium Phosphide cannot be administered in a deceitful manner because of its pungent smell. Taking recourse to the Medical Jurisprudence, where "Aluminium Phosphide' (Celphos) is stated as "Aluminium Phosphide (Celphos) is used as a fumigant to control insects and rodents in food grains and fields". In reported cases of poisoning, symptoms which have been found are burning pain in the mouth, throat and stomach, vomiting mixed with blood, dyspnoea, rapid pulse, subnormal temperature, loss of co-ordination, convulsions of a clonic nature and death. **In the solid form**, it acts as a corrosive in the mouth and throat as it precipitates proteins. **In postmortem appearance**, the tongue, mouth and oesophagus are oedematous and corroded. The mucous membrane of the stomach is corrugated, loosened or hardened and is stained red or velvety. The intestines are inflamed. Celphos once administered or consumed spreads rapidly in the body and kidney, liver, spleen, heart and lungs are affected by the poison.

50. We find from the record that Dr. A. K. Jain's (P.W.-3) opinion, as expressed by him during his deposition that, "चेहरा छाती का उपरी हिस्सा और नखून पर नीलापन था। आन्तरिक परीक्षण पर मस्तिष्क व उसकी झिल्लिया कन्जस्टेड थी। दोनो फेफड़े व उनकी झिल्लियां कन्जस्टेड थी। पेट की झिल्ली कन्जस्टेड थीं आमाशय की उनबवें कन्जस्टेड थी" also finds an authoritative support.

51. Record further discloses that a suggestion appears to have been put forth by the side of the defence to P.W.-3 Dr A. K. Jain, who conducted the postmortem report of the deceased, that as to whether death of deceased is possible due to carrying of a dead foetus by the deceased? The answer was in the negative. This witness has further testified that " मृतका के पेट में पोस्टमार्टम के समय एक बच्चा पाया गया था वह मृत था, वह लगभग 9 माह का था,,,,,,मृतका के शरीर पर कोई जाहिरा चोट नहीं थी और न कोई संघर्ष के निशान थे।" Further, the defence has also produced D.W-1 Dr G. K. Jain, who was also present with the doctor (P.W.-3) conducting the postmortem, in his defence, to contend that the deceased died due to excretion of some poisonous chemical substance after the death of the foetus. In this regard, D.W.-1 has testified that if any foetus dies in its mother's womb, then there is possibility of toxin coming out of the dead foetus, which might affect the mother and possibility of death of mother cannot be ruled out, but a suggestion put to this witness from defence as to whether any poison like "Aluminium Phosphide' (Celphos) etc. could be excreted/found after the death of foetus in the womb, was denied by this witness in quite specific terms. It is not disputed that the deceased died on account of the poison "Aluminium Phosphide' and the defence version also gets falsified itself from the testimony of D.W.-4 Dr Vinay Kumar, Radiologist, who had testified before the trial court "**24/10/2003 को गर्भाशय में बच्चा सीधा व ठीक हालत में था, कोई बीमारी नहीं थी और न 24/10/2003 को बच्चा गर्भ में मरा था।**" Thus, from the version of the defence witnesses, it is believed that though the foetus died in the womb of mother then also the mother could be alive for more than two or three days and it could not be attributed to be the cause of the death of the deceased.

52. In the case in hand, the accused/appellants are suspected to have administered poison to the deceased. Admittedly, it is a case where no direct evidence is available for administering poison. It is well settled that circumstantial evidence, in order to sustain the conviction, must satisfy that the circumstances from

which the inference of guilt is sought to be drawn must be cogently and firmly established on the basis of some set of evidence, which unerringly points towards the guilt of the accused persons. In other words, circumstances taken cumulatively should form a complete chain so that there is no escape from the conclusion that in all human probability, the crime was committed, by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

53. The Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra reported in (1984) 4 SCC 116**, in the case of death by poisoning held that the Court must carefully scan the evidence and determine the following four important circumstances which can justify a conviction:

i). the accused had the poison in his possession.

ii). the deceased died of poison said to have been administered.

iii). accused had an opportunity to administer the poison to the deceased.

iv). there is a clear motive for the accused to administer poison to the deceased.

54. From the aforesaid, it is clear that in the case of murder by administering poison, the Court must carefully scan the evidence and determine the aforesaid four important circumstances. In the light of above principles, it is necessary to ascertain whether in the present case, the aforesaid four important circumstances have been established or not ?

55. From the evidence available on record the prosecution has not been able to establish that the accused had any motive to commit murder of deceased by administering poison to her. Though prosecution has tried to suggest that the deceased was having foetus older than the period of her marriage and out of this fear and resultant shame, they might have committed murder of the deceased, also does not stand to appeal.

56. In the present case, it is undisputed that the deceased was carrying pregnancy of more than 32 weeks and 4 days and it was in the sole knowledge of the family of the accused persons and in that situation and for that reason no one would ever try to kill the deceased and also stop the birth of the child vis-a-vis no woman would even think of ending her life at the tender age of 22 years unless the circumstances had become such that to embrace death appeared to be a better option than to live. The prosecution has failed to adduce any concrete evidence on record to substantiate its case in relation to motive that all the appellants have conspired together to eliminate the deceased for carrying a foetus older than the period of her marriage, is not sufficient to connect the appellants with the commission of the murder of deceased by administering her poison. Therefore, we have no hesitation in rejecting the theory propounded with regard to the motive for the murder of the deceased. From the evidence available on record, we are of the considered opinion that the prosecution has failed to prove that the accused had any motive to administer poison to the deceased with an intention to cause her death.

57. Though, on the state of the evidence as it exists on record, it can not be concluded positively that "Aluminium Phosphide' (celphos) was administered to

the deceased or the accused had any opportunity available to them for administering poison to the deceased, to prove the contrary circumstance that the accused/appellants had the poison in their possession, the prosecution has failed to bring on record any specific evidence to substantiate the said fact. Therefore, we are of the considered opinion that the prosecution has not been able to establish even this circumstance by adducing reliable and cogent evidence that the appellants were in possession of the poison or had actually administered the same to the deceased with the deliberate intention to kill her.

58. As regards the other two conditions i.e. the deceased died due to poisoning and the accused/appellants had an opportunity to administer the poison to the deceased, true it is that the prosecution has been able to prove the fact of presence of the appellants with the deceased at the relevant time and that the deceased died of poison, as is evident from the report of Forensic Science Laboratory (Ex. Ka-4) that "Aluminium Phosphide' poison was found in the viscera of the deceased, but, in absence of any concrete evidence establishing that the accused/appellants had any opportunity to administer poison to the deceased and that they had secured the poison from a particular source, it cannot be said that the prosecution has been able to prove the guilt of accused appellants under section 302 IPC by leading cogent and reliable evidence that it is the accused/appellants who have caused death of deceased.

59. From the facts and circumstances of the case, we find that there is no evidence on record to connect the appellants with the murder of deceased or at least to draw an inference that they had actually administered poison to the deceased. In other words the main link in the chain of circumstances is completely broken and there is no connecting evidence whatsoever worth mentioning incriminating the appellants with the murder of deceased. However, we find that the prosecution has been able to prove that the deceased-Meena was treated with cruelty by the appellants, who happened to be the husband, mother-in-law, and her father-in-law, in her matrimonial home and that she died in her matrimonial home otherwise than in normal circumstances within seven months of her marriage. Therefore, their conviction by the trial Court under Section 304-B IPC and Section 498-A IPC and Section ¾ of D. P. Act deserves to be affirmed and conviction and sentence of the appellants under Section 302 IPC deserves to be set aside.

60. The only issue now before this Court is with regard to the sentence to be imposed upon the appellants for the said offence. Section 304-B IPC prescribes the minimum and the maximum sentence, which may be imposed upon an accused. Since the minimum and maximum sentences are prescribed, the maximum sentence should be imposed in the "rarest of the rare case", and not at the drop of the hat. Some cogent reasons had to be given by the learned Trial Court for prescribing the harshest punishment for the said offence. Moreover, bare perusal of the impugned judgment clearly reveals that no such reasons have been assigned by the learned Trial Court for imposing the harshest punishment of life imprisonment under Section 304-B IPC.

61. In **Hem Chand Vs State of Haryana, (1994) 6 SCC 727**, the Apex Court observed that awarding extreme

punishment, of life imprisonment for the offence under Section 304-B IPC, should be in rare case: and not in all cases. In that case a sentence of 10 years rigorous imprisonment was held to meet the ends of justice.

62. In **Smt Shanti and Another Vs State of Haryana, Air 1991 Sc 1226**, the Apex Court awarded the minimum sentence of 7 years rigorous imprisonment for such an offence. Again in **Salamat Ali VS State of Bihar, A.I.R. 1995 Supreme Court 1863**, their Lordships upheld a sentence of 7 years' imposed upon the husband for the dowry death of his wife.

63. In the case of **Mohd. Hoshan Vs. State of A.P., 2002 SCC (Crl.) 1765**, the Apex Court deemed it appropriate to modify the sentence of imprisonment to the period already undergone having regard to the fact that both the appellants were under imprisonment for about two months. The incident in that case had taken place on 09.03.1983; appellant No. 2 is the mother of appellant No. 1 and was aged about 60 years. In these circumstances, it was held that since both the appellants are on bail it may not be appropriate to sent them to jail. This was a case where the appellants were convicted under Section 306 read with Section 498-A IPC.

64. Similarly in the case of **Devi Ram Vs. State of Haryana, 2002 (10) SCC 76**, wherein the incident in question relates to the year 1987 and the appellant had already served a part of his sentence, after observing that the appellant was an aged person after upholding his conviction, the sentence was reduced to the period already undergone. However a condition was imposed on appellant to deposit the fine of Rs.10,000/- and in default to serve out remaining part of his sentence. This was also a case under Section 306 IPC and Section 498-A IPC.

65. Further, in the case of **Satvir Singh Vs. State of Punjab (supra), 2001 (8) SCC 633**, the Apex Court did not interfere with the conviction under Section 498-A IPC. In this case both the appellants were aged and had crossed the age of 70 years and therefore, the Apex Court decided to modify the sentence by reducing it to the period already undergone. However, the fine part of the sentence was enhanced to rupees one lakh.

66. In the case of **Kansraj Vs. State of Punjab, 2000 (5) SCC 207**, the conviction under Section 304-B and Section 306 IPC was upheld but the sentences awarded was reduced to five years besides payment of fine as imposed by the trial Court.

67. However, in the instant case, it is an admitted fact that a young and promising life has been snuffed out within seven months of her marriage. The deceased would have hoped that her married life would be happy and full of joy. But instead, she was subjected to cruelty and harassment at the hands of the appellants and therefore, the learned Trial Court is justified in convicting the appellants for the offences under Section 304-B, 498-A IPC and Section ¾ of D.P. Act. After giving our careful thought to the facts and circumstances of this case, we find that it is not that type of rare case, which may warrant imposition of the extreme sentence of life imprisonment under Section 304-B IPC without assigning any reasons. Learned Trial Court is not justified in imposing the harshest penalty of life imprisonment upon the appellants,

therefore, a lesser sentence would be enough to meet the ends of justice.

68. Consequently, while affirming the conviction of the appellants for the offences under Section 304-B IPC, Section 498-A IPC and Section ¾ of D. P. Act, we reduce the sentence of life imprisonment imposed upon them for the offence under Section 304-B IPC to a period of imprisonment as directed hereinafter. The conviction and sentence of all the appellants under Section 302 IPC is hereby set aside.

69. Insofar as appellants no. 2 (Chhajju) and appellant No. 3 (Smt Premwati) are concerned, they are stated to be on bail by this Court and are aged more than 60 and 65 years respectively. In view of what has been laid down in the above-cited judgments, we find that after six years of their conviction as also looking to the old age of the appellants no. 2 & 3 and also that at the fag end of their lives, no useful purpose would be served in sending the appellants no. 2 & 3, to jail again and as such, the sentence awarded to them is further reduced to the period already undergone, while maintaining their convictions under Section 304-B, Section 498A IPC and Section ¾ of D. P. Act only. Appellant Nos. 2 and 3 are on bail. Their bail bonds stand cancelled and sureties are discharged.

70. As far as the case of the first appellant no. 1 Ravi, the husband of the deceased is concerned, his conviction is maintained u/s 304-B, 498A IPC and Section ¾ of D. P. Act. And so far as sentence of life imprisonment imposed upon him for the offence under Section 304-B IPC is concerned, the same is reduced to a period of 8 years. All the sentences under different count shall run concurrently in respect of appellant no. 1.

71. Let a copy of the judgment be sent to the court concerned through Sessions Judge, Moradabad within fifteen days. The trial court shall thereafter report compliance within one month.

72. With the above modification, this appeal stands disposed of.

(2021)01ILR A380
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 3268 of 2015
&
Criminal Appeal No. 3586 of 2015
&
Criminal Appeal No. 3601 of 2015

Foolbadan ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri R.S. Ram, Sri Akhilesh Kumar, Sri Apul, Sri Krishna Kumar Chaurasia, Sri Mohd. Monis, Sri Phool Chandra Singh, R.U. Rinki Renu, Sri Ulajhan Singh Bind

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 307, 302, 324 read with section 34, 352, 504, 506 IPC - relationship of eye-witnesses inter se, cannot be a ground to discard their testimony - 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.(Para - 38,43)

Prosecution case in brief is that informant alongwith his brothers was cutting down the boundary line of his field located beside - His cousin and their brother-in-law came there and assaulted them with sticks and spade - armed with spade and others with sticks - exhorted to kill them.(Para - 2)

HELD:- On considering the statements made by DW-1 & DW-2, it appears that there is nothing to support the defense version as stated by them. They have not narrated the specific place of work where he was employed. No any job card/duty card/attendance sheet has been filed to support his presence at that specific place at the time of incident. No any admission slip of hospital has been filed to show that on the date of occurrence appellant was not present. Even appellant Phoolbadan has not made any statement in this regard u/s 313 Cr.P.C. Paper nos. 58-kha/1 to 58-kha/4 are prescriptions of medicines but language used therein is not legible. Paper no. 59-kha is medical certificate in which appellant has been shown to be suffering from entric fever but the name & seal of the issuing authority is not legible. No any Authority/Officer has been examined to prove these papers and to support his defense version. (Para - 54)

Criminal appeal dismissed . (E - 6)

List of Cases cited :-

1. H.P. Vs Jeet Singh , 1999 (38) ACC 550 SC

2. Nathuni Yadav & ors. Vs St. of Bihar & ors. ,1997 (34) ACC 576

3. Thaman Kumar Vs St. of Union Territory of Chandigarh , 2003 (47) ACC 7

4. Brahm Swaroop & anr. Vs St. of U.P. , (2011) 6 SCC 288

5. Dalip & ors. Vs St. of Punj. , A.I.R. (1953) SC 364

6. Masalti Vs St. of U.P. , (A.I.R.) 1965 SC 202

7. Masalti Vs St. of U.P. , (A.I.R.) 1965 SC 202

8. Rameshwar & ors. Vs St. ,2003 (46) ACC 581

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

1. These appeals emanate from the common judgment and order dated 25.07.2015 passed by learned Sessions Judge, Mau in Sessions Trial Nos. 110 of 2012 (State Vs. Rama Shankar and otehrs) and 203 of 2013 (State Vs. Gaurishankar @ Bhuwar) arising out of Case Crime No. 828 of 2011 under Sections 307, 302, 324 read with section 34, 352, 504, 506 IPC, Police Station Haldharpur, District Mau by which appellants have been convicted and sentenced under Section 302/34 IPC with life imprisonment and fine of Rs. 10,000/- for each, in default of payment rigorous imprisonment for a period of two months; under Section 307/34 IPC with rigorous imprisonment for the period of five years' and fine of Rs. 2000/- for each, in default of payment rigorous imprisonment for a period of one month; under Section 324/34 IPC with rigorous imprisonment for a period of one year for each; under Section 352 IPC with rigorous imprisonment for a period of one month each; under Section 504 IPC with rigorous imprisonment of three months' for each and under Section 506 IPC with rigorous imprisonment for a period of one year for each which are to run concurrently, therefore these appeals are heard and being decided together.

2. The prosecution case in brief is that on 06.11.2011 at 3.00 P.M. informant Anil

Kumar s/o Yodhan r/o Bilaujha (Banati), Police Station Haldharpur, District Mau alongwith his brothers Sunil, Pappu and Arvind was cutting down the boundary line of his field located beside Saiyad Baba in SHEEVAN of Naseerabad Kala. His cousin Rama Shankar, Surjeet @ Loha, Gaurishankar @ Bhuwar and their brother-in-law Phoolbadan came there and assaulted them with sticks and spade. Surjeet @ Loha was armed with spade and others with sticks. Surjeet @ Loha exhorted to kill them. They fell down on the ground as a result injured-Sunil and Pappu became unconscious. Informant and his brother Arvind cried for help. Villagers came there. Then accused-appellants fled away from the spot but Pappu succumbed to injuries and Sunil was brought to the hospital with the help of villagers where he also succumbed to injuries.

3. On the same day at 4.15 P.M. informant Anil Kumar lodged the F.I.R. at Police Station Haldharpur against accused-appellants Rama Shankar, Surjeet @ Loha, Gaurishankar @ Bhuwar and Phoolbadan as Case Crime No. 828 of 2011 under Section 307, 302, 324, 352, 504, 506 IPC read with Section 34 IPC. Entry of F.I.R. was made in G.D. Report No. 27 and *chitthi majroobi* of injured Sunil Kumar was prepared and he was sent to the hospital for treatment. Investigation of the case was handed over to Station Officer S.I. Indrajeet.

4. Injured Sunil Kumar was medically examined on the same day at 6.15 P.M. at District Hospital, Mau. Following injuries were found on his person:

I. Incised wound 9.5 cm x 1 cm x bone deep on left parietal region of skull, 8 cm above from left ear. Advised for x-ray of skull.

II. Contusion 3 cm x 2 cm on right occipital region of skull 11 cm post to right ear. Advised for x-ray of skull.

III. Abraded contusion 3 cm x 2.5 cm on left side of forehead 2 cm from left ear.

IV. Contused swelling 11 cm x 12 cm on dorsum of left hand including fingers. Advised x-ray of left hand.

V. Abraded contusion 14 cm x 8 cm dorsum of right hand including fingers. Advised x-ray of right hand.

VI. Lacerated wound 3 cm x 1.5 cm x 40 cm on left leg, 11 cm below from left knee joint. Advised x-ray of left leg.

VII. Abrasion 2 cm x 1 cm on front of left leg 3 cm above the injury no. 6. Advised x-ray of left leg.

VIII. Contusion with swelling 9 cm x 7 cm around the injury no. 6 and 7. Advised x-ray of left leg.

IX. Contused swelling 9.5 cm x 5.5 cm on lateral aspect of left ankle joint. Advised x-ray left ankle.

Opinion: all injuries KUO except injury no. 3. Injury no. 3 is simple in nature. Injury no. 1 caused by sharp object. Other injuries caused by hard & blunt object. Duration fresh. Patient admitted in emergency.

On the same day Sunil Kumar succumbed to injuries at District Hospital.

5. Investigating officer Indrajeet alongwith S.I. Shri Ram Vishwakarma arrived at the place of occurrence on the same day at about 4.45 P.M. and got prepared inquest report about deceased Pappu and his dead body was sealed and handed over to constable and Head Constable Hari Ram with essential papers for carrying the dead body to mortuary for post-mortem.

6. On 7.11.2011 inquest report of deceased Sunil was also prepared by S.I Shri Ram Vishwkarma and dead body was sent for post-mortem.

7. On the same day autopsy of the dead bodies of Pappu and Sunil Kumar was done and post-mortem reports were prepared by Dr. Mahendra Kumar Gupta.

8. The post-mortem report of deceased Pappu shows that he was aged about 18 years. Average built body. Eyes and mouth closed. Rigor mortis was present in lower extremitis. Ante-mortem injuries:- (1) Lacerated wound 3 cm x 2 cm on forehead right side just above eyebrow x bone deep underlying frontal bone fractured. (2) Lacerated wound 2 cm x 2 cm on bone of index finger of right hand x bone deep.

In internal examination: membranes and brain were found lacerated, right & left lungs were pale, right chamber was full and left chamber was empty, semi digested food material 200 ml was present in the stomach, fecal matter and gases were present in small and large intestine, rectum was partially loaded, gall bladder was half filled weighing 11 gm, pancrease 300 gm, spleen 250 gm, kidneys 200 gm, urinary bladder was empty. Cause of death was coma due to ante-mortem head injury.

9. The post-mortem report of deceased Sunil Kumar shows that he was aged about 22 years. Average built body. Eyes and mouth closed. Rigor mortis was present in all limbs. Other natural orifice were NAD. Ante-mortem injuries:-(1) Stitched wound left side skull after removal 9 stitch length 8 cm x width 1 cm x bone deep, 8 cm above the left ear pinna underlying temporal parietal bone fractured. (2) Stitched wound left side leg 4 cm below left side knee joint on removal of stitch length 3 cm x width 1 cm x bone deep. Underlying tibia fibula fractured. (3) Stitched wound 1 cm x ½ cm x muscle deep on right hand dorsal surface.

In internal examination: membranes and brain were found lacerated. Ribs cartilages pleura larynx were NAD. Right & left lungs were NAD. Pericordium was NAD. Right chamber was full and left chamber was empty. Oesophagus was NAD. Vocal cavity teeth 16/16. Semi digested food contents about 200 ml in the stomach. Small intestine and large intestine were full with gases & fecal matter. Rectum was partially loaded. Lever weighing 1100 gm. Gall bladder was half filled. Pancrease 250 gm. Spleen 250 gm. Kidneys 300 gm. Urinary bladder was empty. Cause of death was coma due to ante-mortem head injury.

10. On 06.11.2011, Investigating Officer Shri Indrajeet visited the site of occurrence, he recovered a blood stained spade and three sticks (lathies) from the spot. Taking these items in his possession, he sealed them and prepared the memo in presence of witnesses. He also took plain and blood stained soil from the spot where incident took place and sent them to forensic science laboratory for analysis. He prepared the site plan and recorded the statements of witnesses. Having collected the evidence, he filed charge sheet against appellants under Sections 307, 302, 324 read with Section 34, 352, 504, 506 IPC before the court of Chief Judicial Magistrate, Mau.

11. The court concerned took cognizance of the offence and provided copies of papers to appellants in

compliance of Section 207 Cr.P.C. The case was committed for trial to the court of session against appellants Rama Shankar, Gauri @ Bhuwar and Phoolbadan.

12. Accused-Surjeet @ Loha was found to be juvenile, therefore, case against him was sent to Juvenile Justice Board for inquiry.

13. The court of Session (hereinafter referred to as 'Trial Court') framed charges against appellants under Sections 307, 302, 324 IPC read with Section 34 IPC and 352, 504, 506 IPC. Charges were read over to appellants. They did not plead guilty but denied and claimed for trial.

14. In support of its case prosecution examined P.W.1 Anil Kumar (informant). P.W.2 Arvind as witness of fact. P.W.3 Dr. B.B. Singh who examined injured/deceased Sunil Kumar and prepared injury report. P.W.4 Dr. Mahndra Kumar Gupta who conducted autopsy and prepared post-mortem reports relating to deceased Pappu and Sunil Kumar. P.W.5 S.I. Indrajeet who investigated the case and prepared the charge sheet. P.W.6 Head Constable Rajendra Prasad Yadav who lodged the F.I.R. on the basis of *tahreer* (information) given by informant and made G.D. Entry. P.W.7 constable Siddheshwar Pandey as *parokar*.

15. After conclusion of prosecution evidence statements of accused-appellants were recorded under Section 313 in which they denied the prosecution version and said it to be false.

16. Appellants were given opportunity for defence. They examined D.W.1 Kamla Ram, D.W.2 Chhangur Rajbhar and D.W.3 Biggu and in defence they filed some papers form 55-kha to 58-kha through list of 54-kha.

17. Thereafter, arguments were heard for both the parties prosecution as well as appellants and they were found guilty as a result they were convicted and sentenced as aforesaid by judgment and order dated 25.07.2015 under challenge in these appeals before this Court.

18. We heard Mohd. Monis, learned counsel for appellants and Shri Ravi Prakash, learned A.G.A. for the State and perused the record.

19. Learned counsel for the appellants submitted that informant lodged the first information report after consultation which is ante-time. They have been falsely implicated. There is no motive to murder two real brothers by their cousin (appellants) and brother-in-law. P.W.1 and P.W.2 are real brothers. They are relative and interested witnesses. No any independent witness has been examined by the prosecution. P.W.1 is handicapped, he cannot reach the site of occurrence by jumping four feet high boundary wall of the field, so his presence and testimony becomes suspicious. P.W.2 is not reliable because he is not able to know whereabouts of the place of occurrence. Injuries have been said to be caused with spade which was in the hands of accused-Surjeet @ Loha who has been declared juvenile. So, these accused-appellants cannot be made liable for that. The injuries caused to deceased persons may happen by fall on edge of spade as opined by doctor, it creates doubt. Accused-appellant Phoolbadan was out in relation to employment. Inquest report has also not been testified by the witnesses. In this way whole prosecution story is not believable

and trial court has erred in making proper appreciation of evidence on record. It has recorded the conviction and sentence only on the basis of surmises and conjectures which is liable to be set aside. Thus, accused-appellants are requested to be acquitted.

20. Learned A.G.A. opposed the argument advanced by learned counsel for appellants and submitted that there is no law which makes relative witness unworthy of credit. F.I.R. is not ante-time. There is no contradictions in the witness account. This is a case of direct evidence so absence of motive is of no effect. Informant and accused-appellants belong to the same family & village. Therefore, no person of the village dare to come as witness but testimony of witnesses inspires confidence. There is no iota of suspicion. Learned Trial Court has rightly convicted and sentenced to appellants for the charges, therefore, these appeals are liable to be dismissed.

21. From the submissions made by learned counsel for the parties and perusal of record, the following question emerge for consideration before this Court. Whether appellants are proved to be responsible for causing injuries to the deceased persons which later on, proved fatal to them and also as to whether the F.I.R. is anti-time; motive is absent; witnesses are relatives and credibility of their account; case of defense that deceased persons died of falling from a tree in which members of their family got monetary gain from the Government and accused/appellant Phoolbadan was not present at the time of occurrence but he was working for his livelihood in Benglore.

22. Before we deal with the contentions raised by learned counsel for the appellants, it will be convenient to take note of the evidence which has been adduced by the prosecution.

23. PW-1 Anil Kumar has deposed that on 06.11.2011 at about 3 o'clock, he alongwith his brothers Sunil, Pappu and Arvind was cutting down the boundary line of his field. Meanwhile his cousin Ramashankar, Sujit @ Loha, Gauri Shankar @ Bhunwar and Phoolbadan assailed with lathi, danda and spade. Sujit was equipped with spade and others with lathi. Sujit incited to kill. They all beat Sunil and Pappu with the help of lathi, danda and spade. Injured became unconscious then accused/appellants ran towards Arvind who was crying for help. Anyhow he managed to escape and informed the villagers who came there and appellants went away. Pappu succumbed injuries and Sunil was groaning due to injuries and was crying to rescue him. With the help of villagers Arvind brought him to the District Hospital where he also succumbed to injuries at 6:45 P.M.

24. PW-2 Arvind has deposed that occurrence took place at 3:00 P.M. on 06.11.2011. At the time of occurrence, he alongwith his brothers Anil, Sunil & Pappu was cutting down the boundary line of his field in the Siwan at Naseerabad Kalan. After a while appellants namely Ramashankar, Sujit @ Loha, Gauri Shankar @ Bhunwar and Phoolbadan having lathi, danda and spade came there. Sujit @ Loha exorted to kill and all the appellants started assaulting Sunil Kumar and Pappu. Sunil Kumar became unconscious and Pappu died on the spot. Anyhow he escaped and informed in the village. Villagers came on the spot then accused persons went away while abusing. He brought Sunil Kumar to District

Hospital where he succumbed to injuries at 6:45 P.M.

25. Both these witnesses have been put through grueling cross-examination but they have categorically stated the names of these four accused/appellants for committing the murder of Pappu and Sunil Kumar. They have never said that they were not present on the spot though there are some contradictions in their testimony but they are of cosmetic nature so of no use.

26. There is no enmity between the parties. They belong to near relation. There is no dispute about identification of appellants. Occurrence took place at 3 o'clock in the day time. 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.

27. 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. In our opinion the evidence on record clearly establishes the case of prosecution against the appellants beyond any shadow of doubt.

28. Injuries on the person of deceased Pappu and Sunil Kumar were caused by spade, lathi and danda as stated by PW-1 and PW-2. Exibit Ka-2 is injury report of deceased Sunil Kumar which shows multiple injuries on his person. PW-3 Dr. B.B. Singh has proved the injuries and told that injury no.1 was caused by some sharp edged weapon and others were caused by some hard and blunt object. He also opined that injury no.1 might be caused with gadasa and others with lathi, danda. All the injuries were caused at about 3:00 P.M. on 06.11.2011. PW-4 Dr. Mahendra Kumar Gupta conducted post-mortem of the dead body of the deceased Pappu and Sunil Kumar. He stated that on the person of Pappu there was lacerated wound 3x2 cm bone deep on head above right side eye, frontal bone was fractured, other lacerated wound 2x2 cm x bone deep was on the base of index finger in right hand. Cause of death was ante-mortem injury on the head. He also opined that all these injuries might have been caused with lathi, danda and spade or by sharp edged weapon at about 3:00 P.M. on 06.11.2011. Likewise on the body of Sunil Kumar, he found temporal and parietal bone fractured. On left leg 4 cm below knee joint there was fracture in tibia and fibula bones. He opined that cause of death was coma as a result of ante-mortem head injury and all the injuries might have been caused on 06.11.2011 at about 3:00 P.M. by lathi, danda and spade like sharp objects.

29. In this way injuries found on the body of the deceased Pappu and Sunil Kumar are proved to have been caused with lathi, danda and spade at about 3:00 P.M. on 06.11.2011 and it corroborates the manner of causing injuries resulting into death as stated by PW-1 and PW-2. Thus, the eye witnesses account finds complete corroboration from the medical evidence on record.

30. There is no any inordinate delay in lodging the F.I.R. Occurrence took place at 3:00 P.M. and F.I.R. was lodged at 4:15 P.M. The distance between police station and village where the incident took place is 10 kms, therefore, F.I.R. is prompt.

31. PW-5 Sub-Inspector, Indrajeet Singh has proved investigation of the case. Exibit Ka-5 & Exibit Ka-6 are fard (recovery memos) of weapons lathi, danda and spade used in the commission of crime. He has also proved the bundles containing boxes of blood stained and plain soil. Exibit Ka-22 is report from Forensic Science Laboratory where lathi, danda and spade, blood stained and plain soil was sent for analysis and blood stains were also found on them. It proves that lathi, danda and spade were used in commission of crime and place of occurrence was the same as stated by PW-1 and PW-2.

32. It has been argued that PW-1 Anil Kumar has expressed in his cross-examination that he got tehrir written by Ashwani Kumar who met him at 6:00 P.M. on the place of occurrence but time of lodging the F.I.R. has been shown to be at 4:15 P.M. which is not possible. It clearly shows that F.I.R. was lodged ante-time. Not only this but PW-2 has also made similar statements.

33. In this regard the time mentioned in the F.I.R. is 4:15 P.M. when it was lodged at the police station on the basis of tehrir given by informant. G.D. Entry also shows the time of lodging the F.I.R. as 4:15 P.M. On inquest report of deceased Pappu Exibit Ka-11 time of lodging the F.I.R. has been mentioned by Sub-Inspector, Ramji Vishwakarma as 4:15 P.M. He has started inquest at 4:45 P.M. and concluded it at 5:00 P.M. This inquest report has been prepared in presence of witnesses Dashrath, Manoj, Vijay Kumar, Sunil Kumar and Anil Kumar. *Chitthi Majrubi* for injured/deceased Sunil Kumar was also prepared by Head Constable at police station concerned at the same time when F.I.R. was lodged and Sunil Kumar has been medically examined at about 6:20 P.M. at District Hospital. Medical Report prepared by the doctor is Exibit Ka-2 which is written on the back side of *Chitthi Majrubi*. It infers that F.I.R. was lodged at police station prior to 6:20 P.M. F.I.R. as well as medical report both cannot be said to be ante-time because Medical Officer might have no interest in preparing such report anti-time. In this way, the submission made by learned counsel for the appellants that tehrir was got written by Ashwani Kumar after 6:00 P.M. and F.I.R. was lodged ante-time i.e. at 4:15 P.M. does not get support. Discrepancies in the statements of PW-1 and PW-2 in this regard are immaterial and negligible. Thus, argument made by learned counsel that F.I.R. is ante-time is not sustainable.

34. 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.

35. 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. The instant cause of commission of crime cannot be said to be as cutting down of boundary line of their field by the deceased persons 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.

36. 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.

37. 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.

38. 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.

39. 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 brothers but 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.

40. 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."

41. 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.***

42. 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.

43. It is common knowledge that village 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.

44. This Court has also made such observations in Para No.14 of ***Rameshwar and others vs. State 2003 (46) ACC 581.***

45. Learned counsel for the appellants also argued that deceased persons were climbing on a tree and fell down on the spade kept thereunder as a result sustained injuries ensuing their death for which compensation was given to the dependents by the Government but owing to enmity they have been implicated in this case. To support this argument he has examined DW-3 Biggu who has stated in his examination-in-chief that there was no any dispute or marpeet between Ramashankar, Anil, Pappu and Sunil Kumar on 06.11.2011. In cross-examination he has stated that Sunil Kumar and Pappu were not murdered but they died of falling from a tree. They fell down from a tree at 12 o'clock in the day. He further stated that the tree from which Pappu and Sunil Kumar fell down is located at the site of Sayed Baba. They climbed on the tree for breaking woods and they fell down, he did not go there to rescue them. In the light of statement made by this witness, when we consider the evidence on record, it appears that the statements of appellants under Section 313 Cr.P.C. never spoke about such defense. Site plan Exibit Ka-7 shows that the site of Sayed Baba is located in the south at about 20 steps far from the place where the dead body of the deceased Pappu and injured Sunil Kumar were found lying as indicated by A & B. In between the two places there are bamboo shrubs in continuous like boundary wall. It can not be possible for the dead person and so grieviously injured person to go away from the place at Sayed Baba to the places A & B. Further, the witness said himself to be present in his field till 4:30 P.M. which was 10 to 15 steps far from the place of incident but he had not disclosed as to how dead body of deceased Pappu and injured Sunil Kumar reached on the place A & B. In addition to this no broken woods were found anywhere around the place of occurrence whether that be place A & B or near Sayed Baba site. In this regard no question has been put before the Investigating Officer on the part of appellants during his cross-examination before the trial Court. In this way the

testimony of DW-3 is not reliable but appears to be totally false.

46. In this regard PW-1 and PW-2 have categorically stated before the Court that appellants assaulted Pappu and Sunil Kumar with lathi, danda and spade. Sujit @ Loha used spade. Medical report Exibit Ka-2 shows 8 injuries on the person of deceased Sunil Kumar; an incised wound Injury no.1 was found on the skull, 8 cm above left ear. Injury No.2 was on the right occipital region of skull; Injury No.3 abraded contusion was on the left side of forehead. Injury No.4 contused swelling on left hand. Injury No.5 abraded contusion on right hand including fingers. Injury No.6 lacerated would on left leg 11 cm below knee joint. Injury No.7 abrasion on left leg. Injury No.8 contusion with swelling around Injury Nos.6 & 7. Injury No.9 contused swelling on left ankle joint. Except Injury No.3 all injuries were kept under observation. Injury No.1 was caused by sharp edged weapon. Post-mortem report of deceased Sunil Kumar is Exibit Ka-4 in which ante-mortem injury shows fracture of parietal bone. Tibia and fibula in left leg was also fractured. Likewise post-mortem report of deceased Pappu shows fracture of frontal bone.

47. PW-3 Dr. B.B. Singh has stated that injury no.1 might be caused with sharp edged weapon and other injuries with lathi and danda. In his cross-examination he has expressed possibility that injury no.1 might be caused by falling on sharp edged weapon and likewise Injury no.2 to 9 might have also been caused by falling on the ground. PW-4 Dr. Mahendra Kumar Gupta who conducted post-mortem has stated in his cross-examination that Injury no.1 on the person of deceased Pappu might be caused by striking several times. He had also denied the possibility of death of deceased Pappu and Sunil Kumar by falling from any hill or highly situated place.

48. The nature of injuries on the person of Sunil Kumar shows that there are injuries all over his person. Usually a man falling from a free will get injury of fracture either on head or on legs but injuries (fracture) on both sides are not possible.

49. Exhibit Ka-7 is site plan. Investigating Officer has shown the place of occurrence as A & B where deceased Pappu and Sunil Kumar were found lying. There is no any tree on this place. There are trees of guavas, mullberries, neem and mangoes but far from that place. In this point of view also the arguments of learned counsel for the appellants is of no substance.

50. Learned counsel for the appellants has also argued that appellants Phoolbadan was not present on the spot at the time of occurrence but he was out in relation to his livelihood and was living at Benglore.

51. In the statement of Phoolbadan u/s 313 Cr.P.C. he has not made such statement. Suggestion in this regard has been placed before PW-1 but he has never acceded the absence of Phoolbadan. During his cross-examination he has asserted that appellant Phoolbadan was present with other appellants at the time of incident. PW-2 Arvind has also denied the suggestion regarding appellant Phoolbadan as not being present at the place of occurrence.

52. In defense appellants have examined DW-1 Kamla Ram who has stated that from 2008 to 2011 i.e. till

December 2011 Phoolbadan worked at Benglore with him. For a period of one year Phoolbadan lived with him in a room thereafter Phoolbadan took his family and began to live in adjacent room. They, both, worked together. He got Phoolbadan admitted in hospital when he fell ill. At the time of coming home Phoolbadan fell ill and doctor advised him to take rest. He came back home in the last of month January, 2011. The hospital where Phoolbadan got admitted was called Municipal Hospital.

53. DW-2 Chhangur Rajbhar who was Village Pradhan of the village Pahdeva Jeet stated that on 06.11.2011 Phoolbadan was not in the Village Kharka. He had been living in Benglore from seven to eight months before and was working there. He came Kharka in the month of January, 2012. He has been implicated falsely in this case. His character is very good. In cross-examination he told that he is resident of village Kharka where Phoolbadan also lives. He was told by father of Phoolbadan that he is to witness in the case of Phoolbadan.

54. On considering the statements made by DW-1 & DW-2, it appears that there is nothing to support the defense version as stated by them. They have not narrated the specific place of work where he was employed. No any job card/duty card/attendance sheet has been filed to support his presence at that specific place at the time of incident. No any admission slip of hospital has been filed to show that on the date of occurrence appellant was not present. Even appellant Phoolbadan has not made any statement in this regard u/s 313 Cr.P.C. Paper nos. 58-kha/1 to 58-kha/4 are prescriptions of medicines but language used therein is not legible. Paper no. 59-kha is medical certificate in which appellant has been shown to be suffering from entric fever but the name & seal of the issuing authority is not legible. No any Authority/Officer has been examined to prove these papers and to support his defense version. So in lack of any such authentic evidence on record the bald statements made on behalf of appellant are of no help to him.

55. Having given our considerations to the submissions made by learned counsel for the parties, we are clearly of the opinion that the prosecution has succeeded in establishing its case against the appellants beyond any shadow of doubt and the view taken by learned Sessions Judge is right.

56. In the result the appeals lack merit and are hereby ***dismissed***.

57. 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)01ILR A391
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.01.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 7704 of 2007
with
Criminal Appeal No. 7686 of 2007

Vijay Singh ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri M.P.S. Chauhan, Sri Apul Misra, Sri Yogesh Kumar Srivastava

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

(A) Criminal Law - Indian Penal Code, 1860 - Section 376 (2) (g) - commits gang rape , Section 342 - punishment for wrongful confinement , Section 506 - punishment for criminal intimidation , Section 228-A - Disclosure of identity of the victim of certain offences - The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3 (2) (v) - while appreciating evidence the number of counts of witnesses is not an important aspect in a matter - important is the quality of evidence given by the witness(s). (Para - 34)

P.W.-2 (First informant) - along with his wife, his two daughters namely "V" (prosecutrix/victim)(P.W.-1) and Thanwati and his son reached the brick kilns of Ram Chandra Mukhiya - allegation - first informant, his wife and his daughter were tied to a tree and about 8 meters away from the place and his elder daughter "V" aged about 16 years was then raped by the said three persons, which was witnessed by them helplessly as they were tied to the tree - accused/appellants have been convicted and sentenced under Section 342 of the Indian Penal Code, 1860. (Para - 3)

HELD:- Although "V" P.W.-1 is the prosecutrix/victim of the present case and P.W.-2 is the first informant and her father who claims himself to be an eye witness of the incident and both the witnesses have tried to narrate a version for implicating the accused appellants but the same is a concocted version is termed as a "concocted uniformity" and is thus not safe to be relied upon. The said two witnesses fall in the category of unreliable witnesses. Conviction of the appellants by the trial court is not sustainable in the eyes of law. The trial court committed an error in recording the conviction and sentence of the appellants. (Para - 42,43)

Criminal appeal allowed. (E - 6)

List of Cases cited :-

1. Vadivelu Thevar Vs St.of Madras , AIR 1957 SC 614

2. Laxmibai (Dead) through Lrs. & anr. Vs Bhagwantbuva (Dead) through Lrs. & ors.: (2013) 4 SCC 97

(Delivered by Hon'ble Samit Gopal, J.)

[Delivered by Samit Gopal, J. for the Bench under Chapter VII Rule 1 (2) of the Allahabad High Court Rules, 1952]

1. The aforesaid appeals are connected together and arise out of judgment and order dated 31.10.2007 passed by the Additional District & Sessions Judge, Fast Track Court No.4, Aligarh in Sessions Trial No. 367 of 1998 (State of U.P. vs. Anil) and Sessions Trial No. 278 of 1998 (State of U.P. vs. Vijay and another), whereby the accused/appellants Anil, Vijay Singh and Hariom Sharma have been convicted and sentenced under Section 342 of the Indian Penal Code, 1860 for one year rigorous imprisonment, a fine of Rs. 1,000/- each and in default of payment of fine to one month simple imprisonment, under Section 376 (2) (g) of the Indian Penal Code, 1860 to Life imprisonment, a fine of Rs. 20,000/- each and in default of payment of fine to two months simple imprisonment, under Section 3 (2) (v) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to Life imprisonment, a fine of Rs. 20,000/- each and in default of

payment of fine to two month simple imprisonment. Further, the appellant no.2 Anil Kumar in Criminal Appeal No. 7686 of 2007 has been convicted and sentenced under Section 506 of the Indian Penal Code, 1860 to two years rigorous imprisonment, a fine of Rs. 2,000/- and in default of payment of fine to two months imprisonment. The sentences have been ordered to run concurrently.

2. In view of the legislative mandate as contained in Section 228-A of the Indian Penal Code, 1860 and the observation made by the Apex Court in various judgments, the identity of the prosecutrix/victim is not being disclosed and she will be referred to as "V" hereinafter.

3. The prosecution case as per the first information report lodged by Paramsukh (P.W.-2) is that he along with his wife Smt. Kishan Pyari Devi aged about 55 years, his two daughters namely "V" aged about 16 years and Thanwati aged about 13 years and his son Ved Prakash aged about 10 years reached the brick kilns of Ram Chandra Mukhiya on 19.10.1994 at about 5.00 p.m. in the presence of Ram Singh Contractor, on which Ram Singh Contractor left him and his family members under the supervision of watchman Sherpal. After the contractor left the place, the first informant said to the watchman that his family will not be secured at the kiln and they be sent to the house of the owner but the watchman assured him that in an hour labours will come. The first informant pleaded many times to the watchman and later on went to his hut. Subsequently after sometime at about 7.00 p.m. three persons came to the hut and showed the first informant a country made pistol and directed him that he should call his family members out, otherwise they will burn the hut. It is further stated that the first informant then shouted for the watchman, who then went to the back side and the said persons then took his whole family along with himself to a field of paddy near the brick kiln. The first informant, his wife and his daughter were tied to a tree and about 8 meters away from the place and his elder daughter "V" aged about 16 years was then raped by the said three persons, which was witnessed by them helplessly as they were tied to the tree. It is further stated that out of the said persons he identified two of them, who are namely Thakur Pappu S/o Chintar Pal and Pandit Pappu S/o Babu Lal Sharma R/o Mulla Pada, Bhujpura and the third person was unknown. It is further stated that after about 30 minutes of the incident, the younger daughter of the first informant Km. Thanwati untied them. It is then stated that later on, the said incident was informed to the owner of the brick kiln, who told them that he will inform the police and he may not lodge any report, but since he did not take any action then he has come to lodge the present first information report.

4. An application for lodging of the first information report was given by Paramsukh, the same is marked as Exhibit Ka-1 to the records. On the basis of the said application, a first information report was registered on 22.10.1994 at about 17.30 hrs. at Police Station-Kotwali, District-Aligarh as Case Crime No. 219 of 1994, under Sections 342, 504, 376 of the Indian Penal Code, 1860 and 3 (2) (v) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The said first information report is marked as Exhibit Ka-6 to the records.

5. The prosecutrix/victim "V" was medically examined on 22.10.1994 at 6.30

p.m. by Dr. S. Latoriya (P.W.-3) at Mohan Lal Gautam Women Hospital, Aligarh. The medical examination report is marked as Exhibit Ka-2 to the records. The doctor conducting the medical examination on local examination found the hymen to be torn, old tear present and the vagina admitting two fingers easily. It was mentioned in the medical examination report that no marks of injuries were seen over face, neck, chest, back abdomen and extremities. The opinion given by the doctor is as follows:-

"No definite opinion about rape can be given as she is used to intercourse."

For the determination of age of "V" she was advised X-ray, which was conducted on 24.10.1994 and a report was given by Dr. Qamar Ahmad (P.W.-4), in which after X-ray examination he opined as follows :-

"All centres of ossification united at the respective places."

The said report is marked as Exhibit Ka-3 to the records.

6. The accused/appellant Vijay Singh was also subjected to medical examination on 23.10.1994 at 8.25 p.m. and the doctor found the following injuries on his person:-

"(i) Abrasion 1 cm x ¼ cm on the right side of face.

(ii) Abraded contusion 2 cm x 1 cm on the bridge of nose.

(iii) Tenderness over the left elbow joint.

(iv) Tenderness over the left knee joint.

(v) Contusion 2 cm x 1 cm on the back of left midline chest.

(vi) Tenderness over the front of chest.

(vii) No sign of ext injury seen."

The doctor conducting the medical examination gave his opinion as follows:

"Injury No. 1 to 7 are simple caused by blunt object. Duration ½ day old."

7. The investigation concluded and a charge-sheet dated 21.11.1994 was submitted against the accused persons under Sections 342, 376, 506 of the Indian Penal Code, 1860 and Section 3 (2) (v) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, the same is marked as Exhibit Ka-5 to the records.

8. The Trial Court vide its order dated 26.05.2003 framed charges against accused Vijay Singh and Hariom under Sections 342, 376 (2) (g) of the Indian Penal Code, 1860 and Section 3 (2) (v) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

9. Against accused Anil Kumar, the charges were framed vide order dated 12.10.1998 by the Trial Court under Sections 376, 342, 506 of the Indian Penal Code, 1860 and Section 3 (2) (v) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

10. All the accused persons pleaded not guilty and claimed to be tried. They have not led any defence evidence.

11. The prosecution in order to prove its case produced "V" as P.W.-1, who is the prosecutrix/victim and the daughter of the first informant. Paramsukh P.W.-2 is the first informant of the present matter and the father of "V", who claims himself to be an eyewitness of the incident. Amongst the formal witnesses Dr. S. Latoriya P.W.-3

conducted the medical examination of "V", Dr. Qamar Ahmad P.W.-4 is the Radiologist, who conducted the X-ray examination of "V", R.P. Chaudhary P.W.-5 is the Sub-Inspector, who took up the investigation and remained the Investigating Officer till 27.10.1994, after which it was transferred to Sharad Chandra Pandey, who had submitted the charge-sheet. The said witness proved the handwriting of Sharad Chandra Pandey and also of Constable Clerk Lakhan Singh, who had transcribed the chik first information report.

12. The Trial Court after considering the entire evidence on record came to the conclusion that there is sufficient evidence against the accused persons for committing rape on "V" and in so far as the evidence of "V" was concerned, which was recorded in Sessions Trial No. 367 of 1998 (State of U.P. vs. Anil Kumar), the Trial Court came to its conclusion that the statement of "V" was recorded after about 10 years of the incident as such the variations were of no consequence and convicted the accused persons and sentenced them as stated above.

13. We have heard Shri Yogesh Kumar Srivastava, learned counsel for the appellants Hariom Sharma and Vijay Singh and Ms. Kumari Meena, learned Additional Government Advocate for the State and perused the record.

14. In the present matter two sets of evidences have been recorded. One set of evidence has been recorded in Sessions Trial No. 278 of 1998 (State of U.P. vs. Vijay Singh and another), in which two accused persons, who were tried are Vijay Singh and Hariom Sharma. The second set of evidence has been recorded in Sessions Trial No. 367 of 1998 (State of U.P. vs. Anil Kumar), in which accused Anil Kumar is the sole accused.

Accused Anil Kumar, who is the appellant no.2 in Criminal Appeal No. 7686 of 2007 has died and as such his appeal stands abated vide order dated 08.09.2020 passed by this Court.

15. As of now, the appellant no.1 Hariom Sharma in Criminal Appeal No. 7686 of 2007 and the sole appellant Vijay Singh in Criminal Appeal No. 7704 of 2007 are the surviving accused persons before this Court in the two appeals.

16. The trial of Anil Kumar was separated being Sessions Trial No. 367 of 1998 (State of U.P. vs. Anil Kumar) and separate evidence was recorded in the same and since he has died and his appeal has abated, this Court will not be referring to the evidence recorded in his trial as the same would not be of any purpose and help to the surviving accused persons namely Hariom Sharma and Vijay Singh as the evidence in their trial has been recorded separately.

17. The learned counsel for the appellants made the following submissions:-

(i) The prosecutrix/victim "V" is a major girl. There is no evidence whatsoever in the present matter to show that rape has been committed on her.

(ii) The medical evidence in the present matter does not at all corroborate with the prosecution case. The doctor did not find any mark of injury on the body of "V". The doctor gave an opinion that she is used to intercourse and no definite opinion about rape can be given. The link, which

comes forward by way of medical evidence for corroborating an incident of rape, is totally missing.

(iii) Except for "V" as P.W.-1 and her father Paramsukh as P.W.-2, who has claimed to be an eyewitness of the incident, no other person specially Smt. Kishan Pyari Devi, the wife of P.W.-2 and the mother of P.W.-1, her younger sister Km. Thanwati and her younger brother Ved Prakash have been produced as witnesses, who are also claimed to be eyewitnesses.

(iv) The delay in lodging of the first information report of 3 days does not have any plausible explanation and thus, the same has been lodged just to falsely implicate and harass the accused persons.

(v) There have been serious and material contradictions in the version given by "V" P.W. - 1 and Paramsukh P.W. - 2 in their statements.

18. On the other hand, the learned Additional Government Advocate for the State opposed the submissions of learned counsel for the appellants and argued that "V" was produced and examined as P.W.-1, who has stated categorically about rape being committed on her by the accused persons. It is further argued that even Paramsukh P.W.-2, who is the father of "V" and the first informant, is an eyewitness of the incident and had also categorically stated about rape being committed by the accused persons on his daughter. It is argued that the presence of P.W.-2 is very natural. It is argued that the appeal lacks merit and is liable to be dismissed.

19. "V" P.W.-1 is the prosecutrix/victim and the daughter of the first informant. She in her examination - in - chief states that she belongs to Jatav community. She identifies accused persons present in Court and states that they belong to Thakur community. She states that the incident took place around 4 years back. She used to work at Bhujpura brick kiln along with her father and mother. She states that in the night at about 8.00 p.m. three people came and took her away out of whom two accused are present in Court and the third was an unknown person. They took her forcibly to the jungle. The accused persons took her mother and father also. Her brother and sister were also taken by them. The said persons tied her father and mother with a tree and took her away. They took her 2 kms. away from that place. She was raped at that place. She then describes the manner, in which rape was committed upon her. She states that the accused ran away after committing rape upon her. Her mother and father then reached the place, where she was present and then she came back with them. She states that her father lodged the first information report and got her medical examination done. The accused persons threatened her of dire consequences.

20. In her cross-examination she has stated that she and her family members have never worked in the brick kiln for casting bricks, where the incident took place. She came to the said place along with her mother and father for the first time. She has no relative in Bhujpura. She prior to the present incident did not know any person of Bhujpura and even did not know accused persons from before. She was called to work in the brick kiln by Ram Singh Contractor. On the first day, they stayed at the kiln itself. There was a hut at the kiln and they stayed in it. Baking work at the kiln was not being done. There was no person at the kiln. The night was a dark night. It was so much dark that face of a person could not be seen. She states that it was about 8.00 p.m. She, her mother, her

father and her brother and sister were in the hut. She states that when rape was being committed her both hands were not on the waist of the accused. Her hands were on the ground. It took about 30 minutes in committing rape. She states that she had bleeding from her private part. She states that her petticoat and dhoti got blood stained. She states that the accused persons had scratched on her chest. Her chest had marks of scratches of nails. She states that the accused persons had even injured her private part and she had received injuries. Her dhoti was taken off and thrown aside. She was only wearing petticoat and blouse. No cloth was spread her under her waist. She states that the place where she was thrown on the ground was a ploughed field. She was thrown in the open and the accused persons had turned her various times. All the three accused persons committed rape within 30 minutes and then ran away. She states that she received scratch on her face but she does not know whether there was any injury mark or not. Her legs were apart. She states that her family members were tied to a tree. Her mother was tied with a dhoti. She was made to stand near a tree and dhoti was wrapped all around. She does not know as to which tree it was, but it did not have any leaves on it. Her mother and father were got untied by her sister and then the family members took her back by lifting her. Her whole family and Ram Singh Contractor had gone to the police station. The accused persons did not let them go to the police station and they went after three days. They reached the police station on the third day at about 7.00--8.00 a.m. Police did not take her clothes into their possession. Her medical examination was conducted on the third day. She was interrogated by the police on the day when her medical examination was conducted. She states that she had told the Investigating Officer that it was dark night. She states that she has also informed the Investigating Officer that the accused persons had with their hands scratched her chest and private parts due to which she received injuries. She states that she also told the Investigating Officer that she did not know the accused from before. She states that watchman had told the names of the accused persons. She states that if the said facts have not been written in my statement by the Investigating Officer, she does not know the reason for the same. She states that she told the Investigating Officer that her family members had brought her to the house by lifting her and if the same has not been written in her statement by the Investigating Officer, she does not know the reason. To a suggestion that all the three persons did not commit rape on her, she denies the same. She further denies the suggestion that a false report has been got registered on the saying of villagers. Further to a suggestion that three unknown persons had come for a loot and on the saying of villagers they have been falsely implicated in a case of rape, she denies the same.

21. "V" was recalled by the prosecution for further examination by the orders of the Trial Court, wherein she stated that she came to know of the name of accused Vijay Singh @ Pappu Thakur and Hariom Sharma @ Pappu Pandit at the time of incident. The said accused persons were taking names of each other.

22. In her cross-examination she stated that the accused persons were taking names of each other at the time of incident. She heard the name of Hariom @ Pappu and Vijay @ Pappu. She states that accused persons were calling each other by taking

names of their caste. They said Thakur Pappu may also come. Amongst the accused persons one was Pandit Pappu. She states that in her earlier statement she has stated that the accused persons were of Thakur community. She states that amongst the accused persons one was a Thakur and the other was a Brahmin. She states that her earlier statement that both the accused persons were of Thakur community was not correct. She states that she has not given any statement in Court that both the accused persons were of Thakur community. She further states that her father had gone for getting the first information report lodged. She had a talk with her father prior to the lodging of the first information report. She had told the entire incident to her father. She states that she did not know the accused persons from before. She states that the accused present in Court is Hariom. They were calling each other by name. She states that now she does not know as to of which caste the accused belongs. The name of Hariom was mentioned in the first information report. She states that when the accused persons were calling each other by taking their names. Her father was also present there. Her father was present at a distance of 10 to 20 steps. To a suggestion that she is giving a false statement, she denies.

23. Paramsukh P.W.-2 is the father of "V", the first informant of the present matter and also claims himself to be an eyewitness of the incident. In his examination - in - chief he states that "V" is his daughter. They belong to Jatav community. The accused are of higher caste. He states that around 4 years back he was working in a brick kiln in Bhujpura and were staying there in the night. At about 8.00 p.m., the accused persons along with one other person came to the kiln and asked him for "maal", to which he said that he has nothing and then he was called out of his hut. At that time his family consisted of himself, his wife Kishan Pyari, his daughter "V" and another daughter Thanwati and a small child. The said persons took them to the paddy field forcibly and tied them to a babul tree. The accused persons tied all of them except "V" and took "V" away at some distance from them. Thanwati could not be tied and she slipped from it as she was small. The accused persons then committed rape on "V" and ran away. His younger daughter Thanwati untied them and then they went to "V" and lifted her and brought her back. He states that then they went to the house of Mukhiya in the village, who called Ram Singh Contractor. Ram Singh Contractor then took him to his house. They did not let him lodge a report for 2 days. He then lodged a report after 2 days. He was read out the report, and states that he gave the same and also identifies his thumb impression on it, which was marked as Exhibit Ka-1 to the records. He states that the medical examination of his daughter was done. He states that at that time his daughter was aged about 14 years.

24. In his cross-examination he states that he had mentioned the age of his daughter as 16 years in his report. He states that he had earlier worked in the kiln and was driving a buggy. He states that at the time of incident except for his family there was no one else. The watchman had run away. He states that he does not know that the watchman had run away prior to the coming of the accused persons. He does not know the name of the watchman, who is a resident of Daudpur. The accused persons had come and asked for "maal" and they were referring to his daughter by saying so, the night was dark. He and his family

members did not know the accused from before. He does not know the name of Mukhiya, who is called so. He states that the accused persons told their names after their arrest. Villagers had told the names of the accused persons. At the time of lodging of the report he knew their names. The accused persons made them walk ahead of themselves. Both the accused called him Pappu. He did not know the caste of the accused prior to lodging of the report. All the accused were of Thakur community. He states that he does not know the name of the person, who told him the name of the accused. He states that he had written in the report of the accused had detained them. If the same is not written in the report he does not know the reason for it. He states that his report was written at the police station by someone else and he cannot tell as to who wrote it. On the report his thumb impression was got affixed and the same was read to him. He states that the delay in lodging of the first information report was due to the reason that the accused had detained them. He states that he had told the name of third accused also, but if the same is not in the report he does not know the reason about it. All the persons were tied with a dhoti. They were tied for about 30 minutes. They had lifted the girl and brought her. The accused persons had stopped them from lodging of the first information report and had threatened them of dire consequences, due to which the same was got registered on the third day, for which they had gone by hiding for lodging the report. He was interrogated by the Investigating Officer on the day of lodging of the report. He had told the names of three Pappu's to the Investigating Officer, but if in his statement, the name of third person has not been written, he does not know the reason. He states that he had told the Investigating Officer that the accused persons had detained them due to which the first information report has been lodged with a delay, but if the said fact has not been written, he does not know the reason. To a suggestion that he has falsely named the accused on the saying of villagers, he denies. He states that he cannot say as to whether he could recognize the accused persons due to dark or not. Further to a suggestion that on the saying of villagers due to party-bandi he has falsely implicated the accused persons, he denies the same. He states that it is true that the Inspector at the police station had written his report and got his thumb impression affixed on it.

25. The said witness was recalled for further examination by the prosecution vide order of the Trial Court. He states that the accused persons were taking names of each other and were calling them by taking names and they used to come to the kiln for taking bricks. He further states that at the time of incident they had taken the names.

In the cross-examination he stated that they were taking name of Pappu. They were calling Thakur Pappu. They were saying that Pappu burn the hut. Both were Pappu Thakur. The third person was Anil he had written the names of all the three accused in the report. He is illiterate. He does not remember the name of the third person. He states that he had got the name of Anil written in the report, but if his name is not written he does not know the reason. He states on seeing the accused persons in Court that he now does not remember their names. The names of the accused were told to him by Ram Chandra Mukhiya. He states that previously he had stated that he had written the names on the saying of villagers. He states that he does not remember as to which police personal

wrote the report. He states on seeing Exhibit Ka-1 that the same was written by a police personal at the Police Chauki. On a suggestion that he is giving the statement on the tutoring of the Government Advocate, he denies the same. He states that he had got the correct names of the accused written.

26. Dr. S. Latoriya P.W.-3 was posted as Medical Officer in Mohan Lal Gautam Women Hospital, Aligarh on 22.10.1994. She examined "V", who was brought by police constable. She states that she did not find any injury on the face, neck, chest, back, hands and legs of "V". She states that on internal examination she found the hymen to be old torn, which admitted two fingers easily. She had advised X-ray examination for ascertaining the age of "V". She states that she cannot give any opinion about rape as "V" was habitual to intercourse. She proves the medical examination report, which was marked as Exhibit Ka-2 to the records.

In her cross - examination she states that in the report there is no mention of any injury and if there would have been any injury, she would have written it. She states that it is true that the victim was habitual to intercourse. She further states that there is a variation of two years on other sides of age.

27. Dr. Qamar Ahmad P.W.-4 was posted as Senior Radiologist in M.S. Hospital on 24.10.1994. He got the X-ray examination done under his supervision of "V". He states that the right wrist, right elbow and the right knee was subjected to X-ray and it was seen that all centres of ossification are united at the respective places. He proves the X-ray plates, which is marked as Material Exhibit-1 to the records.

In the cross-examination he states that the age of "V" as per Radiological examination is about 19 years. He states that the age of girl can be 2 years above 19 years, but cannot be less than 19 years. He states that he has not mentioned the age in his report. The estimation of age is about 19 years. He states that the supplementary report is not on the record of this case. He states that he has disclosed the age of the girl on the basis of X-ray plates.

28. R.P. Chaudhary P.W.-5 is the first Investigating Officer of the case. The investigation remained with him from 22.10.1992 to 27.10.1994. During this period. He recorded the statement of the first informant, his wife and the victim. He prepared the site plan and inspected the place of occurrence. He then recorded the statement of Ved Prakash, the son of the first informant. He proves the site plan, which is marked as Exhibit Ka-4 to the records. He arrested accused Anil Kumar on 25.10.1994 with the help of the first informant and "V". He had recommended recording of the statement u/s. 164 Cr.P.C., which was recorded and then the investigation was transferred to Sharad Chandra Pandey. He identifies the handwriting of Sharad Chandra Pandey and proves the charge-sheet, which was prepared by him. The same is marked as Exhibit Ka-5 to the records. He then identifies the handwriting of Constable Clerk Lakhan Singh and proves the chik report as that written by him. The same is marked as Exhibit Ka-6 to the records. He proves the G.D. entry being G.D. No. 30 at 17.30 hrs. dated 22.10.1994 regarding the lodging of the first information report and

proves the carbon copy of the same, which is marked as Exhibit Ka-7 to the records.

In his cross-examination he states that he prepared the site plan on the pointing out of the first informant on 22.10.1994. He has not mentioned the distance between the hut of the first informant and the place of occurrence in the site plan. He states that the field was not having any crop of paddy. It was lying vacant. He states that there was a closed well near the place of occurrence. He has not written the names of the person whose fields are near the place of occurrence. He states that the place of occurrence was a vacant land and was not used for cultivation. He states that there were 12 huts at the kiln. To a suggestion that he did not go to the place of occurrence and has thus, not mentioned the names of the owners of the tubewell and fields and has not mentioned the distance between the place of occurrence and the huts, he denies. He states that he has not mentioned the length and breadth of the kiln. He states that in the 12 huts, 12 families live. He did not interrogate any labour as they were not present at the spot. He states that he did not consider it necessary to interrogate the labours and as such did not make any effort again. He states that he did not show the route of the accused going as he did not consider it necessary. He interrogated "V" on 22.10.1994. He states that "V" did not tell him that the night was dark and the face of anyone was not visible. He states that he did not ask "V" about the blood stained clothes and she did not tell him about the accused scratching her chest. He states that she had told him that she knew the accused from before. He states to have interrogated Paramsukh on 22.10.1994 and have also read the first information report. He has stated that in the first information report it is mentioned that the delay in lodging the same was due to the fact that the brick kiln owner had told him not to lodge it. He states that the first informant had in his statement told him that the owner of the brick kiln has informed the police. He states that the scribe of the first information report is Vinod Kumar Gautam. The first informant told him in his statement that he does not know the name of the scribe of the first information report. To a suggestion that the application has been got written at the police station, he denies. To a further suggestion that the Inspector has written the report by his hand, he denies. He states that he has not taken into custody the petticoat and blouse of girl as the incident was 3 days old. He denies the suggestion that he did not go to the place of occurrence and did paper work falsely at the police station.

29. The accused in their statements under Section 313 Cr.P.C. have denied the incident.

30. Accused Anil Kumar in his statement under Section 313 Cr.P.C. has stated that he is not named in the first information report, he has been implicated on the saying of others and has been falsely implicated and the investigation as done is totally faulty, he be acquitted.

31. Accused Vijay Singh in his statement under Section 313 Cr.P.C. has stated that he has enmity with Ram Chandra of kiln, who has falsely got shown him as an accused. He had purchased the land of someone and was digging mud from the boundary of his field due to which he was inimical. He states that he has been implicated in the matter due to enmity. Paramsukh was working in the kiln of Ram Singh Contractor. Paramsukh did not know him from before.

32. Accused Hariom Sharma in his statement recorded under Section 313 Cr.P.C. has stated that he has no relationship with Vijay Singh, he is a

Brahmin and has been falsely implicated due to village party-bandi and due to enmity.

33. "V" P.W.-1 states that she was raped by three persons but the medical evidence runs totally contrary to it. She also states to have received scratches caused by nails of the accused persons on her chest and private parts but there is no such injury found by the doctor who medically examined her. She states that she had bled while being raped and her clothes became blood stained but neither did she give any such clothes to the Investigating Officer nor did the doctor conducting her medical examination find any such injury on her private parts but to the contrary she found her to be habitual to sexual intercourse.

34. Similarly Paramsukh P.W.-2 has also given the same version of the incident and rape on his daughter as given by "V" P.W.-1. Even his statement does not find corroboration from the medical evidence. He states to be an eye witness to the incident alongwith his wife, younger daughter and son but the same also does not find corroboration from any source.

35. The other alleged eye witnesses of the incident being the mother, younger sister and younger brother of "V" P.W.-1 have not been produced before the trial court but their not being produced can in no manner be fatal to the prosecution and in a case like this the version of the prosecutrix/victim is sufficient to prove the charge against the accused persons but in the present case Paramsukh P.W.-2 who is the first informant and the father of PW 1 has deposed of being an eye witness of the incident.

36. This court has to appreciate the evidence of the said two witnesses viz. "V" P.W.-1 and Paramsukh P.W.-2 as to whether they are truthful witnesses and as to whether their evidence is of such quality that they are to be treated as fully reliable witnesses after testing their deposition from the corroborating evidence and circumstances to prove the charges against the accused persons.

37. The law regarding the test to assess the quality of oral evidence led by the prosecution for proving or disproving a fact is well settled. In the case of ***Vadivelu Thevar Vs. State of Madras : AIR 1957 SC 614***, the Apex Court has held as follows:

"..... Generally speaking oral testimony in this context may be classified into three categories, namely (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact.

The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable."

38. Further, it is also well settled that while appreciating evidence the number of counts of witnesses is not an important aspect in a matter. What is important is the quality of evidence given by the witness(s). In the case of ***Laxmibai (Dead) through Lrs. and Another Vs. Bhagwantbuva (Dead) through Lrs. and others: (2013) 4 SCC 97***, the Apex Court held as under:

"39. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one attesting witness, it has been held that the number of witnesses produced do not carry any weight."

39. In the present matter the evidence of "V" examined as P.W.-1 that she was raped by three persons during which she bled from her private parts to such an extent that the clothes which she was wearing became blood stained and that she was injured by the accused persons by their act during the commission of rape does not find corroboration from any source. The medical examination done on her, though was after three days but that cannot give the result as given in the present case in the circumstances of the incident being taken place as alleged by "V" P.W.-1 and Paramsukh P.W.-2. Had "V" bled from her private parts due to rape being committed on her by three persons, the doctor would have discovered corresponding injuries in her private parts. Even her version that the accused persons has scratched her chest and private parts and she had received scratch marks and injuries on her chest and private parts also is conspicuously missing in the medical evidence. The blood stained clothes of "V" did not see the light of the day. The version even on this count does not find corroboration and is thus untrue. The finding of the doctor PW 3 in her medical examination report and statement in court also at this point is important to be referred and considered which says that "V" was habitual to sexual intercourse. The other factor that the incident was committed in a ploughed filed has been stated by "V" in her deposition. Her not receiving any bodily injury while being raped by three persons in a ploughed field while lying bare in it is also an impossibility.

40. Although the appellant Vijay Singh was medically examined and his medical examination report is on record but the same has neither been relied by the prosecution for any event nor has he taken use of it for any benefit. The same has not even been proved in the trial by any witness.

41. The evidence of Paramsukh P.W.-2 also suffers from the same lacunas as that of "V" P.W.-1.

42. This court comes to the conclusion that although "V" P.W.-1 is the prosecutrix/victim of the present case and Paramsukh P.W.-2 is the first informant and her father who claims himself to be an eye witness of the incident and both the witnesses have tried to narrate a version for implicating the accused appellants but the same is a concocted version is termed as a "concocted uniformity" and is thus not safe to be relied upon. The said two witnesses fall in the category of unreliable witnesses.

43. Thus the conviction of the appellants by the trial court is not sustainable in the eyes of law. The trial court committed an error in recording the conviction and sentence of the appellants. Hence the impugned judgment and order dated 31.10.2007 passed by the trial court is liable to be set aside, which is accordingly set aside.

44. The present appeals are **allowed**.

45. The appellants- Vijay Singh and Hariom Sharma are in jail. They are directed to be released forthwith unless wanted in any other case.

46. Keeping in view the provision of Section 437-A of The Code of Criminal Procedure, 1973 the accused-appellants Vijay Singh and Hariom Sharma are directed to furnish a personal bond in terms of Form No. 45 prescribed in The Code of Criminal Procedure, 1973 of a sum of Rs. 25,000/- with two reliable sureties in the like amount before the court concerned 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 the instant judgment or for grant of leave, the aforesaid appellants on receipt of notice thereof shall appear before the Apex Court.

47. The lower court record along with a copy of this judgment be sent back immediately to the trial court concerned for compliance and necessary action.

48. 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.

49. The computer generated copy of such judgment shall be self-attested by the counsel(s) of the party(ies) concerned.

50. 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)01ILR A404
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2020

BEFORE

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

FAFO No. 1244 of 2020
&
FAFO Defective No. 545 of 2020

Smt. Chanda Begum & Anr. ...Appellants
Versus
Shri Shahnawaz & Anr. ...Respondents

Counsel for the Appellants:
Sri Shreesh Srivastava, Sri Sanjay Kumar Srivastava

Counsel for the Respondents:
Sri Subhash Chandra Srivastava

Civil Law - Employees Compensation Act (8 of 1923) – Section 4A - Compensation - Interest - payment of interest is a consequence of default & it has to be directed to be paid without going into the reasons for the delay - Penalty - only in case where the delay is without justification, the employer might also be held liable to penalty after giving him a show cause notice - Liability of Insurance Company to pay- just because the owner had not intimated to the Insurance Company about the accident it cannot be the reason for not directing the Insurance Company to pay the interest & saddling the owner with the payment of interest - Finding that Insurance Company is not liable for interest is against the spirit of taking insurance policy (Para 10,11,15)

Partly allowed. (E-4)

List of Cases cited :-

1. Miskina & 5 ors. Vs M/s H.D.F.C. Egro General Insurance Co. Ltd. & ors. FAFO No.1538 of 2020 dt. 26.11.2020

2. Sri Shiv Lal & anr. Vs.Sri Vivek Shaker Gupta & anr. FAFO No. 1673 of 2020 dt. 10.12.2020.

3. Oriental Insurance Company Vs Siby George & ors. 2012(4) T.A.C. 4 (SC);

4. Smt. Surekha & ors. Vs The Branch Manager, National Insurance Company Ltd Civil Appeal No. 10018 of 2017 dt 3.8.2017

5. Sanju Kushwaha Vs Vimal Kumar Verma; FAFO No. 1553 of 2020 dt 3.12.2020

6. Sri Shiv Lal & anr. Vs Sri Vivek Shaker Gupta & anr. FAFO No.1673 of 2020 dt 10.12.2020

7. Guru Govekar Vs Miss Filomena F. Lobo & ors., AIR 1988 SC 1332

8. K. Shivaraman & ors. Vs P. Satishkumar & ors. 2020 (4) SCC 594

9. North East KRTC Vs Smt. Sujatha Civil Appeal No. 7470 of 2009 dt 2.11.2018

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

1. First Appeal From Order No.1244 of 2020 is preferred by claimants and First Appeal From Order Defective No.545 of 2020 is filed by the owner which have been placed before this Court for final disposal. Appeal preferred by Insurance Company namely F.A.F.O No. 1301 of 2020 has already been decided rather dismissed with costs by my brother Judge on 27.8.2020. Papers of the said matter are placed for perusal before this Court.

2. Heard Sri Sanjay Kumar Srivastva, learned counsel for the appellant-claimants, Mohd. Naushad Siddiqui, learned counsel for appellant-owner and Sri Subash Chandra Srivastava, learned counsel for respondent-Insurance Company.

3. Both these appeals arise out of the judgment and award dated 18.2.2020 passed by the Commissioner, Workmen's Compensation Act, 1923 (for short as 'Act') being Additional Labour Commissioner, Kanpur (hereinafter referred to as 'Commissioner') awarding sum of Rs.6,30,062/- with interest at the rate of 9% from the date of accrual of compensation in favour of the claimants. The owner was saddled with liability to pay interest and notice for hearing as to why penalty should not be directed was issued. The Insurance Company was directed to satisfy decretal amount and interest from the date of judgment till deposit of amount.

4. As far as the appeal of the claimants is concerned, the only question of law to be answered is whether in the given facts and circumstances of the case, the Commission has committed manifest error of law holding that if the respondent has failed to deposit the awarded amount within 30 days from the date of judgment then only claimants are entitled for the interest at the rate of 9% from the date of award till the amount is deposited.

5. In support of his submission, learned counsel for the claimants has relied on the decision in First Appeal From Order No.1538 of 2020 titled **(Miskina and 5 others Vs. M/s H.D.F.C. Egro General Insurance Co. Ltd. and other)** decided on 26.11.2020 and decision rendered in First Appeal From Order No.1673 of 2020 titled **(Sri Shiv Lal and another Vs.Sri Vivek Shaker Gupta and Another)** decided on 10.12.2020.

6. As far as appeal of the owner is concerned, learned counsel for the owner has submitted that the Commissioner has committed patent error directing the owner to pay interest though the question is no longer res integra.

7. In support of his submission, learned counsels both for the claimants and owner have relied on the decisions in **Oriental Insurance Company Vs. Siby George and others, 2012(4) T.A.C. 4 (SC); Smt. Surekha and others Vs. The Branch Manager, National Insurance Company Ltd.** decided on 3.8.2017, First Appeal From Order No. 1553 of 2020 **(Sanju Kushwaha Vs. Vimal Kumar Verma)** decided on 3.12.2020 and First Appeal From Order No.1673 of 2020 **(Sri Shiv Lal and another Vs.Sri Vivek Shaker Gupta and Another)** decided on 10.12.2020.

8. As against this, learned counsel for Insurance Company tried to point out that the judgment and order impugned is just and proper as it was the duty of the owner to notify the insurance company about the accident which was not done and hence the owner was saddled with the payment of interest till date of decision and this is a finding of fact which does not require to be interfered with.

9. While dealing with the above questions of law, it would be appropriate to reproduce Section 4A of the Act which reads as under:

"4A. Compensation to be paid when due and penalty for default.?

1.Compensation under section 4 shall be paid as soon as it falls due.

2.In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall

be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

3.Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall?

(a.)direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b.)if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears, and interest thereon pay a further sum not exceeding fifty per cent of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation.?For the purposes of this sub-section, ?scheduled bank? means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934)."

10. The Supreme Court in the case titled **Oriental Insurance Company Vs. Siby George and others, 2012(4) T.A.C. 4 (SC)** where in it has been held by the Apex Court that payment of interest is a consequence of default and it has to be directed to be paid without going into the reasons for the delay and only in case where the delay is without justification, the employer might also be held liable to penalty after giving him a show cause notice. Thus, just because the owner had not intimated to the Insurance Company, it cannot be the reason for not directing the Insurance Company to pay the interest.

11. Hence, the findings that the Insurance Company will not be liable for interest is against the spirit of taking the insurance policy and the very object for introducing insurance policy would get frustrated. I am even fortified in my view by the decision in the case titled **Guru Govekar vs Miss Filomena F. Lobo & Ors, AIR 1988 SC 1332.**

12. In **K. Shivaraman and others Vs. P. Satishkumar and others, 2020 (4) SCC 594**, after considering several decisions, the purpose of Workmen's Compensation Act has been reiterated. The scope of Section 4 and 4A has been reconsidered. In paragraph 16 of the judgment the word used is 'as soon as it falls due'. Thus the said decision would also help the claimant as well as the owner to the facts in this case.

13. I am even fortified in my view by the decision in Civil Appeal No. 7470 of 2009 **North East Karnataka Road Transport Corporation Vs. Smt. Sujatha** decided on 2.11.2018, in Civil Appeal No. 10018 of 2017, **Smt. Surekha and others Vs. the Branch Manager, National Insurance Company Ltd. decided on 3.8.2017**, which holds that Insurance Company has to be made liable and further the relevant date from when the interest would be payable is decided therein, namely, one month of the date, when the compensation accrues. The decision of this Court in First Appeal From Order No.1538 of 2020 **(Miskina and 5 others vs. M/s H.D.F.C. Egro General Insurance Ltd. and another)** decided on 26.11.2020 and

First Appeal From Order No. 1553 of 2020 **(Sanju Kushwaha Vs. Vimal Kumar Verma)** decided on 3.12.2020 will also aid both claimants and owner.

14. In view of the above, questions of law framed in both these appeals are answered in the affirmative.

15. These appeals are partly allowed. The judgment and award of the Commissioner shall stand modified to the aforesaid extent namely to the extent that the Insurance Company shall deposit the decretal amount with interest at the rate of 12% from one month after the date of accident till the amount is deposited.

15. The appeal of the Insurance Company has been dismissed with costs quantified at Rs.10,000/-. Learned counsel for the Insurance Company has conveyed that amount of cost be converted to penalty if at all this Court feels that penalty has to be imposed. Normally the penalty will have to be paid if it is found that there was deliberate reason for delay in paying the amount. Here, it is the parents who are demanding from one son for the death of another son and they have claimed from Insurance Company with whom the vehicle was insured to make payment. Hence, the minimal penalty of Rs.10,000/- would suffice which was the cost inflicted by my brother Judge on the Insurance Company. Appellants of these appeals shall deposit a sum of Rs.10,000/- which would be substitution for penalty. The notice for penalty is also now not to be proceeded with further by the authorities in peculiar facts of this case.

16. This Court is thankful to all the learned Advocate for ably assisting the Court and Sri S.D. Ojha, learned Advocate for rendering services as Amicus Curiae.

(2021)01ILR A408
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.12.2020

BEFORE

THE HON'BLE ALOK MATHUR, J.

U/S 482/378/407 No. 2389 of 2020

Alka Pandey ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Pradeep Kumar Rai, Devansh Mishra, Prakash Pandey, Praveen Kumar Shukla, Priyansu Singh

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Criminal Procedure Code (2 of 1974) – Section 482 - Unwarranted & Adverse remark against subordinate judicial officer - Expunction - High Court has inherent powers u/s 482 CrPC to expunge the remarks made by itself or by subordinate Court to prevent abuse of process of Court or otherwise secure the ends of justice (Para 9)

B. Constitution of India , Art.235 - District and Sessions Judge has administrative control over the judicial officers subordinate to him, but the administrative control cannot be equated to power of superintendence which is vested only with the High Courts - if the conduct of the subordinate judicial officer requires corrective action advisable course available is to intimate the Hon'ble the Chief Justice or the Administrative Judge along with the

copy of the judgement for further action, rather than taking up the matter on the judicial side - so that subordinate judge have an opportunity to clarify his position & shall not be condemned unheard (Para 11, 13)

C. Unwarranted & Adverse remark against subordinate judicial officer on judicial side - Not to be made, unless - (a)the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself - (b) there is evidence on record bearing on that conduct justifying the remark, (c) where it is necessary for decision of the case, as an integral part thereof, to advert on that conduct - Sessions Judge is expected to judge the case before him & judicial pronouncements must be judicial in nature but had no jurisdiction to judge the judicial officer who was the author of the judgment (Para 10,11,13)

Allowed. (E-4)

List of Cases cited :-

1. St. of U.P. Vs Mohd. Naim, (1964) 1 CrLJ 549

2. In the Matter of "K" A Judicial Officer (2001) 3 SCC 54

3. Amar Pal Singh Vs St. of U.P. & anr. (2012) 6 SCC 491

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

1. Heard Sri Pradeep Kumar Rai, learned counsel for the applicant assisted by Sri Prakarsh Pandey, Advocate as well as learned Additional Government Advocate for the State of U.P. and Sri Gaurav Mehrotra, Advocate who has put in appearance on behalf of opposite party no. 2.

2. The present application under section 482 Cr.P.C. has been filed by a judicial officer whose judgment in Criminal Case No. 909/2019 convicting the accused under Section 406 and 411 IPC , was set aside in appeal by the Sessions Judge, who has also commented adversely on the applicant and therefore being aggrieved by the same, prayer has been made to quash/expunge the said remarks.

3. The facts in brief are that the applicant while posted as Additional Chief Judicial Magistrate, Court No. 01, Hardoi heard and decided Criminal Case No. 909/2019 (State Vs. Yamohan Singh). The accused therein, was alleged to have appeared in an examination on 20/04/1999, and during the said examination when the investigator had accompanied one other student outside the hall, the accused left the examination along with the question paper and the answer sheet. It is stated that he was subsequently apprehended and found to be in possession of the answer sheet and was therefore charged under Section 406 and 411 of the IPC. The applicant decided the said case on 17/08/2019 and found the accused guilty and sentenced him to 2 years simple imprisonment and a fine of Rs. 5000/- failing which he was to undergo six months further imprisonment. The order of trial Court was subjected to appeal before the Sessions Judge, Hardoi.

4. The Sessions Judge, Hardoi allowed the Criminal Appeal No. 47/2019, filed by the accused against the order passed by the applicant. The Sessions Judge held that there was no eyewitness of the fact that the accused had ever

participated in the said examination nor did anyone see him leaving the said examination hall along with the question paper. He also returned a finding that the Investigating Officer was not examined and therefore the recovery of the question paper itself was doubtful and therefore held that none of the charges could be proved by the prosecution and consequently allowed the said appeal. He also made the following remarks against the applicant:-

"विद्वान मजिस्ट्रेट ने बिना साक्ष्य का विश्लेषण किये हुए अपीलार्थी/अभियुक्त के विरूद्ध आरोप सिद्ध होने का जो निष्कर्ष निकाला है वह त्रुटिपूर्ण है। यहाँ यह उल्लेखनीय है कि विद्वान मजिस्ट्रेट के द्वारा जो निर्णय लिखा गया है, उसमें अभियोजन केस के उपरान्त उस साक्ष्य का वर्णय किया गया है जो अभियोजन ने प्रस्तुत किया है, जिसमें सभी साक्षियों की मुख्य परीक्षा व प्रतिपरीक्षा के बयान उसी रूप में उतार लिये गये हैं और फिर उसके बाद बिना साक्ष्य का कोई विश्लेषण किये हुए विद्वान मजिस्ट्रेट सीधे निष्कर्ष पर आ गये हैं और यह निष्कर्ष दे दिया है कि अभियोजन साक्ष्य से अभियुक्त के विरूद्ध धारा 406, 411 भा0दं0सं0 के आरोप सिद्ध हो रहे हैं। अपर मुख्य मजिस्ट्रेट स्तर के न्यायिक अधिकारी से ऐसे निर्णय की अपेक्षा नहीं की जा सकती। विद्वान मजिस्ट्रेट से निर्णय लेखन में सुधार अपेक्षित है।"

5. Aggrieved by the comments and observations made by the judgment passed in the criminal appeal, the Judicial Magistrate, who authored the trial Court's judgment, has approached this Court by means of present application under Section 482 Cr.P.C.

6. In the instant application we are not called upon to examine the correctness of the order passed by the Sessions Judge with regard to the findings recorded on merits of the case as sitting in appeal, but examine the impugned judgment only with regard to the aforesaid comments/observations made against the applicant who was discharging the duties of the presiding judge.

7. The question which arises for determination in the present application is whether it was appropriate or was there any justification for the Sessions Judge in his capacity as an appellate Court to pass any comments regarding the dexterity, knowledge or intelligence or manner of dealing with a case by the trial Judge. Numerous judgments have been placed before us passed by the Hon'ble Supreme Court as well as by this Court which have unequivocally discouraged the practice by the superior Courts from commenting upon the capabilities or in any manner reflecting upon the persona of the Judge of the subordinate Court while hearing an appeal or revision where such judgment is under challenge or even otherwise where such a judgment is placed for consideration before the higher Court.

8. We also heard Sri Gaurav Mehrotra, Advocate appearing on behalf of the High Court, who has submitted the written instructions. He has also informed that the remarks of the District and Sessions Judge are only advisory in nature and not condemnatory. He further informed this Court that on the basis of the said remark no action has been taken against the applicant nor is there any proposal of the same.

9. The jurisdiction of this Court under section 482 Cr.P.C. to expunge the remarks made in the order of subordinate Court was duly considered and answered in affirmative by the Hon'ble Supreme Court in the case of **State of U.P. Vs. Mohd. Naim, (1964) 1 CrLJ 549.** The Hon'ble Apex Court duly considered the power of the High Court under section 482 Cr.P.C. and observed that it has inherent powers to expunge the remarks made by itself or by subordinate Court to prevent abuse of

process of Court or otherwise secure the ends of justice. It was further observed in the said judgment that if there is one principle of cardinal importance in the administration of justice, it is :

"the proper freedom and independence of judges and magistrates will be maintained and they must be allowed to perform the functions freely and fearlessly and without undue interference by anybody, even by this Court, at the same time it is equally necessary that in expressing their opinions judges and magistrates must be guided by considerations of justice, fair play and restrain."

10. It is not infrequent that sweeping generalisation defeat the very purpose for which they are made to stop it has been traditionally recognised that the matter of making disparaging remarks against person/authority who's conduct comes into consideration before the Courts of law in the cases to be decided by them. It is relevant to consider (a) whether the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself, (b) whether there is evidence on record bearing on that conduct justifying the remark, (c) whether it is necessary for decision of the case, as an integral part thereof, to advert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from some petty moderation and reserve.

11. The Sessions Judge while hearing the appeal had full powers and jurisdiction at his command to re-appreciate the evidence to disagree and come to a different conclusion that of the trial Court, but his jurisdiction fell short of commenting upon the shortcomings of the applicant while discharging the duties of trial Court dealing with the said case. It was not expected from him to remonstrate that applicant while discharging the duties of a trial judge had not written the judgment as expected from a judicial officer. The said comment starkly reflects upon the persona of the judicial officer, and while deciding the said appeal the Sessions Judge was expected to judge the case which were before him, and had no jurisdiction to judge the judicial officer who was the author of the judgment. Undeniably the District and Sessions Judge has administrative control over the judicial officers subordinate to him, but the administrative control cannot be equated to power of superintendence which is vested only with the High Courts. The Hon'ble Supreme Court in this regard has also even cautioned the High Courts to refrain from making observations extending to criticism of the subordinate judicial officer in as much as the said judicial officer is condemned unheard which is violative of principles of natural justice, and it should not be forgotten that the subordinate judiciary itself is dispensing justice and it gives chance to the litigating party to have a sense of victory not only over his opponent but also over the judge who decided the case against him. This is subversive of the judicial authority of the deciding judge and such an unsavory situation leads to the judicial officer filing a petition which reduces his status to a litigant and this is clearly not conducive of judicial functioning. In the case of **In the Matter of "K" A Judicial Officer (2001) 3 SCC 54** it was observed:-

"Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of

restraint, this humility of function should be constant theme of our Judges. This quality in decision-making is as much necessary for Judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other coordinate branches of the State, the executive and the legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the Judge has failed in these qualities, it will be neither good for the Judges nor for the judicial process."

12. It should also be remembered that the conduct of the subordinate judicial officer unbecoming of himself and requiring corrective action should not be overlooked, but there is an alternative safe and advisable course available to choose from which is to intimate the Hon'ble the Chief Justice or the Administrative Judge along with the copy of the judgement for further action, rather than taking up the matter on the judicial side. The advantage of this course of action would be, that the subordinate judge concerned would have an opportunity to clarify his position and shall not be condemned unheard.

13. In the case of **Amar Pal Singh vs State of Uttar Pradesh and Another, (2012) 6 SCC 491** the Apex Court observed as follows :

"27. A Judge is required to maintain decorum and sanctity which are inherent in judicial discipline and restraint. A judge functioning at any level has dignity in the eyes of public and credibility of the entire system is dependent on use of dignified language and sustained restraint, moderation and sobriety. It is not to be forgotten that independence of judiciary has an insegregable and inseparable link with its credibility. Unwarranted comments on the judicial officer creates a dent in the said credibility and consequently leads to some kind of erosion and affects the conception of rule of law. The sanctity of decision making process should not be confused with sitting on a pulpit and delivering sermons which defy decorum because it is obligatory on the part of the superior Courts to take recourse to correctional measures. A reformative method can be taken recourse to on the administrative side.

28. It is condign to state it should be paramount in the mind of a Judge of superior Court that a Judicial officer projects the face of the judicial system and the independence of judiciary at the ground reality level and derogatory remarks against a judicial officer would cause immense harm to him individually (as the expunction of the remarks later on may not completely resuscitate his reputation) but also affects the credibility of the institution and corrodes the sacrosanctity of its zealously cherished philosophy. A judge of a superior Court however strongly he may feel about the unmerited and fallacious order passed by an officer, but is required to maintain sobriety, calmness, dispassionate reasoning and poised restraint. The concept of loco parentis has to take a foremost place in the mind to keep at bay any uncalled for any unwarranted remarks.

29. Every judge has to remind himself about the aforesaid principles and religiously adhere to them. In this regard it would not be out of place to sit in the time machine and dwell upon the sagacious

saying of an eminent author who has said that there is a distinction between a man who has command over "Shastras' and the other who knows it and puts into practice. He who practises them can alone be called a "vidvan'. Though it was told in a different context yet the said principle can be taken recourse to, for one may know or be aware of that use of intemperate language should be avoided in judgments but while penning the same the control over the language is forgotten and acquired knowledge is not applied to the arena of practice. Or to put it differently the knowledge stands still and not verbalised into action. Therefore, a committed comprehensive endeavour has to be made to put the concept to practice so that it is concretised and fructified and the litigations of the present nature are avoided.

30. Coming to the case at hand in our considered opinion the observations, the comment and the eventual direction were wholly unwarranted and uncalled for. The learned Chief Judicial Magistrate had felt that the due to delay and other ancillary factors there was no justification to exercise the power under Section 156 (3) of the Code. The learned Single Judge, as is manifest, had a different perception of the whole scenario. Perceptions of fact and application of law may be erroneous but that never warrants such kind of observations and directions. Regard being had to the aforesaid we unhesitatingly expunge the remarks and the direction which have been reproduced in paragraph three of our judgment. If the said remarks have been entered into the annual confidential roll of the judicial officer the same shall stand expunged. That apart a copy of the order be sent by the Registrar of this Court to the Registrar General of the High Court of Allahabad to be placed on the personal file of the concerned judicial officer."

14. Considering the dictum of the Hon'ble Supreme Court and applying it to the facts of the present case it is apparent that even though in his decision, the Sessions Judge has given adequate reasons for coming to a different conclusion in the criminal appeal, and setting aside the judgment of the trial Court, there was no occasion for him to observe that it was not expected of the judicial magistrate to write such a judgment and further that there is further scope of improvement. Though these comments on the face of it do not seem to be adverse but they clearly convey the dissatisfaction and displeasure of the District and Sessions Judge towards the applicant. It has repeatedly been observed by the Supreme Court as well as by this Court that criticism and observations touching upon the judicial officer incorporated in judicial pronouncements have their own infirmities for not only the judicial officers are condemned unheard of the harm caused by such criticism or observations also incapable of being undone. Sobriety, moderation and reserve are the greatest qualities of a judicial officer and he/she should never be divorced from them.

15. In the present case the Sessions Judge has re-examined the entire evidence and came to a contrary finding and has therefore allowed the criminal appeal. There was absolutely no occasion or any need to make any comments upon the applicant and in case he felt strongly about the shortcomings of the applicant, then it was always open for him to inform his Administrative Judge or Hon'ble the Chief Justice.

16. Therefore for the reasons stated above, I have no hesitation in deleting the following observations made in the judgment and order dated 19.10.2019, passed by the Sessions Judge, Hardoi in Criminal Appeal No. 47/2019 - Yamoham Singh Vs. State of U.P. :-

"विद्वान मजिस्ट्रेट ने बिना साक्ष्य का विश्लेषण किये हुए अपीलार्थी/अभियुक्त के विरूद्ध आरोप सिद्ध होने का जो निष्कर्ष निकाला है वह त्रुटिपूर्ण है। यहाँ यह उल्लेखनीय है कि विद्वान मजिस्ट्रेट के द्वारा जो निर्णय लिखा गया है, उसमें अभियोजन केस के उपरान्त उस साक्ष्य का वर्णय किया गया है जो अभियोजन ने प्रस्तुत किया है, जिसमें सभी साक्षियों की मुख्य परीक्षा व प्रतिपरीक्षा के बयान उसी रूप में उतार लिये गये हैं और फिर उसके बाद बिना साक्ष्य का कोई विश्लेषण किये हुए विद्वान मजिस्ट्रेट सीधे निष्कर्ष पर आ गये हैं और यह निष्कर्ष दे दिया है कि अभियोजन साक्ष्य से अभियुक्त के विरूद्ध धारा 406, 411 भा0दं0सं0 के आरोप सिद्ध हो रहे हैं। अपर मुख्य मजिस्ट्रेट स्तर के न्यायिक अधिकारी से ऐसे निर्णय की अपेक्षा नहीं की जा सकती। विद्वान मजिस्ट्रेट से निर्णय लेखन में सुधार अपेक्षित है।"

17. The application is accordingly **allowed.**

(2021)01ILR A414
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.10.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application u/s 482 No. 15206 of 2020

Rahul Kumar Gaur @ Rahul Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Jitendra Singh, Sri Ashish Srivastava

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

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 154 - Second FIR - Not Prohibited - two FIR for same incident permissible if - informants are different, accused persons are different, version of both the FIR's is different - rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible - Prohibition only when - further complaint by the same complainant against the same accused subsequent to the registration of the case under the Code (Para 12, 13)

Applicant father lodged F.I.R. against the son of opposite party no. 2 u/s 302 IPC for causing death of his son Naresh Chand (Applicant's brother) - I.O. submitted charge sheet against son of opposite party no. 2 - court took cognizance & framed charges - opposite party no.2 filed application u/s 156 (3) Cr.P.C. alleging applicant killed his own brother Naresh Chand - Magistrate directed for registration of F.I.R. - I.O. submitted final report - opposite party no.2 filed protest petition, on which summoning order passed against applicant - Summoning order challenged inter alia on ground - FIR already lodged by applicants with respect to the incident of murder of Naresh Chand, therefore second FIR at the instance of opposite party no.2 with respect to the same incident was not maintainable - *Held* - Second FIR is a counter FIR and is capable of taking note of and tried on merits as per law - second FIR was not filed by the same person, who had filed the first FIR; it was filed as a counter complaint; accused persons and allegations different - No illegality in summoning order (Para 3, 4, 8, 13)

Dismissed. (E-4)

List of Cases cited :-

1. Surendra Kaushik & ors. Vs St. of U.P. & ors. (2013) 5 SCC 148

2. P. Sreekumar Vs St. of Ker. AIR 2018 Supreme Court 1482

3. Sonu Gupta Vs Deepak Gupta (2015) 3 SCC 424

4. Harshendra Kumar Vs Rebatilata Koley & ors. (2011) 3 SCC 351

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

1. Heard Sri Jitendra Singh, learned counsel for the applicant, learned A.G.A. for the State and perused the material available on record.

2. The present application under Section 482 Cr.P.C. has been filed by the applicant for quashing the order dated 1.2.2020 passed by the Additional Sessions Judge, Court No. 11, Aligarh passed in Criminal Revision No. 200 of 2018 (Rahul Sharma Vs. State of U.P. and another) and the summoning order dated 19.9.2016 under Sections 302/120B IPC as well as the proceedings of Complaint Case No. 194/12 of 2015, New No. 16705 of 2016, (Dharmveer Vs. Rahul and others) pending before the Chief Judicial Magistrate, Aligarh, District Aligarh.

3. Brief facts of the case as per the petition are that on 19.10.2013 the applicant and his brother, Naresh Chand were coming to home on Motor Cycle. They were assaulted by the son of opposite party no.2 and his grandsons, causing injury to them due to which Naresh Chand died. The applicant's father lodged an F.I.R. on 20.10.2013 registered as Case Crime No. 1333 of 2013 under Sections 302, 120B IPC, Police Station Kwarsi, District Aligarh. The investigating officer submitted the charge sheet against the son of opposite party no.2 and his granddaughter on 9.1.2014 where upon Additional Session Judge, Court No.9, Aligarh took cognizance and charges were framed on 16.5.2015.

4. The opposite party no.2/complainant filed an application No. 684/11/2013 (Dharmveer Vs. Rahul Sharma and others) under Section 156 (3) Cr.P.C. making allegations that the applicant with two other persons had killed his own brother Naresh Chand and falsely implicated the son of opposite party no.2, and her granddaughter. The Chief Judicial Magistrate directed for registration of the F.I.R. vide order dated 25.1.2014 and in pursuance thereof F.I.R. in Case Crime No. 1333A/2013 under Sections 302/120B IPC, P.S. Kwarsi, District Aligarh was lodged on 31.1.2014. The Investigating Officer submitted final report dated 12.10.2014 against which the Complainant/opposite party no.2 filed a protest petition, registered as Case No. 194/12/2015, New No. 16705 of 2016, (Dharmveer Vs. Rahul and others), on which summoning order dated 19.9.2016 was passed against the applicant. The Criminal Revision No. 200 of 2016 (Sri Rahul Sharma Vs. State of U.P. and another) filed against the summoning order was rejected by the learned Additional District and Sessions Judge, Court No.11, Aligarh.

5. Learned counsel for the applicant submits that the summoning order is bad inasmuch as the Magistrate has not weighed the evidence and has passed the order without due application of judicial mind. The second FIR was lodged as a

counter blast to the FIR lodged by the applicant's father. His further submission is that the allegations in the complaint are false and concocted story has been set up. In fact the son and grand daughter of the complainant committed murder of Naresh Chand and there was no motive for the applicant to commit murder of Naresh Chand. His further submission is that as the FIR in case Crime No. 1333 of 2013 under Sections 302, 120B IPC had already been lodged by the present applicants with respect to the incident of murder of Naresh Chand, the FIR/protest-treated as complaint case filed by the complainant opposite party no.2 herein was not maintainable and the Magistrate ought not to have taken cognizance thereon and ought not to have passed order of summoning. He submits that the summoning order passed by the Magistrate deserves to be quashed along with the order passed in revision.

6. Learned A.G.A. submits that the summoning order has been passed on consideration of the material before the Magistrate finding that the case for summoning of the accused on the basis of the said material was made out, prima facie. He further submits that the complaint could be filed notwithstanding the fact that the present applicant had lodged the FIR earlier in point of time. The complaint could not be said to be not maintainable. He submits that the summoning order and the order passed in revision are perfectly legal and justified and do not call for any interference by this Court in the exercise of jurisdiction under Section 482 Cr.P.C.

7. I have considered the submissions as advanced by learned counsel for the applicant, learned A.G.A. and perused the material brought on record.

8. The submission of the learned counsel for the applicant that once the FIR was lodged by the applicant with respect to the same incident in Case Crime No. 1333 of 2013 under Section 302 IPC, and the cognizance has been taken, the second FIR at the instance of opposite party no.2 with respect to the same incident was not maintainable, is legally not acceptable and deserves rejection.

9. In **Surendra Kaushik and others Vs. State of U.P. and others**, (2013) 5 SCC 148, the question was "whether after registration of FIR and commencement of the investigation, a second FIR relating to the same incident on the basis of a direction issued by the learned Magistrate under Section 156(3) of the Code, could be registered?", the Hon'ble Supreme Court held that it is quite luminous that the lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. The prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible. It is apt to reproduce paragraph Nos. 11 to 24 of Surendra Kaushik (supra) as under:-

"11. If the primary requirement is satisfied, an FIR is registered and the criminal law is set in motion and the officer-in-charge of the police station takes up the investigation. The question that has emerged for consideration in this case is whether after registration of the FIR and commencement of the investigation, a second FIR relating to the same incident on the basis of a direction issued by the learned Magistrate under Section 156(3) of the Code can be registered.

12. For apposite appreciation of the issue raised, it is necessitous to refer to certain authorities which would throw significant light under what circumstances entertainment of second FIR is prohibited. In Ram Lal Narang (supra), this Court was dealing with the facts and circumstances of a case where two FIRs were lodged and two charge- sheets were filed. The Bench took note of the fact that the conspiracy which was the subject-matter of the second case could not be said to be identical with the conspiracy which was the subject-matter of the first one and further the conspirators were different, although the conspiracy which was the subject-matter of the first case may, perhaps, be said to have turned out to be a part of the conspiracy which was the subject-matter of the second case. After adverting to the various facets, it has been opined that occasions may arise when a second investigation started independently of the first may disclose wide range of offences including those covered by the first investigation. Being of this view, the Court did not find any flaw in the investigation on the basis of the subsequent FIR.

13. In T.T. Antony (supra), it was canvassed on behalf of the accused that the registration of fresh information in respect of the very same incident as an FIR under Section 154 of the Code was not valid and, therefore, all steps taken pursuant thereto including investigation were illegal and liable to be quashed. The Bench, analyzing the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 170 of the Code, came to hold that only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 of the Code and, therefore, there can be no second FIR and consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. It was further observed that: (T.T.Antony case, SCC p. 197 para 20)

"20..... On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 [of the Code].

14. It is worth noting that in the said case, the two-Judge Bench explained and distinguished the dictum in Ram Lal Narang by opining that the Court had indicated that the real question was whether the two conspiracies were in truth and substance the same and held that the conspiracies in the two cases were not identical. It further proceeded to state that: (T.T. Antony case, SCC p 198, para 21)

"21..... the Court did not repel the contention of the appellant regarding the illegality of the second FIR and the investigation based thereon being vitiated, but on facts found that the two FIRs in truth and substance were different [since] the first was a smaller conspiracy and the second was a larger conspiracy as it turned out eventually.

15. Thereafter, the Bench explained thus: (T.T. Antony case, SCC p 198, para 21)

"21.....The 1973 Cr.O.C. specifically provides for further investigation after forwarding of report under sub-section (2) of Section 173 CrPC and forwarding of further report or reports to the Magistrate concerned under Section 173 (8) CrPC. It follows that if the gravamen of the charges in the two FIRs -- the first and the second -- is in truth and substance the same, registering the second FIR and making fresh investigation and forwarding report under Section 173 Cr.P.C. will be irregular and the court cannot take cognizance of the same."

16. In Upkar Singh a three-Judge Bench was addressing the issue pertaining to the correctness of law laid down in the case of T.T. Antony. The larger Bench took note of the fact that a complaint was lodged by the first respondent therein with Sikhera Police Station in Village Fahimpur Kalan at 10.00 a.m. on 20th May, 1995 making certain allegations against the appellant therein and some other persons. On the basis of the said complaint, the police had registered a crime under Sections 452 and 307 IPC. The appellant had lodged a complaint in regard to the very same incident against the respondents therein for having committed offences punishable under Sections 506 and 307 IPC as against him and his family members. As the said complaint was not entertained by the police concerned, he, under compelling circumstances, filed a petition under Section 156 (3) of the Code before the Judicial Magistrate, who having found a prima facie case, directed the concerned police station concerned to register a crime against the accused persons in the said complaint and to investigate the same and submit a report. On the basis of the said direction, Crime No. 48-A of 1995 was registered for offences punishable under Sections 147, 148, 149 and 307 IPC.

17. Challenging the direction of the Magistrate, a revision was preferred before the learned Sessions Judge who set aside the said direction. Being aggrieved by the order passed by the learned Sessions Judge, a Criminal Miscellaneous petition was filed before the High Court of Judicature at Allahabad and the High Court, following its earlier decision in Ram Mohan Garg v. State of U.P., dismissed the revision. While dealing with the issue, this Court referred to para 18 of T.T. Antony and noted how the same had been understood: (Upkar Singh case, SCC p. 296, para 11)

"11. This observation of the Supreme Court in the said case of T.T. Antony is understood by the learned counsel for the respondents as the Code prohibiting the filing of a second complaint arising from the same incident. It is on that basis and relying on the said judgment in T.T. Antony case an argument is addressed before us that once an FIR is registered on the complaint of one party a second FIR in the nature of a counter- case is not registrable and no investigation based on the said second complaint could be carried out."

18. After so observing, the Court held that the judgment in T.T. Antony really does not lay down such a proposition of law as has been understood by the learned counsel for the respondent therein. The Bench referred to the factual score of T.T. Antony and explained thus: (Upkar Singh case, SCC p. 297, para 16)

"16.....Having carefully gone through the above judgment, we do not think that this Court in T.T. Antony v. State of Kerla has precluded an aggrieved person from filing a counter-case as in the present case."

To arrive at such a conclusion, the Bench in Upkar Singh case referred to para 27 of the decision in T.T. Antony wherein it has been stated that: Upkar Singh case, SCC p. 297, para 16)

"16..... '27..... a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173 (2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 [of the Code] or under Articles 226/227 of the Constitution.' (T.T. Antony case, SCC p. 200)" (emphasis in original)

Thereafter, the three-Judge Bench ruled thus: (Upkar Singh case, SCC pp. 297-98, para 17)

"17.....In our opinion, this Court in that case only held that any further complaint by the same complainant or others against the same accused, subsequent to the registration of a case, is prohibited under the Code because an investigation in this regard would have already started and further complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence will be prohibited under Section 162 of the Code. This prohibition noticed by this Court, in our opinion, does not apply to counter-complaint by the accused in the first complaint or on his behalf alleging a different version of the said incident."

19. Be it noted, in the said verdict in Upkar Singh case, reference was made to Kari Choudhary v. Sita Devi wherein it has been opined that (Upkar Singh case, SCC p. 298, para 18)

"18.....'11..... there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried [out] under both of them by the same investigating agency. (Kari Choudhary case, SCC p. 717, para 11)"

"11. Reference was made to the pronouncement in State of Bihar v. J.A.C. Saldanha wherein it has been highlighted that the power of the Magistrate under Section 156 (3) of the Code to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out under Section 3 of the Police Act."

20. It is worth noting that the Court also dealt with the view expressed in

Ram Lal Narang and stated thus: (Upkar Singh case, SCC p. 299, para 22)

"22. A perusal of the judgment of this Court in Ram Lal Narang v. State (Delhi Admn.) also shows that even in cases where a prior complaint is already registered, a counter-complaint is permissible but it goes further and holds that even in cases where a first complaint is registered and investigation initiated, it is possible to file a further complaint by the same complainant based on the material gathered during the course of investigation. Of course, this larger proposition of law laid down in Ram Lal Narang case is not necessary to be relied on by us in the present case. Suffice it to say that the discussion in Ram Lal Narang case is in the same line as found in the judgments in Kari Choudhary and State of Bihar v. J.A.C. Saldanha. However, it must be noticed that in T.T. Antony case, Ram Lal Narang case was noticed but the Court did not express any opinion either way."

Explaining further, the Court in Upkar Singh case observed (in para 23) that if the law laid down by this Court in T.T. Antony is to be accepted to have held that a second complaint in regard to the same incident filed as a counter complaint is prohibited under the Code, such conclusion would lead to serious consequences inasmuch as the real accused can take the first opportunity to lodge a false complaint and get it registered by the jurisdictional police and then that would preclude the victim to lodge a complaint.

21. In Pandurang Chandrakant Mhatre the Court referred to T.T. Antony Ramesh Baburao Devaskar v. State of Maharashtra and Vikram v. State of Maharashtra and opined that the earliest information in regard to the commission of a cognizable offence is to be treated as the first information report and it sets the criminal law in motion and the investigation commences on that basis. Although the first information report is not expected to be an encyclopaedia of events, yet an information to the police in order to be first information report under Section 154(1) of the Code, must contain some essential and relevant details of the incident. A cryptic information about the commission of a cognizable offence irrespective of the nature and details of such information may not be treated as first information report. After so stating, the Bench posed the question whether the information regarding the incident therein entered into general diary given by PW-5 is the first information report within the meaning of Section 154 of the Code and, if so, it would be hit by Section 162 of the Code. It is worth noting that analyzing the facts, the Court opined that information given to the police to rush to the place of the incident to control the situation need not necessarily amount to an FIR.

22. In Babubhai this Court (in para 21), after surveying the earlier decisions, expressed the view that the court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is in the affirmative, the second FIR is liable to be quashed. However, in case the contrary is proved, where the version in the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible. In case the accused in the

first FIR comes forward with a different version or counterclaim in respect of the same incident, investigation on both the FIRs has to be conducted.

23. It is worth noting that in Babubhai case, the Court expressed the view that the High Court had correctly reached the conclusion that the second FIR was liable to be quashed as in both the FIRs, the allegations related to the same incident that had occurred at the same place in close proximity of time and, therefore, they were two parts of the same transaction.

24. From the aforesaid decisions, it is quite luminous that the lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made clear by the three-Judge Bench in Upkar Singh, the prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible."

10. In the case of **P. Sreekumar v. State of Kerla AIR 2018 Supreme Court 1482** the Hon'ble Supreme Court has held that there is no prohibition in law to file the second FIR and once it is filed, such FIR is capable of being taken note of and tried on merits in accordance with law. It was for the reasons interalia that the second FIR was not filed by the same person, who had filed the first FIR; it was filed as a counter complaint; the number of accused persons and the set of allegations were different.

11. It is apt to reproduce para Nos. 29 to 32 of **P. Sreekumar (Supra)** as under :-

"29) Their Lordships after examining all the previous case laws on the subject laid down the following proposition of law in the following words speaking through Justice N. Santosh Hegde:

"23. Be that as it may, if the law laid down by this Court in T.T. Antony case is to be accepted as holding that a second complaint in regard to the same incident filed as a counter-complaint is prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given hereinbelow i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently he will be deprived of his legitimate right to bring the real accused to book. This cannot be the purport of the Code.

24. We have already noticed that in T.T. Antony case this Court did not consider the legal right of an aggrieved person to file counterclaim, on the contrary from the observations found in the said

judgment it clearly indicates that filing a counter-complaint is permissible.

25. In the instant case, it is seen in regard to the incident which took place on 20-5-1995, the appellant and the first respondent herein have lodged separate complaints giving different versions but while the complaint of the respondent was registered by the police concerned, the complaint of the appellant was not so registered, hence on his prayer the learned Magistrate was justified in directing the police concerned to register a case and investigate the same and report back. In our opinion, both the learned Additional Sessions Judge and the High Court erred in coming to the conclusion that the same is hit by Section 161 or 162 of the Code which, in our considered opinion, has absolutely no bearing on the question involved. Section 161 or 162 of the Code does not refer to registration of a case, it only speaks of a statement to be recorded by the police in the course of the investigation and its evidentiary value."

30) The aforesaid principle was reiterated by this Court (Two Judge Bench) in Surendra Kaushik and others v. State of U.P. and others, (2013) 5 SCC 148: (AIR 2013 SC 3614) in the following words:

"24. From the aforesaid decisions, it is quite luminous that the lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter-FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made clear by the three-Judge Bench in Upkar Singh, the prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible."

31) Keeping the aforesaid principle of law in mind when we examine the facts of the case at hand, we find that the second FIR filed by the appellant against respondent No.3 though related to the same incident for which the first FIR was filed by respondent No.2 against the appellant, respondent No.3 and three Bank officials, yet the second FIR being in the nature of a counter-complaint against respondent No.3 was legally maintainable and could be entertained for being tried on its merits.

32) In other words, there is no prohibition in law to file the second FIR and once it is filed, such FIR is capable of being taken note of and tried on merits in accordance with law."

12. From the aforesaid judgments of Hon'ble the Supreme Court in **Surendra Kaushik** (Supra) and **P. Sreekumar** (Supra) it is very well settled that the lodgement of two FIRs is not prohibited in law. The concept of sameness has a restricted meaning which does not encompass filing of counter FIR relating to the same or connected cognizable offence. Rival versions in respect of the same incident do take different shapes and in that event lodgemet of two FIR's is permissible.

13. In the case at hand in the two FIR the accused persons are different. The incident is same but the informants are different. The version of both the FIR's is different. The two FIRs are on different set of facts. There is no legal bar as the concept of sameness is not attracted. The FIR is a counter FIR and is capable of taking note of and tried on merits as per law.

14. At the stage of summoning, the Magistrate is required to apply his judicial mind only with a view to find out whether a prima facie case has been made out for summoning the accused persons. At this stage, the Magistrate is not required to consider the defence version or materials or arguments nor is he required to evaluate the merits of the materials or evidence of the complainant, as has been laid down by Hon'ble the Supreme Court in the case of R.R. Kapur Vs. State of Panjab, reported in AIR 1960 SC 866 and State of Haryana Vs. Bhajan Lal, reported in 1992 SCC 426. The power under Section 482 Cr.P.C. is exercised by the High Court only in exceptional circumstances and only when a prima facie case is not made out against the accused persons. The disputed defence of the accused cannot be considered at this stage.

15. In "**Sonu Gupta versus Deepak Gupta',** reported in (2015) 3 SCC 424, the Hon'ble Supreme Court has held as under in paragraph 8:-

"8..... At the stage of cognizance and summoning the Magistrate is required to apply his judicial mind only with a view to take cognizance of the offence or in other words to find out whether a prima facie case is made out for summoning the accused persons. At this stage, the learned Magistrate is not required to consider the defence version or materials or arguments nor is he required to evaluate the merits of the materials or evidence of the complainant, because the Magistrate must not undertake the exercise to find out at this stage whether the materials would lead to conviction or not."

16. From the perusal of record and the summoning order it cannot be said that no cognizable offence is made out against the applicants on the basis of the material available before the Magistrate for summoning. The Magistrate was satisfied that a prima-facie case for summoning was made out and such satisfaction is based on the material on record. Learned counsel for the applicants could not demonstrate as to how the summoning order suffers from illegality or perversity or improper exercise or any case for summoning was not made out even prima facie.

17. The submission of learned counsel for the applicant that no such incident occurred and the applicant has been falsely implicated is a disputed question of fact which cannot be determined in these proceedings at this stage. It requires evidence and can be ascertained only during the trial. In Harshendra Kumar versus Rebatilata Koley & others (2011) 3 SCC 351, the Hon'ble Supreme Court has held that it is fairly well settled that while exercising inherent jurisdiction under Section 482 Cr.P.C. Or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or

embark upon an enquiry in respect of the accusations.

18. The order passed by the learned Magistrate is in conformity with the settled law. I do not find any illegality in the order under challenge. The prayer for quashing the summoning orders and further proceedings of the complaint case is refused.

19. This application under Section 482 Cr.P.C. is hereby dismissed.

20. No order as to costs.

(2021)01ILR A424
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application u/s 482 No. 37777 of 2019

Arvind Kumar & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ranjit Saxena

Counsel for the Opposite Parties:
A.G.A., Sri Daya Shanker Pandey

A. Criminal Law - Criminal Procedure Code (2 of 1974)- Section 482 - Quashing of charge-sheet - Offences u/Ss.323, 504, 506, 376, 377 of Indian Penal Code - Rape - allegation that the accused committed rape upon the victim forcibly against her wishes by false promise to marry her *Held* - High Court cannot embark upon the appreciation of evidence produced by the accused in his defence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings - if perusal of the F.I.R., material collected by the I.O. makes out a prima facie case against the accused - Charge-sheet not liable to be quashed (Para 26)

B.Criminal Law - Indian Penal Code (45 of 1860) – Section 376 - Rape - Consensual sex - False promise to marry Held - Accused did not rape victim forcefully but he established physical relations with her on the promise to marry her but against her wishes, which amounts to rape on the principal of cheating and deception of fact - offences of this nature involves social defamation - there is always a general tendency to suppress such events at the initial stage in order to avoid the lady being stigmatized - offence committed by the applicant is egregious in nature and speaks about depravity of the applicants character, who had no moral qualms in violating modesty and honour of a lady due to which she suffers mental agony & social death (Para 14)

Dismissed. (E-4)

List of Cases cited :-

1. Thermax Ltd. & ors. Vs K.M. Johny & ors. (2011) 11 SCC

2. Hem Raj Vs St. of Har. (2014) 4 SCC 395

3.Rishipal Singh Vs St. of U.P. (2014) 7 SCC 215

4. Subhash Kashinath Mahajan Vs The St. of Mah. & ors. (2018) 6 SCC 454

5. Dhruvaram Murlidhar Sonar Vs St. of Mah. & ors. 2019 (1) SCALE-6

6.M. Srikanth Vs St. of Telangana (2019) 10 SCC 373

7.Saleem Ahmed Vs. State & ors. 2019 (15)

8. Parminder Kaur & ors. VS St. of Pun. 2020 (2) ALD (Crl.) 417 (SC)/2020 MLJ (Crl.) 609;

9.Rakesh Kumar Yadav Vs St. of Chhatt.2020 (2) RCR (Crl.) 148

10. Sushil Sethi & ors. Vs St. of Arun. P. reported in 2020 (3) SCC 240

11.Santosh Prasad Vs The St. of Bihar (2020) 3 SCC 443

12.In Re: Assessment of the Criminal Justice System In Response to Sexual Offences reported in 2020 (1) ALT (Crl.) 1 (A.P.)

13. P. Gopalkrishnan Vs St. of Ker. & ors. reported in 2019 (16)SCALE 752/AIR 2020 SC1;

14.Ganga Prasad Mahto Vs St. of Bihar & ors. reported in 2019 (5) SCALE 305

15.Habiburrahaman Vs. St. of U.P. (Cri. Misc. Appl. U/S. 482 No. 1305 of 2018 dt 09.01.2019

16. Laxman Prasad & ors. Vs. St. of U.P. (Criminal Misc. Application U/S. 482 No. 10821 of 2010 dt 18.07.2019

17. Akhilesh Mishra & ors. Vs. St. of U.P. (Misc. Bench No. 29683 of 2017 decided on 16th November, 2018).

18. Mohd. Allauddin Khan Vs The St. of Bih. & ors. 2019 0 Supreme (SC) 454

19. Rajeev Kaurav Vs Balasahab & ors. 2020 0 Supreme (SC) 143

20. Anurag Soni Vs St. of Chhatt. (2019) 13 SCC 1

21. R.P. Kapur Vs St. of Pun. AIR 1960 SC 866

22. St.of Har. & ors. Vs Ch. Bhajan Lal & ors.1992 Supp.(1) SCC 335

23. St. of Bih. & anr. Vs P.P. Sharma & anr. 1992 Supp (1) SCC 222

24. Zandu Pharmaceuticals Works Ltd. & ors. Vs Mohammad Shariful Haque & anr. (2005) 1 SCC 122

25. M. N. Ojha Vs. Alok Kumar Srivastava; (2009) 9 SCC 682

26. Nallapareddy Sridhar Reddy Vs The State of An. P. & ors. 2020 0 Supreme (SC) 45 And. P.

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. The present 482 Cr.P.C. application has been filed to quash the charge sheet no. 1/2019 dated 5th January, 2019 and Cognizance taking order dated 19th July, 2019 passed in Criminal Case No. 3374 of 2019 (State Vs. Arvind & Others), under Sections 323, 504, 506, 376, 377 and 420 I.P.C., Police Station-Surajpur, District-Gautam Budh Nagar, arising out of Case Crime No. 940 of 2018, under Sections 323, 504, 506, 376 and 377 I.P.C., Police Station-Surajpur, District-Gautam Budh Nagar, pending in the Court of Additional

Chief Judicial Magistrate, Gautam Budh Nagar. The applicants have further prayed for stay of the aforesaid criminal proceedings during the pendency of the present application.

2. Heard Mr. Ranjit Saxena, learned counsel for the applicants, Mr. Daya Shanker Pandey, learned counsel for opposite party no.2 and Mr. Pankaj Srivastava, learned A.G.A. for the State as well as perused the entire material available on record.

3 . On the matter being taken up, on 19th October, 2019, a Coordinate Bench of this Court passed following order:

"Heard Sri Ranjit Saxena, learned counsel for the applicants, Sri Attreya Dut Mishra, learned A.G.A. appearing for the State and perused the record.

his application under Section 482 Cr.P.C has been moved with a prayer to quash the charge-sheet no. 1 of 2019 dated 05.01.2019 as well as cognizance order dated 19.07.2019 filed in Crl. Case No.3374 of 2019 (State vs. Arvind and others) under sections 323, 504, 506, 376, 377, 420 IPC arising out of Case Crime No.0940 of 2018, Police Station Surajpur, District Gautambudh Nagar and also to quash the entire proceedings of the aforesaid case and also a prayer is made to stay the proceedings in this case till the disposal of this application.

It is argued by the learned counsel for the applicants that the applicants have been falsely implicated by the opposite party no. 2. She has falsely implicated the other persons also by blackmailing them as it is her habit. She has disclosed her age to be different as one place she has disclosed her age to be 33 years and at another place to be 27 years. She is a fraud lady. She had tried earlier to blackmail the applicants regarding which the applicants had lodged FIR through an application under section 156(3) Cr.PC, copy of which is at pages 44-47 of the paper book. She had also refused herself to be medically examined which is evident from the report of Samudaik/Prarthamik Swasth Kendra, Gautambudh Nagar, copy of which is annexed at page-124 of the paper book. These aspects have not been taken into consideration by the Investigating Officer of this case and has filed charge-sheet in a routine manner, which is nothing but an abuse of the process of the Court. He has relied upon the judgments of Supreme Court rendered in Dhruvaram MurlidharSonar vs. State of Maharasthra and others, MANU/SC/1518/2018, Subhash Kashinath Mahajan vs. State of Maharashra and others, MANU/SC/0275/2018 and Hem Raj vs. State of Haryana, MANU/SC/0016/2014.

Learned counsel for the applicant has also argued that the accused-applicant no. 1 is suffering from kidney ailment and is on dialysis which is being done thrice in a week.

Learned A.G.A. has vehemently opposed the prayer for quashing the proceedings and has brought to the notice of the Court that in the statement of the victim recorded under section 164 Cr.PC. which is annexed at page-128, she has clearly supported the prosecution version by saying that she had met the applicant no.1 about 2 1/2 years ago at Sector 12, Noida for the purposes of getting job and during this period both of them developed

nearness to each other and the accused had promised that he would marry her and under that promise, he continued to establish physical relationship with the victim against her wishes. Unnatural sex was also done with her. She used to work and all the money was taken by the applicant no. 1 by deceiving her. Subsequently, she came to know that he was a married man and keeping her in dark, she was being physically exploited.

I have gone through the FIR, in which the opposite party no. 2/victim has stated that she resides in Noida. About two years ago, the accused-applicant no. 1 had met her in Greater Noida in Designer Arch and during this period, he proposed to marry her and started coming to her flat. One day he had established physical relationship with her after assuring her that he would marry her and thereafter when she told the accused to marry her, he used to avoid and under false promise that he would marry her, he continued to commit rape upon her. He used to tell her that both his kidneys are dis-functional and if she leaves him, he would die and by saying this, he used to blackmail her and also used to commit unnatural sex. She did not know that he was already married. She used to give the entire salary to the accused-applicant no.1. Thereafter, when she became jobless in the year 2018, she brought some money from her father and opened a Cafe in Sector 62. When she asked for the money which was given to the accused to be returned, he refused and when she threatened that she would make complaint to the police in this regard, out of Rs.four lacs, which was given to him, about Rs.one lac and fifty thousand was given back to her through cheque. Rest of the money, she has taken from her father and thereafter the accused started running cafe with her, telling the people that they were husband and wife. He continued to have physical relationship with her despite resistance. She kept quiet but on 15.09.2018, when she called him on phone, she heard voice of some lady at the other end and when she reached the home of the accused-applicant no.1, she found that the accused-applicant no. 1 was a married person. Thereafter, the father of the applicant no. 1 had given her threat to kill her and also abused her. Thereafter, she called the police at 100 number and the police had picked up the accused-applicant no.1 and had also asked the opposite party no. 2 to show the place where she was raped in Noida. When she came to the police station Surajpur and gave an application, the accused-applicant was called there and then he fell on the feet of the opposite party no. 2 and told her that he would keep her properly and that he should be excused and feeling pity upon him, the accused was got released from there. When the opposite party no. 2 reached her home, the father of the accused-applicant no.1 Prem Pal Singh started abusing her and stated that he would not return her money nor his son would keep her and one of his friend Neeraj had also threatened to kill her. One Vipin and Kishan Kant had also abused and threatened that her life would be spoiled.

Matter requires consideration.

Learned A.G.A. has accepted notice on behalf of opposite party no. 1.

Issue notice to opposite party no. 2 returnable within four weeks.

Both the opposite parties shall file counter affidavits by the next date.

List this case on 06.12.2019.

Till then no coercive action shall be taken against the applicants in the aforesaid criminal case subject to the law laid down by Hon'ble Supreme Court in the case of Asian Resurfacing of Road Agency Pvt. Ltd. vs. Central Bureau of Investigation, 2018 SCC Online SC 310."

4. Before addressing the legal aspects of the case before this Court, it would be worthwhile to record the following relevant facts for deciding the present application under Section 482 Cr.P.C.:

On 17th September, 2018 at 04:34 p.m., opposite party no.2, namely, Vineeta Chauhan has lodged a first information report against five named accused persons including applicant nos. 1 and 2, namely, Arvind Kumar and Prempal Singh, who are allegedly son and father, under Sections 323, 504, 506, 376 and 377 I.P.C. at Police Station-Surajpur, District-Gautam Budh Nagar. In the first information report, it has been alleged that the informant/ opposite party no. 2/victim has stated that she resides in Noida. About two years ago, the accused-applicant no. 1 had met her in Greater Noida in Designer Arch and during this period, he proposed to marry her and started coming to her flat. One day, he had established physical relationship with the informant on the promise that he would marry her and thereafter when she told the accused/applicant no.1 to marry her, he used to avoid and under false promise that he would marry her, he continued to commit rape upon her. He used to tell her that both his kidneys are dis-functional and if she leaves him, he would die and by saying this, he used to blackmail her and also used to commit unnatural sex. She did not know that he was already married. She used to give the entire salary to the accused-applicant no.1. Thereafter, when she became jobless in the year 2018, she brought some money from her father and opened a Cafe in Sector- 62. When she asked for the money, which was given to the accused/applicant no.1 to be returned, he refused and when she threatened that she would make complaint to the Police in this regard, a sum of about Rs. one lac and fifty thousand out of Rs. Four lacs which was given to him, was given back to her through cheque. Rest of the money, she has taken from her father and thereafter the accused/applicant no.1 started running cafe with her, telling the people that they were husband and wife. He continued to have physical relationship with her despite resistance. She kept quiet but on 15.09.2018, when she called him on phone, she heard voice of some lady at the other end and when she reached the home of the accused-applicant no.1, she found that the accused-applicant no. 1 was a married person. Thereafter, the father of the applicant no. 1 had threatened to kill her and also abused her. Thereafter, she called the police at 100 number and the police had picked up the accused-applicant no.1 and had also asked the opposite party no. 2 to show the place where she was raped in Noida. When she came to the police station Surajpur and gave an application, the accused-applicant was called there and then he fell on the feet of the opposite party no. 2 and told her that he would keep her properly and that he should be excused and feeling pity upon him, the accused was released from there. When the opposite party no. 2 reached her home, the father of the accused-applicant no.1 Prem Pal Singh started abusing her and stated that he would not return her money nor his son would keep her and one of his friend Neeraj had

also threatened to kill her. One Vipin and Kishan Kant had also abused and threatened that her life would be ruined.

5. The said first information report lodged by opposite party no.2 has been challenged by all the five named accused persons including applicant nos. 1 and 2 by means of Criminal Misc. Writ Petition no. 27147 of 2018. The said writ petition has been disposed of by a Division Bench of this Court vide order dated 28th September, 2018, wherein the arrest of the accused persons have been stayed till filing of the Police report under Section 173 (2) Cr.P.C.

6. On lodging of the aforesaid first information report, the Investigating Officer has recorded statements of witnesses. After completing statutory investigation under Chapter XII Cr.P.C., the Police has submitted the charge-sheet against the applicants under Sections 323, 504, 506, 376, 377 and 420 I.P.C. On submission of the aforesaid charge-sheet, the Additional Chief Judicial Magistrate-II, Gautam Budh Nagar has taken cognizance vide order dated 19th July, 2019 and has directed registration of the case which has been registered as Criminal Case No. 3374 of 2019 (State Vs. Arvind & Others), under Sections 323, 504, 506, 376, 377 and 420 I.P.C., Police Station-Surajpur, District-Gautam Budh Nagar. Both the applicants have also been summoned by the court below vide order dated 19th July, 2019. It is against the aforesaid charge-sheet and taking cognizance order/summoning order that the present application under Section 482 Cr.P.C. has been filed.

7. Mr. Ranjit Saxena, learned counsel for the applicants has made following submissions on behalf of the applicants:

I. The entire criminal proceedings being Criminal Case No. 3374 of 2019 (State Vs. Arvind & Others), under Sections 323, 504, 506, 376, 377 and 420 I.P.C., Police Station-Surajpur, District-Gautam Budh Nagar, arising out of Case Crime No. 940 of 2018, under Sections 323, 504, 506, 376 and 377 I.P.C., Police Station-Surajpur, District-Gautam Budh Nagar, initiated against the applicants are an abuse of process of law.

II. No case under Section 376 I.P.C. is made out against the applicants as there is no medical examination report because the victim/opposite party no.2 has refused to get herself medically examined internally. It is settled legal position that medical examination report is the only evidence for initiating a trial against the accused persons, who are son and father in the present case, and hence, they cannot be jointly held guilty for an offence under Section 376 I.P.C.

III. Initially Opposite party no.2 is a sly, liar, cheater and fraud woman, as is evident from her three different date of births mentioned in her Pan Card as 25th July, 1978, Aadhar Card as 25th July, 1985 and in the present first information report as 1990. She is habitual to scold and blackmail people by threatening to implicate them in a false rape case. She earned money by blackmailing many people in the past. Initially, opposite party no.2 married one Mohd. Malik resident of Jafrabad Delhi. Thereafter opposite party no.2 divorced Mohd. Malik about 8 years ago. Thereafter she remained with one Vikki Pandit resident of Noida in living relationship. Opposite party no.2 met with applicant no.1 through Sudhir Chauhan and they became friends and started meeting each other. But after some time, opposite

party no.2 started asking for money from the applicant no.1 and when the applicant no.1 refused to give the same, then she started threatening him that if he does not give her money, she will implicate him in a false rape case. Thus, frightening the applicant, opposite party no.2 and her colleague, namely, Sudhir Chauhan took Rs. 2,95,000/- from applicant no.1. Fearing, neither applicant no.1 revealed the said blackmailing from his family nor his friends nor the Police. Thereafter opposite party no.2 again blackmailed applicant no.1 and demanded Rs. 10 lacs. Applicant no.1 gave Rs. 4 lacs to opposite party no.2 only through her colleagues, namely, Hussain Abbas and Sudhir Chauhan due to which opposite party no.2 along with her colleagues have beaten applicant no.1 by threatening to implicate him in a false rape case. Ultimately, applicant no.1 got fed up from such blackmailing and has made an application before the Station House Officer, Police Station-Surajpur, District-Gautambudh Nagar on 16th September, 2018 for lodging of the first information report. When the Police has not considered the same, applicant no.1 has also lodged first information report on 26th September, 2018 against opposite party no.2, Hussain Abbas and Sudhir Chauhan through an application under Section 156 (3) Cr.P.C., which has been registered as Case Crime No. 0981 of 2018, under Sections 323, 384, 386, 389, 504, 506 and 507 I.P.C., Police Station-Surajpur, District-Gautam Budh Nagar.

IV. Learned counsel for the applicants submits that the criminal case initiated by opposite party no.2 against the applicants is a case of counter blast to the criminal case initiated by applicant no.1 against opposite party no.2 and her two colleagues, as he has made an application before the Court below as well as before the Station House Officer of the concerned Police Station on 16th September, 2018, whereas Opposite party no.2 has lodged first information report against the applicants on 17th September, 2018.

V. Learned counsel for the applicants also submits that the allegations of opposite party no.2 that by concealing that applicant no.1 was already married, applicant no.1 has established physical relationship on the promise to marry her and he was living with opposite party no.2 as husband and wife and she gave her salary per month to applicant no.1, are totally false and incorrect. Applicant no.1 is already married with one Shashi Bala and is having one daughter, who was studying in B.Sc. Final year. Neither applicant no.1 promised opposite party no.2 to marry her nor lived with her as husband nor established any physical relationship with her. He has never taken any money from opposite party no.2.

VI. Learned counsel for the applicants next submits that neither the applicant no.1 has established physical relations with opposite party no.2 forcefully nor on the principle of deception of fact i.e. on promise to marry her due to which opposite party no.2 has refused to get herself medically examined internally. Applicant no.1 was also not living with opposite party no.2 in any relationship. Therefore no case under Section 376 I.P.C. is made out against the applicant no.1. The applicant is running a company in the name and style of Balaji Enterprises. Applicant no.1 is not involved in any criminal case. The kidney of applicant no.1 is not functioning and he used to get dialysis done twice a week in Max Hospital, Ghaziabad. Applicant no.2, who is a retired teacher, is

also not involved in the alleged offence in any manner. Being the father of applicant no.1, he has been falsely implicated in the present case.

VII. Learned counsel for the applicants lastly submits that for the alleged incident took place in the year 2018, the present first information report has been lodged on 17th September, 2019 i.e. after so many days for which no plausible explanation has been given by opposite no.2, which also makes the prosecution story doubtful.

VIII. 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 of law. On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicants that the proceedings of the above mentioned criminal case are liable to be quashed by this Court.

IX. In support of his case, the learned counsel for the applicants has placed reliance upon following judgments of the Apex Court:

(i) Thermax Ltd. & Ors. Vs. K.M. Johny & Ors. Reported in 2011 (11) SCC;

(ii) Hem Raj Vs. State of Haryana reported in 2014 (4) SCC 395;

(iii) Rishipal Singh Vs. State of U.P. reported in 2014 (7) SCC 215;

(iv) Subhash Kashinath Mahajan Vs. The State of Maharastra & Others reported in 2018 (6) SCC 454;

(v) Dhruvaram Murlidhar Sonar Vs. State of Maharashtra & Others reported in 2019 (1) SCALE-64;

(vi) M. Srikanth Vs. State of Telangana reported in 2019 (10) SCC 373;

(vii) Saleem Ahmed Vs. State & Others reproted in 2019 (15);

(viii) Parminder Kaur & Others VS. State of Punjab reported in 2020 (2) ALD (Crl.) 417 (SC)/2020 (3) MLJ (Crl.) 609;

(ix) Rakesh Kumar Yadav Vs. State of Chhattishgarh, reported in 2020 (2) RCR (Crl.) 148;

(x) Sushil Sethi & Ors. Vs. State of Arunachal Pradesh reported in 2020 (3) SCC 240;

Santosh Prasad Vs. The State of Bihar reported in 2020 (3) SCC 443;

(xi) In Re: Assessment of the Criminal Justice System In Response to Sexual Offences reported in 2020 (1) ALT (Crl.) 1 (A.P.);

(xii) P. Gopalkrishnan Vs. State of Keral & Others reported in 2019 (16)SCALE 752/AIR 2020 SC 1;

(xiii) Ganga Prasad Mahto Vs. State of Bihar & Others reported in 2019 (5) SCALE 305.

X. Learned counsel for the applicants has also placed reliance upon the following judgments of this Court:

(i) Habiburrahaman Vs. State of U.P. (Criminal Misc. Application U/S. 482

No. 1305 of 2018 decided on 9th January, 2019);

(ii) Laxman Prasad & Ors. Vs. State of U.P. (Criminal Misc. Application U/S. 482 No. 10821 of 2010 decided on 18th July, 2019); and

(iii) Akhilesh Mishra & Ors. Vs. State of U.P. (Misc. Bench No. 29683 of 2017 decided on 16th November, 2018).

8. Per contra, Mr. Pankaj Srivastava, learned A.G.A. for the State as well as Mr. D.S. Mishra, learned counsel for opposite party no.2 have opposed the prayer made by the learned counsel for the applicants.

9. I. Learned A.G.A. submits that applicant no.1 has committed rape upon the victim/opposite party no.2 forcibly against her wishes and thereafter the investigation was concluded and charge-sheet has been submitted against the applicants.

II. Learned A.G.A. further submits that the judgments relied upon by the learned counsel for the applicants in the cases of Parminder Kaur, Rakesh Kumar Yadav, Santosh Prasad, In Re: Assessment of the Criminal Justice System in Response to Sexual Offences, P. Gopalkrishnan, Ganga Prasad Mahto and S. Khusboo (Supras) are either in appeals or against conviction or in different footing having no reliance to the person, as such the same are not applicable in the facts of the present case.

III. Learned A.G.A. further states that the submission made by the learned counsel for the applicant that in view of the judgment of the Apex Court in the case of Dhruvaram Murlidhar Sonar vs. State of Maharashtra & Others reported in 2019 (1) SCALE-64, Page-111-121, this Hon'ble Court exercising its inherent power under Section 482 Cr.P.C. may quash the charge-sheet in such a heinous crime is liable to be rejected, as the said judgment is not applicable in the facts of the present case. In the said case, the complainant has forcibly raped the victim but in the present case the applicant no.1/accused raped the victim/informant not forcibly but against her wishes by promising to marry her.

IV. Learned A.G.A. further states that the judgment relied upon by the learned counsel for the applicant in the case of Pramod Surya Bhan Pawar Vs. The State of Maharashtra will also not be applicable in the facts of the present case because in the aforesaid case the accused and the victim lived in relation upto 12 year w.e.f. 2004 to 2016. They knew each other since 1998 and were intimated since 2004. Further the judgment relied upon by the learned counsel for the applicants in the case of Ahmad Ali Quaraishi & Others Vs. State of U.P. & Others is also not applicable in the facts of the present case. In the said case the Apex Court has quashed the charge-sheet because civil dispute was going on between the parties.

V. Lastly, the learned A.G.A. states that this High Court may not quash the entire criminal proceedings under Section 482 Cr.P.C. for which he has relied upon the judgment of the Apex Court in the case of **Mohd. Allauddin Khan Vs. The State of Bihar & Others** reported in 2019 0 Supreme (SC) 454, wherin the Apex Court has held that the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 Cr.P.C. because whether there are contradictions or/and inconsistencies in the statements of the witnesses is an essential issue relating

to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. However, in the present case the said state is yet to come.

VI. Learned A.G.A. has further relied upon the judgment of the Apex Court in the case of **Rajeev Kaurav Vs. Balasahab & Others** reported in 2020 0 Supreme (SC) 143, wherein the Apex Court has held that it is no more res integra that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence/offences alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any law or Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings. It is clear from the law laid down by this Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.

VII. The learned A.G.A. further relied upon the judgments of this Court in the cases of V.K. Rai & Another Vs. State & Another passed in Application U/S 482 No. 3707 2004, decided on 29th April, 2019 and Sri Rudra Prakash Tiwari @ Raju Tiwari & Another Vs. State of U.P. & Another passed in Application U/S 482 No. 12608 of 2020 decided on 6th October, 2020.

VIII. On the cumulative strength of the aforesaid submissions, learned A.G.A. states that this Court may not exercise its inherent power under Section 482 Cr.P.C. in the present case, and hence the present application is liable to be rejected.

10. I. Mr. D.S. Pandey, learned counsel for opposite party no.2 submits that the submission made by the learned counsel for the applicants that the criminal proceedings initiated by opposite party no.2 against the applicants is a case of counter blast to the criminal proceedings initiated by applicant no.1 against opposite party no.2 have no legs to stand on the ground that opposite party no.2 has lodged the first information report on **17th September, 2018 at 04:34 p.m,** whereas applicant no.1 has lodged first information report against opposite party no.2 along with her two alleged colleagues on **25th September, 2018 at 22:31 p.m.** under order of the Additional Chief Judicial Magistrate-II, Gautam Budh Nagar dated **20th September, 2018** in an application under Section 156 (3) Cr.P.C. Apart from the above, the submission of the learned counsel for the applicants that for lodging of the first information report, he has made an application before the Station House Officer, Police Station-Surajpur, District-Gautambudh Nagar on 16th September, 2018, a copy of which has been enclosed at page nos. 52 to 54 of the paper book, has also no leg to stand, as the receipt of the speed post from which the said application has been sent is of dated 17th September, 2018. Learned counsel for opposite party no.2 applicant, therefore, submits that from the aforesaid it is clear that the criminal proceedings initiated by applicant no.1 against opposite party no.2 and her two colleagues are counter blast to the criminal

proceedings initiated by opposite party no.2 against the applicants.

II. Learned counsel for opposite party no.2 further submits that the Investigating Officer has investigated both the aforesaid cases, but he has submitted the charge-sheet against the applicants in the criminal case which has been initiated by opposite party no.2, whereas the Investigating Officer has submitted final report in the criminal case which has been initiated by applicant no.1 against opposite party no.2 and her two colleagues. Learned counsel for opposite party no.2, therefore, submits that from the aforesaid, it is clear that the allegations made by applicant no.1 against opposite party no.2 and her two colleagues have been found to be fake and false, whereas the allegations made by opposite party no.2 against the applicants have been found to be correct and genuine.

III. Learned counsel for opposite party no.2 further submits that the submission of the learned counsel for the applicants that applicant no.1 was only a friend of opposite party no.2 and being married person, he has never lived with opposite party no.2 as her husband nor he has established any physical relations with her on the promise to marry her, is also liable to be rejected. Initially, applicant no.1 has concealed from opposite party no.2 that he is already married having one daughter. By concealing the said fact, he lived with her as husband and established physical relations with her on the promise to marry her, which is a case of rape as the same has committed against her wishes by cheating and deception, which makes out an offence under Section 376 I.P.C. against him. As soon as opposite party no.2 came to know that applicant no.1 was already married, she used to exert pressure upon him to marry with her but he again and again pretended and avoided and ultimately, opposite party no.2 was bound to lodge first information report.

IV. Learned counsel for opposite party no.2 further states that though opposite party no.2 has refused to get herself examined internally but from the medical examination report of external part of opposite party no.2, it is clear that physical relation has been established between opposite party no.2 and applicant no.1 as husband and wife and the same has been continued for more than two years as she has believed that applicant no.1 would marry her. On believing applicant no.1, opposite party no.2 was giving her salary to applicant no.1 for performing his business of cybercafe in which they spent sometimes and everybody knew that they were husband and wife.

V. Learned counsel for opposite party no.2 further states that it is heinous offence, as applicant no.1 has raped her on the promise to marry but against her wishes. On asking of opposite party no.2 as to when, he would perform marriage with her, he always avoided saying that at the earliest he would marry her but he has not solemnized marriage with her and also misbehaved and threatened her. Opposite party no.2 being innocent lady has believed the false promise of applicant no.1 and started living with him as his wife but she did not know that applicant no.1 was cheating and committing rape behind the false promise of marriage. It is not a case of living relation but it is case of cheating and deception by establishing physical relation with the victim on the promise to marry her but against her wishes. Since applicant no.1 has established physical relations with opposite party no.2 since long on the

promise to marry her but against her wishes, case of rape i.e. offence under Section 376 I.P.C. is made out against the applicants.

VI. In view of the aforesaid submissions, the learned counsel for opposite party no.2, thus, submits that the present application under Section 482 Cr.P.C. is liable to be rejected.

11. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

12. The submission made by the learned counsel for the applicants that neither applicant no.1 has committed rape upon the informant nor he has established any physical relations with her on promise to marry her or on deception that he is already married, he was only his friend, is liable to be rejected on the ground that the said issue cannot be examined at this stage because the trial has yet to come, in which documentary as well as oral evidence shall be led by the prosecution side as well as defense side and thereafter on the basis of the said evidence, the said issue can be examined and decided.

13. At this stage, as per the case of the prosecution, this Court comes on the issue as to whether case for the alleged offence under Section 376 I.P.C. is made out against the applicants or not. The Apex Court in the case of **Anurag Soni Vs. State of Chhattishgarh** reported in (2019) 13 SCC 1, has observed that if prosecution proves beyond reasonable doubt that consent of prosecutrix was obtained by accused on false promise to marry her, through knowing well from very beginning that he had no such intention, it cannot be treated as consent but amounts to cheating and consent given under "misconception of fact" within the meaning of Section 90 I.P.C. In paragraph nos. 14 to 19 the Apex Court has observed as follows:

"14. Considering the aforesaid facts and circumstances of the case and the evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused never intended to marry the prosecutrix; ***he gave false promises/promise to the prosecutrix to marry her and on such false promise he had a physical relation with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact as per Section 90 of the IPC and such a consent shall not excuse the accused from the charge of rape and offence under Section 375 of the IPC.***

15. Though, in Section 313 statement, the accused came up with a case that the prosecutrix and his family members were in knowledge that his marriage was already fixed with Priyanka Soni, even then, the prosecutrix and her family members continued to pressurise the accused to marry the prosecutrix, it is required to be noted that first of all the same is not proved by the accused. Even otherwise, considering the circumstances and evidence on record, referred to hereinabove, such a story is not believable. The prosecutrix, in the present case, was an educated girl studying in B. Pharmacy. Therefore, it is not believable that despite having knowledge that that appellant's marriage is fixed with another lady - Priyanka Soni, she and her family members

would continue to pressurise the accused to marry and the prosecutrix will give the consent for physical relation.

16. In the deposition, the prosecutrix specifically stated that initially she did not give her consent for physical relationship, however, on the appellant's promise that he would marry her and relying upon such promise, she consented for physical relationship with the appellant-accused. Even considering Section 114-A of the Indian Evidence Act, which has been inserted subsequently, there is a presumption and the court shall presume that she gave the consent for the physical relationship with the accused relying upon the promise by the accused that he will marry her. As observed hereinabove, from the very inception, the promise given by the accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of the accused to marry the prosecutrix as his marriage with Priyanka Soni was already fixed long back and, despite the same, he continued to give promise/false promise and alluded the prosecutrix to give her consent for the physical relationship.

17. Therefore, considering the aforesaid facts and circumstances of the case and considering the law laid down by this Court in the aforesaid decisions, we are of the opinion that both the Courts below have rightly held that the consent given by the prosecutrix was on misconception of fact and, therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under Section 375 of the IPC. Both the Courts below have rightly convicted the accused for the offence under Section 376 of the IPC.

18. Now, so far as the submission on behalf of the accused-appellant that the accused had marriage with Priyanka Soni on 10.06.2013 and even the prosecutrix has also married and, therefore, the accused may not be convicted is concerned, the same cannot be accepted. ***The prosecution has been successful by leading cogent evidence that from the very inspection the accused had no intention to marry the victim and that he had mala fide motives and had made false promise only to satisfy the lust. But for the false promise by the accused to marry the prosecutrix, the prosecutrix would not have given the consent to have the physical relationship. It was a clear case of cheating and deception.***

19. As observed hereinabove, the consent given by the prosecutrix was on misconception of fact. Such incidents are on increase now-a-days. Such offences are against the society. Rape is the most morally and physically reprehensible crime in a society, an assault on the body, mind and privacy of the victim. As observed by this Court in a catena of decisions, while a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, the rape tantamounts to a serious blow to the supreme honour of a woman, and offends both her esteem and dignity. ....."

14. The submission made by the learned counsel for the applicants that no case for the offence under Section 376 I.P.C. is made out against the applicants, as there is no medical evidence, which

supports the said offence, is also liable to be rejected on the ground that though applicant no.1 did not rape opposite party no.2 forcefully but he has established physical relations with her and lived as husband and wife on the promise to marry her but against her wishes, which amounts to rape on the principal of cheating and deception of fact. It is case of such heinous crime where the social ramification of such crimes are very dishonourable to the victim and she suffers social death. The offences of this nature which involves social defamation, there is always a general tendency to suppress such events at the initial stage in order to avoid the lady being stigmatized. The offence committed by the applicants is egregious in nature and it speaks about depravity of the applicants character, who had no moral qualms in violating modesty and honour of a lady due to which she suffers mental agony.

15. The submission made by the learned counsel for the applicants that there is delay in lodging of the first information report for which no plausible explanation has been given which makes the prosecution case doubtful, is also liable to be rejected on the ground that as per the prosecution case, applicant has concealed from opposite party no.2 that he was already married and by concealing that fact he lived with her as husband and wife and he has established physical relation with her on the promise to marry her but against her wishes. As soon as she knew that the applicant no.1 was already married, she exerted pressure upon him to marry her after taking divorce with her wife and when he denied to marry her, she has made an application before the Police Station concerned for lodging of the first information report and when her application has not been considered, she immediately moved an application under Section 156 (3) Cr.P.C.

16. The submission of the learned counsel for the applicants that the present criminal case initiated by opposite party no.2 against the applicants is a case of counter blast to the criminal case initiated by applicant no.1 against opposite party no.2 and her two colleagues bearing Case Crime No. 981 of 2018 dated 26th September, 2018 under Sections 323, 384, 386, 389, 504, 506 and 506 I.P.C. has only been made to be rejected by this Court on the ground that the first information report has been lodged by opposite party no.2 against the applicants on **17th September, 2018 at 1731 hours,** whereas the application has been made by the applicants on **20th September, 2018** under Section 156 (3) Cr.P.C. for lodging of the first information report against opposite party no.2 and her two colleagues, as a result whereof on the direction issued by the court below only on **26th September, 2018** first information report has been lodged against opposite party no.2 and her two colleagues. As a matter of fact, this plea has only been taken to build up a case of counter blast and nothing else.

17. Now, this Court comes on 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 charge-sheet and the proceedings at the stage when the Magistrate has merely issued process against the applicants and trial is to yet to come only on the submission made by the learned counsel for the applicants that present criminal case initiated by opposite party no.2 are not only malicious but also abuse of process of law. The aforesaid issue 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, and**

(v) **M. N. Ojha Vs. Alok Kumar Srivastava;** 2009 (9) SCC 682.

18. In the case of **R.P. Kapur (Supra),** the following has been observed by the Apex Court in paragraph 6:

"Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under s. 561 -A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code. In the present case the magistrate before whom the police report has been filed under s. 173 of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the .proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the a11egations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no ques- tion of appreciating evidence arises; it is a matter merely of looking at the complaint or the

First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under s. 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magis- trate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and' contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under s. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide: In Re: Shripad G. Chandavarkar AIR 1928 Bom 184, Jagat Ohandra Mozumdar v. Queen Empress ILR 26 Cal 786), Dr. Shanker Singh v. The State of Punjab 56 Pun LR 54 : (AIR 1954 Punj 193), Nripendra Bhusan Ray v. Govind Bandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. K. Sivarama Subrahmanya Ayyar ILR 47 Mad 722: (AIR 1925 Mad 39)."

19. In the case of **State of Haryana (Supra)**, the following has been observed by the Apex Court in paragraph 105:

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

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

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

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

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

20. In the case of **State of Bihar (Supra)**, the following has been observed by the Apex Court in paragraph 22. :-

"The question of mala fide exercise of power assumes significance only when the criminal prosecution is initiated on extraneous considerations and for an unauthorised purpose. There is no material whatsoever is this case to show that on the date when the FIR was lodged by R.K. Singh he was activated by bias or had any reason to act maliciously. The dominant purpose of registering the case against the respondents was to have an investigation done into the allegations contained in the FIR and in the event of there being sufficient material in support of the allegations to present the charge sheet before the court. There is no material to show that the dominant object of registering the case was the character assassination of the respondents or to harass and humiliate them. This Court in State of Bihar v J.A.C. Saldhana and Ors., [1980] 2 SCR 16 has held that when the information is lodged at the police station and an offence is registered, the mala fides of the informant would be of secondary importance. It is the material collected during the investigation which decides the fate of the accused person. This Court in State of Haryana and Ors. v. Ch. Bhajan Lal and Ors., J.T. 1990 (4) S.C. 650 permitted the State Government to hold investigation afresh against Ch. Bhajan Lal inspite of the fact the prosecution was lodged at the instance of Dharam Pal who was enimical towards Bhajan Lal."

21. In the case of **Zandu Pharmaceuticals Works Ltd. (Supra),** the following has been observed by the Apex Court in paragraphs nos. 8 to 12:

"8. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new

powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

9. In R. P. Kapur v. State of Punjab (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 e.g. want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face 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.

10. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is

evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process 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. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.

11. 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 this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) 335). A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows:

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

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

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. (4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code. (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the 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 Act concerned, providing efficacious redress for the grievance of the aggrieved party.

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

As noted above, 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. 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 being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage.*** *(See: Janata Dal v. H. S. Chowdhary (1992 (4) SCC 305), and Raghubir Saran (Dr.) v. State of Bihar (AIR 1964 SC 1). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi v. R. Prasanna Kumar (1990 Supp SCC 686), State of Bihar v. P. P. Sharma (AIR 1996 SC 309), Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995 (6) SCC 194), State of Kerala v. O. C. Kuttan (AIR 1999 SC 1044), State of U.P. v. O. P. Sharma (1996 (7) SCC 705), Rashmi Kumar v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) (AIR 1996 SC 2983) and Rajesh Bajaj v. State NCT of Delhi (1999 (3) SCC 259.*

12. The above position was recently highlighted in State of Karnataka v. M. Devendrappa and Another (2002 (3) SCC 89)."(emphasis added)

22. Thereafter, in the case of **M.N. Ojha Vs. Alok Kumar Srivastava,**

reported in 2009 (9) SCC 682 has made observations in paragraphs 25, 27, 28, 29 and 30 regarding the exercise of power under section 482 Cr.P.C. as well as the principles governing the exercise of such jurisdiction:-

"25. Had the learned SDJM applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself along with the complaint, surely he would have dismissed the complaint. He would have realized that the complaint was only a counter blast to the FIR lodged by the Bank against the complainant and others with regard to same transaction.

26. This Court in Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. [(1998)5 SCC 749 held:

"28. 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 of the accused. The Magistrate has to carefully scrutinise 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."

27. The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinize even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

28. The High Court committed a manifest error in disposing of the petition filed by the appellants under Section 482 of the Code without even adverting to the basic facts which were placed before it for its consideration.

29. It is true that the court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot go into the truth or otherwise of the allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending.

30. ***Interference by the High Court in exercise of its jurisdiction under Section 482 of Code of Criminal Procedure can only be where a clear case for such interference is made out. Frequent and uncalled for interference even at the preliminary stage by the High Court may result in causing obstruction in progress of the inquiry in a criminal case which may not be in the public interest.***

But at the same time the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to exercise the jurisdiction may equally result in injustice more particularly in cases where the Complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint."(emphasis added)

23. In the case of **Md. Allauddin Khan (Supra)**, which has been relied upon by the learned A.G.A. for the State, the Apex Court has held that the High Court had no jurisdiction to appreciate the evidence in proceedings under Section 482 Cr.P.C. The relevant paragraph nos. 15 to 17 are being quoted herein below:

"15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379read with Section 34 IPC, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

*17. I**n our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.") because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case."(Emphasis added)***

24. The Apex Court in its another judgment in the case of **Nallapareddy Sridhar Reddy Vs. The State of Andhra Pradesh & Ors.** reported in 2020 0 Supreme (SC) 45, dealing with a case under Sections 406 and 420 I.P.C. has observed that the Court does not have to delve deep into probative value of evidence regarding the charge. It has only to see if a prima facie case has been made out. Veracity of deposition/material is a matter of trial and not required to be examined while framing charge. The Apex Court further observed that the veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The Apex Court in paragraph nos. 21, 22 and 24 has observed as follows:

"21 The appellant has relied upon a two-judge Bench decision of this Court in Onkar Nath Mishra v The State, (2008) 2 SCC 561 to substantiate the point that the ingredients of Sections 406 and 420 of the IPC have not been established. This Court while dealing with the nature of evaluation by a court at the stage of framing of charge, held thus:

"11. ***It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence.*** *At that stage, the court is not expected to go deep into the probative value of the material on record.* ***What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out.*** *At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence." (Emphasis supplied)*

22 In the present case, the High Court while directing the framing the additional charges has evaluated the material and evidence brought on record after investigation and held:

"LW1 is the father of the de facto complainant, who states that his son in law i.e., the first accused promised that he would look after his daughter at United Kingdom (UK) and promised to provide Doctor job at UK and claimed Rs.5 lakhs for the said purpose and received the same and he took his daughter to the UK. He states that his son-in-law made him believe and received Rs.5 lakhs in the presence of elders. He states that he could not mention about the cheating done by his son-in- law, when he was examined earlier. LW13, who is an independent witness, also supports the version of LW1 and states that Rs.5 lakhs were received by A1 with a promise that he would secure doctor job to the complainant's daughter. He states that A1 cheated LW1, stating that he would provide job and received Rs.5 lakhs. LW14, also is an independent witness and he supported the version of LW13. He further states that A1 left his wife and child in India and went away after receiving Rs.5 lakhs.

Hence, from the above facts, stated by LWs. 13 and 14, prima facie, the version of LW1 that he gave Rs.5 lakhs to A1 on a promise that he would provide a job to his daughter and that A1 did not provide any job and cheated him, receives support from LWs. 13 and 14. When the amount is entrusted to A1, with a promise to provide a job and when he fails to provide the job and does not return the amount, it can be made out that A1 did not have any intention to provide job to his wife and that he utilised the amount for a purpose other than the purpose for which he collected the amount from LW1, which would suffice to attract the offences under Sections 406 and 420 IPC. ***Whether there is truth in the improved version of LW.1 and what have been the reasons for his lapse in not stating the same in his earlier statement, can be adjudicated at the time of trial.***

It is also evidence from the record that the additional charge sheet filed by the investigating officer, missed the

attention of the lower court due to which the additional charges could not be framed." (Emphasis supplied)

24 ***The veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The High Court has relied upon the materials on record and concluded that the ingredients of the offences under Sections 406 and 420 of the IPC are attracted. The High Court has spelt out the reasons that have necessitated the addition of the charge and hence, the impugned order does not warrant any interference."*** *(Emphasis added)*

25. The Apex Court in its latest judgment in the case of **Rajeev Kourav (Supra),** which has been heavily relied upon by the learned A.G.A., has clearly held that the conclusion of the High Court to quash the criminal proceedings on the basis of its assessment of the statements recorded under Section 161 Cr.P.C. is not permissible as the evidence of the accused cannot be looked into before the stage of trial. The relevant portions whereof read as follows:

*"****6. It is no more res integra that exercise of power under Section 482 CrPC to quash a criminal proceeding is only when an allegation made in the FIR or the charge sheet constitutes the ingredients of the offence/offences alleged. Interference by the High Court under Section 482 CrPC is to prevent the abuse of process of any Court or otherwise to secure the ends of justice. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings. It is clear from the law laid down by this Court that if a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.***

7. Mr.Shoeb Alam, learned counsel appearing for Respondent Nos.1 to 3 relied upon several judgments of this Court to submit that allegations only disclose a case of harassment meted out to the deceased. The ingredients of Section 306 and 107 IPC have not been made out. It is submitted that there is nothing on record to show that the Respondents have abetted the commission of suicide by the deceased. He further argued that abetment as defined under Section 107 IPC is instigation which is missing in the complaint made by the Appellant. He further argued that if the allegations against Respondent Nos.1 to 3 are not prima facie made out, there is no reason why they should face a criminal trial.

8. We do not agree with the submissions made on behalf of Respondent Nos.1 to 3. The conclusion of the High Court to quash the criminal proceedings is on the basis of its assessment of the statements recorded under Section 161 CrPC. Statements of witnesses recorded

under Section 161CrPC being wholly inadmissible in evidence cannot be taken into consideration by the Court, while adjudicating a petition filed under Section 482 CrPC1.

9. Moreover, the High Court was aware that one of the witnesses mentioned that the deceased informed him about the harassment meted out by Respondent Nos.1 to 3 which she was not able to bear and hence wanted to commit suicide. The High Court committed an error in quashing criminal proceedings by assessing the statements under Section 161 Cr. P.C.

10. ***We have not expressed any opinion on the merits of the matter. The High Court ought not to have quashed the proceedings at this stage, scuttling a full-fledged trial in which Respondent Nos.1 to 3 would have a fair opportunity to prove their innocence."****(Emphasis supplied)*

26. In view of the aforesaid, this Court finds that the submissions made by the applicants' 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. 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, 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 F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted 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 charge sheet or the proceedings against the applicants arising out of them as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing. All the judgments relied upon by the learned counsel for the applicants referred to above are clearly distinguishable in the facts of the present case.

27. The prayer for quashing the impugned charge-sheet as well as the entire proceedings of the aforesaid State case are refused, as I do not see any abuse of the court's process at this pre-trial stage.

28. The present application under Section 482 Cr.P.C. is, accordingly, rejected. There shall be no order as to costs.

29. Written submissions filed by the learned counsel for the applicants, learned counsel for opposite party no.2 and the learned A.G.A. for the State are taken on record.

30 Interim order, if any, stands discharged.

(2021)01ILR A448
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.11.2020

BEFORE

THE HON'BLE DEEPAK VERMA, J.

Application u/s 482 No. 41730 of 2018

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

Counsel for the Applicants:
Sri Alok Kumar Rai, Sri Manoj Kumar Rai

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

Criminal Law - Criminal Procedure Code (2 of 1974),- Section 482 - Inherent power - Quashing of criminal proceedings - Compromise - Indian Penal Code- Sections 323,506,498-A - matrimonial disputes - If parties want to move on in a matrimonial dispute on the basis of compromise, they may be allowed to compound the offences in terms of settlement - After compromise/settlement arrived at between the parties, the chance of ultimate conviction is bleak - no useful purpose is likely to be served by allowing a criminal prosecution to continue, as the same would be futile exercise and a sheer wastage of precious time of the Court - continuation of a criminal proceedings after compromise would cause oppression and prejudice to the parties concerned (Para 14, 15)

Commission of offence u/Ss.323,506,498-A of Penal Code - Matter related to matrimonial dispute - Parties to dispute arrived at amicable settlement - No useful purpose to be served by allowing criminal prosecution against accused – Summoning order against applicant quashed (Para 14 15 16)

Allowed. (E-4)

List of Cases cited :-

1. B.S. Joshi & ors. Vs St. of Har. & anr. (2003) 1 SCC (Cri) 848

2. St. Of M.P. Vs Laxmi Narayan & ors. AIR 2019 SC 1296

3. Parbatbhai Aahir @ Parbhatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. Criminal Appeal No.1723 of 2017

(Delivered by Hon'ble Deepak Verma, J.)

1. Heard learned counsel for the applicant and Sri Vijay Tripathi, learned counsel for opposite party No.2, learned AGA and perused the record.

2. The present 482 Cr.P.C. application has been filed with a prayer to quash the Complaint Case No.1172 of 2018 (Nisha Singh vs. Vidyadhar Singh and others), under Sections 323, 506, 498-A I.P.C. and 3/4 D.P. Act, as well as impugned summoning order dated 20.09.2018 passed by the Civil Judge (Senior Division), FTC/Additional Chief Judicial Magistrate, Sonbhadra.

3. It is germane to give actual facts regarding case. On 16.06.2017 opposite party No.2 filed complaint against the applicants and three other persons alleging therein that before marriage applicants came to parental house for solemnizing matrimonial ceremonies and that time demanded Rs.2 lacs dowry from her father and threatened them that if they did not fulfil the demand then applicant No.1 will not marriage her, thereafter some relatives intervened then applicant ready for marriage on condition that after marriage they would give Rs.2 lacs thereafter marriage was solemnize on 17.02.2016 and complainant went to her in-laws house, when father of complainant could not fulfil the demand of Rs.2 lacs they started torture and cruelty against her. Complainant told about cruelty of applicant to her father, complainant's father came and convinced them but they did not agree and continued threatening and tortured the complainant.

At last on 27.06.2016 they beaten and threatened her and thrown her out of house. Complainant filed complaint against the applicant and Magistrate after taking statement under Sections 200 and 202 Cr.P.C., summoned the applicants under Sections 323, 506, 498-A I.P.C. and Section ¾ of Dowry Prohibition Act on 20.09.2018. Applicant by way of aforesaid 482 Application challenged the complaint case as well as summoning order dated 20.09.2018 passed by the Civil Judge (Senior Division), FTC/Additional Chief Judicial Magistrate, Sonbhadra on the ground that entire allegations of case are baseless, false and concocted and no occurrence was taken place. No injury caused to opposite party No.2 but due to false implication and undue harassment, the opposite party No.2 taken false and fabricated stand in order to harass and humiliate the applicant. He further submitted that opposite party No.2 is a married lady and lived in a modern style and she dislike the living style of the applicants whereas the applicant No.1 always wants to keep opposite party No.2 with him and lead a happy marriage life with her with full honour and dignity but due to aggressive and non co-operative attitude of opposite party no.2, the Applicant No.1 filed Case No.274 of 2017 against opposite party No.2 under Section 9 of Hindu Marriage Act for restitution of conjugal rights before Principal Judge, Family Court, Ranchi which was decreed in favour of applicant No.1 on 15.09.2017. He further submitted that cause of action of the present case arose in District Ranchi, Jharkhand and in view of Hon'ble Apex Court law laid down in case of Geeta Mehrotra Vs. State of U.P., reported in 2012 (10) ADJ 464 (SC). The aforesaid complaint case is liable to be dismissed on the ground of jurisdiction and further impugned order as well as proceedings are arbitrary and mala fide and not supported by documentary evidence.

4. This Court on 20.11.2018 passed the following order:

"Heard learned counsel for the applicants and Miss. Poonam Singh Sengar, learned A.G.A. for the State.

This petition under Section 482, Cr.P.C. has been filed for quashing the proceedings of complaint Case No. 1172/2018, under sections 323, 506, 498A IPC & 3/4 Dowry Prohibition Act (Nisha Singh Vs. Vidyadhar Singh and others) as well as the impugned summoning order dated 20.09.2018 passed by Civil Judge (Senior Division), F.T.C./Additional Chief Judicial Magistrate, Sonbhadra.

It is contended by learned counsel for the applicants that the husband as well as entire family members of the husband-applicant no. 1 have been falsely implicated in the present case by the opposite party no.2 on the general allegations, which is against the well settled principles of law as laid down by Hon'ble Apex Court reported in 2012 (10) SCC 741 in the matter of Geeta Mehrotra and another Vs. State of Uttar Pradesh.

So far as the husband-applicant no. 1 namely, Vidyadhar Singh is concerned following orders is being passed:-

From the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicant. All the submission made at the bar relates to the disputed question of fact, which

cannot be adjudicated upon by this Court in exercise of power conferred under Section 482 Cr.P.C.. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283. The disputed defence of the accused cannot be considered at this stage. Moreover, the applicant have got a right of discharge under Section 239 or 227/228 or 245 Cr.P.C. as the case may be through a proper application for the said purpose and they are free to take all the submissions in the said discharge application before the Trial Court.

The prayer for quashing the proceedings is refused.

However, it is provided that if the applicant no. 1 appears and surrenders before the court below within 30 days from today and applies for bail, then the bail application of the applicant be considered and decided in view of the settled law laid by this Court in the case of Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290 as well as judgment passed by Hon'ble Apex Court reported in 2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P. For a period of 30 days from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicant. However, in case, the applicant does not appear before the Court below within the aforesaid period, coercive action shall be taken against him.

With the aforesaid directions, this application is finally disposed off so far as applicant no. 1 is concerned.

So far as the applicant nos. 2 and 3 are concerned the following orders is being passed:-

Issue notice to the opposite party no.2 returnable within four weeks. Steps be taken within a week.

Learned A.G.A. prays for and is granted four weeks time to file counter affidavit. The opposite party no. 2 may also file counter affidavit within the said period. As prayed by the learned counsel for the applicants two week thereafter is granted for filing rejoinder affidavit.

List after expiry of the aforesaid period before appropriate Court.

Till the next date of listing, no coercive action shall be taken against the applicant Nos. 2 and 3 in the aforesaid case."

5. Thereafter short counter affidavit has been filed by opposite party No.2 alleging therein after mutual consent both applicant No.1 (husband) and opposite party No.2 (wife) settled their disputes including the criminal case registered as Case Crime No.1172 of 2018 filed under Sections 323, 506, 498-A I.P.C. and Section ¾ of Dowry Prohibition Act. Both the parties came to settlement and prepared joint compromise petition under Section 13-B of Hindu Marriage Act, 1955 on 29.01.2019 filed in the Family Court, Sonbhadra with prayer to divorce decree be granted in terms of compromise, the same

has been filed with the short counter affidavit. He further submitted that opposite party No.2 has expressed willingness to respect and abide by the terms and conditions. He prays for quashing of proceedings of Complaint Case No.1172 of 2018, under Sections 323, 506, 498-A I.P.C. and Section ¾ of Dowry Prohibition Act (Nisha Singh Vs. Vidyadhar Singh and others).

6. This Court by order dated 21.09.2020 has passed the following order:

"Learned counsel for both sides are present.

It is being argued that parties have entered in compromise.

Let a compromise be filed before trial Court, where, it shall be verified and after its due verification, the same along with order of trial Court be filed by way of supplementary affidavit.

List before the appropriate Bench on 20.10.2020.

Interim order, if any, shall continue till the next date."

7. C.J.M., Sonebhadra in compliance of order dated 21.09.2020 submitted a report that which is on record. Appellant and his wife, opposite party No.2 (Nisha Singh) filed compromise application with affidavit and they were verified by their counsels, namely, Sri Ravi Prakash Tripathi and Sri T. P. Gupta.

8. Considering the facts and circumstances of the case there is no need to proceedings be further go on in terms of the above points.

9. Learned Additional Government Advocate as well as learned counsel appearing on behalf of opposite party No.2 do not dispute the aforesaid fact. Learned counsel for opposite party No. 2 has also submitted at the Bar that since the parties concerned have settled their dispute as mentioned above, therefore, opposite party No.2 has no grievance and has no objection in quashing the impugned criminal proceedings against the applicant.

10. After having heard the arguments of learned counsel for the parties, before proceedings further, it is apposite to give reference of some judgments of the Apex Court, wherein the Apex Court has laid down the guideline for quashing of criminal proceedings arising out of non-compoundable offences under Section 320 Cr.P.C. on the basis of compromise and amicable settlement of matrimonial cases between the parties concerned, which are as follows:-

*(i) The Apex Court in case of **B.S. Joshi and others Vs. State of Haryana and another** (2003) 1 SCC (Cri) 848 gave its approving nod to the existence and exercise of High Court's power to quash the criminal proceedings on compromise in suitable matrimonial cases. Paragraph nos. 14 and 15 of the said judgment are reproduced herein-below:-*

"14. There is no doubt that the object of introducing Chapter XX-A containing Section 498A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-

technical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XXA of Indian Penal Code.

15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code."

(ii) The Apex Court in case of ***State of Madhya Pradesh Vs. Laxmi Narayan and others,*** *AIR 2019 SC 1296, considering previous judgments and section 320 Cr.P.C. has laid down guideline for exercising the inherent power under Section 482 Cr.P.C. in case of settlement of dispute between the parties concerned. Paragraph no. 13 of the said judgment is reproduced herein-below:-*

"13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

(i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

(ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

(iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

(iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc., which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by

the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

(v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc."

11. Hon'ble Apex Court in the judgment while deciding Criminal Appeal No.1723 of 2017 in the case of Parbatbhai Aahir @ Parbhatbhai Bhimsinhbhai Karmur and others Vs. State of Gujarat and another has considered the decision in State of Tamil Nadu vs. R Vasanthi Stanley, the Court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"14... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score.

15..... A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system ....."

12. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

(i) 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;

(ii) 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.

(iii) 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;

(iv) 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;

(v) 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;

(vi) 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;

(vii) 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;

(viii) 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;

(ix) 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;

13. On going through the judgments referred herein above makes it very clear that even in the cases which involved non compoundable offences, their quashing has been approved by the Apex Court if the nature of the offence is such which does

not have grave and wider social ramifications and where the dispute is more or less confined between the litigating parties. The inherent jurisdiction of this Court may be suitably exercised if the parties inter-se have mutually decided to bury the hatchet and settle the matter amicably in between them in a criminal litigation emanating from matrimonial disputes, which are quintessentially of civil nature and other criminal litigations, which do not have grave and deleterious social fall-outs. The Court in the wider public interest may suitably exercise its power in appropriate case and terminate the pending proceedings in order to secure ends of justice or to prevent an abuse of the process of any court. Such positive exercise of the inherent jurisdiction can also find its vindication in a more pragmatic reason. When the complainant of a case or the victim of the offence itself expresses its resolve not to give evidence against the accused in the back drop of the compromise between the parties inter-se or if the fact of inter-se compromise in between the parties is apparent on the face of record, and they are still called upon the depose in the Court, they in all probability, go back on their words and resile from their previous statements, the truthfulness of which is best known only to themselves. They are in such circumstances very likely to eat their words and perjure themselves. The solemn proceedings of the Court often get reduced to a sham exercise and farce in such circumstances. The proceedings can hardly be taken to their logical culmination and in such circumstances, the prospect of the conviction gets lost.

14. The object of criminal law is primarily to visit the offender with certain consequences. He may be made to suffer punishment or by paying compensation to the victim, but the law at the same time also provides that it may not be necessary in every criminal offence to mete out punishment, particularly, if the parties concerned wants to bury the hatchet. If they want to move on in a matrimonial dispute on the basis of compromise, they may be allowed to compound the offences in terms of settlement.

15. After compromise/settlement arrived at between the parties in the present case, the chance of ultimate conviction is bleak and therefore, no useful purpose is likely to be served by allowing a criminal prosecution against the applicant to continue, as the same would be futile exercise and a sheer wastage of precious time of the Court. The continuation of a criminal proceedings after compromise would cause oppression and prejudice to the parties concerned.

16. Considering the facts and circumstances of the case in the light of dictum and guideline laid down by the Apex Court as mentioned above, this Court feels that this is a fit case, where this Court can exercise its inherent power to secure the end of justice. In view of above interest of justice would be met, if the prayer of parties is acceded to and the criminal proceedings and other litigation between the parties is brought to an end.

17. As a fallout and consequence of above discussions, Complaint Case No.1172 of 2018 (Nisha Singh vs. Vidyadhar Singh and others), under Sections 323, 506, 498-A I.P.C. and 3/4 D.P. Act, as well as impugned summoning order dated 20.09.2018 against the applicants are hereby quashed.

18. The instant application under Section 482 Cr.P.C. is **allowed** in terms of compromise as mentioned above.

(2021)01ILR A457
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2017

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE UMESH CHANDRA TRIPATHI, J.

Writ C No. 11910 of 2015

Shayamdhar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Govind Krishna, Sri Uday Singh, Sri Abhishek Krishna

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Constitution of Gram Panchayat - delimitation and separation of village - guidelines for re-organization/delimitation of gram panchayats - legislative functions and policy matters of the State are not to be interfered ordinarily by the Court. (Para - 8)

Petitioner is resident of village Bhavapur, gram panchayat Deeha, Tehsil Soraon, District Allahabad - engaged in cultivation - State Government issued the order setting forthwith the guidelines for re-organization/delimitation of gram panchayats - District Magistrate rejected representation of the petitioner with regard to delimitation and separation of village, Bhavapur from gram panchayat Deeha - ground - representation has been submitted after expiry of the period within which objection ought to have been filed. (Para - 2,3)

HELD:- Constitution of Gram Panchayat, decision to include a particular area in a particular local body etc., are all legislative functions and policy matters of the State. Interference therein is not ordinarily within the domain of Court unless it is shown that exercise is in violence of some statutory provisions or the constitutional provisions or is so patently arbitrary.(Para -7)

Writ Petition dismissed. (E-6)

List of Cases cited :-

1. St. of Punj. Vs. Tehal Singh & ors.. , JT (2002) 5 SC 40

2. U.O.I. & ors. Vs Kannadapara Sanghatanegala Okkuta & Kannadigara & ors. , (2002) 10 SCC 226

3. Collector & ors. Vs. P. Mangamma & ors. , (2003) 4 SCC 488

4. St. of Raj. & ors. vs. Lata Arun , (2002) 6 SCC 252

5. Premium Granites & anr. Vs St. of T.N. & ors. , (1994) 2 SCC 691.

6. H.P.Vs. High Court of H.P. , (2000) 10 SCC 646

7. J.R. Raghupathy & ors.. Vs St. of A.P. & ors.. AIR 1988 SC 1681

8. Federation of Railway Officers Association & ors. Vs U.O.I. , (2003) 4 SCC 289.

9. Samvidhan Bahali Andolan & anr. Vs U.O.I. & ors. , AIR 1998 All 210

10. Baldev Singh Vs St. of H.P. , AIR 1987 SC 1239

(Delivered by Hon'ble Sudhir Agarwal, J. & Hon'ble Umesh Chandra Tripathi, J.)

1. Heard Sri Govind Krishna, learned counsel for the petitioner and learned Standing Counsel for the State.

2. By means of this writ petition, order dated 10.12.2014 (annexure-8) passed by respondent no. 5-District Magistrate, Allahabad has been challenged. By the impugned order, District Magistrate has rejected representation of the petitioner with regard to delimitation and separation of village, Bhavapur from gram panchayat Deeha on the ground that representation has been submitted after expiry of the period within which objection ought to have been filed.

3. In brief facts of the case are that petitioner is resident of village Bhavapur, gram panchayat Deeha, Tehsil Soraon, District Allahabad and is engaged in cultivation. State Government issued the order dated 16.8.2014 setting forthwith the guidelines for re-organization/delimitation of gram panchayats. Thereafter, petitioner made an application dated 15.9.2014 before respondent no. 3 praying for separation of village Bhavapur from gram panchayat Deeha. Another application dated 20.10.2014 with same prayer was also submitted to respondent no. 3 but all in vain. Thereafter, petitioner has approached this Court by means of Writ C no. 60848 of 2014 which was decided by this Court vide order dated 25.11.2014 directing respondent no. 3 to consider the grievance of the petitioner within eight weeks from the date of presentation of such representation. Pursuant to the order passed by this Court, petitioner has again approached to respondent no. 3 by representation dated 3.12.2014. Consequently, vide office memo dated 10.12.2014, said representation of the petitioner was rejected by respondent no. 5 i.e. District Magistrate on the ground that it was submitted after expiry of period mentioned in executive order dated 16.8.2014.

4. Counsel for petitioner contended that respondents ought to have constituted separate village Bhavapur from gram panchayat Deeha.

5. The submission is thoroughly misconceived. The contention that a particular part should have been included or excluded is not within right of any resident of concerned area since the exercise, in effect, is in the nature of legislative function, and, unless it can be shown to be violative of any statutory provision, no interference is called for in exercise of judicial review under Article 226 of the Constitution.

6. Learned counsel for petitioner could not show as to what statutory provision has been violated by the State Government. We, therefore, do not find any reason to interfere.

7. Constitution of Gram Panchayat, decision to include a particular area in a particular local body etc., are all legislative functions and policy matters of the State. Interference therein is not ordinarily within the domain of Court unless it is shown that exercise is in violence of some statutory provisions or the constitutional provisions or is so patently arbitrary, as is evidence from bare perusal of record. (See: **State of Punjab Vs. Tehal Singh and Ors., JT 2002 (5) SC 40**).

8. The legislative functions and policy matters of the State are not to be interfered ordinarily by the Court. In **Union of India**

and others Vs. Kannadapara Sanghatanegala Okkuta & Kannadigara and others, 2002(10) SCC 226 it was held that it is not the function of the Court to decide location or situs of the headquarter since it is the function of Government and it was followed in **Collector and others Vs. P. Mangamma and others, 2003(4) SCC 488**. Similar is the view taken in **State of Rajasthan and Ors. vs. Lata Arun, 2002(6) SCC 252** and **Premium Granites and Another vs. State of Tamil Nadu and Others, 1994(2) SCC 691**.

9. In State of **Himachal Pradesh Vs. High Court of Himachal Pradesh, 2000(10) SCC 646** a direction was issued by the Court to construct road. It was seriously deprecated by Apex Court holding that it amounts to financial indiscipline since it is within the domain of Government and not Court. Similar is the view taken in **J.R. Raghupathy and Ors. Vs. State of A.P. and Ors. AIR 1988 SC 1681** and **Federation of Railway Officers Association and Ors. Vs. Union of India, 2003(4) SCC 289.**

10. In **Samvidhan Bahali Andolan and Anr. vs. Union of India (UOI) and Ors., AIR 1998 All 210** the Court said that creation of revenue districts etc. is the internal arrangement of State and a policy matter to be decided by the Government. It is not to be interfered by the Court unless it is shown that there is some violation of statutory provision.

11. No such violation of any statutory provision could be shown by learned counsel for petitioner in the case in hand. He, however, placed reliance on Apex Court's decision in **Baldev Singh Vs. State of Himanchal Pradesh AIR 1987 SC 1239**. Having gone through the aforesaid decision, in our view, the same has no application at all the the facts of this case and, therefore, does not help the petitioner in any manner.

12. In view of above, we do not find any merit in the writ petition.

13. Dismissed.

(2021)01ILR A459
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 13298 of 2020

Shipra Sristhi Apartment Owners Association (Regd.) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhinav Gaur, Sri Anoop Trivedi (Senior Adv.), Sri Vibhu Rai

Counsel for the Respondents:
C.S.C., Sri Ravi Prakash Pandey, Sri Rohan Gupta, Sri Tarun Agrawal, Sri Ravi Kant

(A) Civil law - Home-buyers - U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 - U.P. Apartment Act, 2010 - U.P. Industrial Area Development Act, 1976 - Object of the Act - To give primacy to the interest of the owners of apartments and protection of their rights against arbitrary and profit oriented actions of the promoters / builders in which a role of an arbiter has been assigned to the competent authority in the Development Authority.(Para -3)

Judicial notice taken by court - late large number of cases - on behalf of home-buyers - who after having spent their hard-earned life savings, buy an apartment, only to face hostile and arbitrary actions from the promoters/builders/Development Authorities - instead of resolving such disputes, they become mute spectators -there is an element of huge public interest involved in respect of each and every home-buyer whose legitimate grievance is to be addressed within the parameters of agreement and law. (Para - 4,7)

HELD:- A general mandamus is issued to the Competent Authorities under U.P. Apartment Act, 2010 & U.P. Industrial Area Development Act, 1976 or any other cognate enactment to decide the grievance of the home-buyers or their associations, positively within 3 months from the date the grievance is brought to their knowledge, by reasoned and speaking order under intimation to the aggrieved persons.The Competent Authority shall ensure that before any decision is taken, a right of audience is given to the parties concerned.(Para - 8,9)

Writ petition disposed of. (E-6)

List of Cases cited :-

M/s Designarch Infrastructure Pvt. Ltd. Vs Vice Chairman, Ghaziabad Development Authority, 2013 (9) ADJ 594

(Delivered by Hon'ble Pankaj Naqvi, J. & Hon'ble Piyush Agrawal, J.)

1. Heard Sri Anoop Trivedi, the learned Senior Counsel assisted by Sri Vibhu Rai for the petitioner, Sri Akhhileshwar Singh, learned standing counsel for the State and Sri Ravi Kant, the learned Senior Counsel assisted by Sri Rohan Gupta for the Development Authority.

2. The State of U.P. taking cognizance of the rise in population and demand for space specially for residential purposes enacted U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 (for short "the Act").

3. The object of the Act is to give primacy to the interest of the owners of apartments and protection of their rights against arbitrary and profit oriented actions of the promoters / builders in which a role of an arbiter has been assigned to the competent authority in the Development Authority as held in **M/s Designarch Infrastructure Pvt. Ltd. vs. Vice Chairman, Ghaziabad Development Authority, 2013 (9) ADJ 594.**

4. We take judicial notice that of late large number of cases are coming to this Court on behalf of home-buyers who after having spent their hard-earned life savings, buy an apartment, only to face hostile and arbitrary actions from the promoters/builders/Development Authorities and instead of resolving such disputes, they become mute spectators. This is the genesis of the present petition.

5. The petitioner, a registered association of home-buyers, has preferred this writ petition highlighting several irregularities in violation of their agreements on the part of the respondent no. 3 being the developer-co-promoter of a residential project *"Shipra Shritsti"*, owned and floated by M/s Shipra Estate Limited & Jay Krishan Estates Developers Pvt. Ltd which despite several representations to the competent authority/respondent no. 2, have gone unattended.

6. Sri Ravi Kant, the learned Senior Counsel assisted by Sri Rohan Gupta for the Development Authority and Sri

Akhileshwar Singh, the learned standing counsel for the State submit that it would be in the fitness of things and in the ends of justice that this petition is disposed of with the direction to the Competent Authority under the Act to take a decision on the grievance of the petitioner, after hearing the parties concerned, in accordance with law.

7. We appreciate the fair stand taken by all concerned. However, as indicated above, there is an element of huge public interest involved in respect of each and every home-buyer whose legitimate grievance is to be addressed within the parameters of agreement and law.

8. We deem appropriate to issue a general mandamus to the Competent Authorities to dispose of the grievance of the home-buyers within a stipulated period so as to obviate an individual home-buyer or a registered association, as the case may be, from approaching this Court time and again. The benefit of this order shall also be extended to the competent authority envisaged under U.P. Industrial Area Development Act, 1976 and other cognate enactments.

9. The writ petition is disposed of with the following directions:-

(i) A general mandamus is issued to the Competent Authorities under U.P. Apartment Act, 2010 & U.P. Industrial Area Development Act, 1976 or any other cognate enactment to decide the grievance of the home-buyers or their associations, positively within 3 months from the date the grievance is brought to their knowledge, by reasoned and speaking order under intimation to the aggrieved persons.

(ii) The Competent Authority shall ensure that before any decision is taken, a right of audience is given to the parties concerned.

(iii) The Competent Authority shall ensure that an officer not below the rank of a Gazetted Officer shall periodically visit the apartment / building at least once in 6 months at a prior notice to the registered association which shall be obliged to circulate it amongst its member so as to give them an opportunity to ventilate their grievance, if any. Any reported violation shall be immediately brought to the notice of the Authority concerned which shall immediately take remedial steps.

(iv) Any inaction on the part of Competent Authority shall be construed as serious dereliction of duty, warranting interference from the State Government.

10. The Registrar General is directed to communicate this order to the Principal Secretary (Urban Development), U.P. Government, Lucknow, with a further direction to circulate the same to all the Competent Authorities concerned for due compliance, forthwith.

(2021)01ILR A461
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 18632 of 2020

Kuldeep Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Anand Kumar Singh

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Only an aggrieved person can maintain a writ petition - must be material to show that the petitioner has suffered some injury or has been denied or deprived of a legal right - In the absence of the aforesaid, he cannot be said to be a "person aggrieved" so as to maintain the writ petition - in the absence of any injury to his legal right or legally protected interest, a complainant cannot claim status of a party to an adversarial litigation. (Para-6,7)

Petitioner filed complaint against the respondent - complaint was with regard to certain work carried out by the village panchayat - enquiry officer held that the entire work carried out by the village Pradhan was satisfactory - copy of the enquiry report forwarded to the petitioner - impugned orders passed by the District Panchayat Raj Officer - finding recorded in impugned orders - entire work was found to have been completed satisfactorily. (Para - 2,3)

HELD:- No good reason to interfere with the finding of the facts recorded by the respondent no.4 in the impugned orders. Another aspect that requires to be taken note of is that the petitioner is a complainant not a "person aggrieved" so as to maintain the writ petition.(Para - 4,5,6)

Writ Petition dismissed. (E-6)

List of Cases cited :-

Ravi Yashwant Bhoir Vs District Collector, Raigad & ors. , (2012) 4 SCC 407

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioner and the learned standing counsel for the State-respondents.

2. The petitioner filed a complaint against the respondent nos.5 and 6, who were Secretary and Gram Pradhan of Village Panchayat Karamchandpur, Block Kamalganj, District Farrukhabad. The complaint was with regard to certain work carried out by the village panchayat. An enquiry was made by the competent officer and the complaint was found to be without substance. The enquiry officer held that the entire work carried out by the village Pradhan was satisfactory. The copy of the enquiry report dated 19.11.2019 was also forwarded to the petitioner as appears from the subsequent order dated 13.03.2020. In the background of the aforesaid fact the impugned orders dated 13.03.2020 and 27.06.2020 have been passed by the District Panchayat Raj Officer, Farrukhabad.

3. In both the aforesaid impugned orders a finding has been recorded that in the enquiry the entire work was found to have been completed satisfactorily.

4. We do not find any good reason to interfere with the finding of the facts recorded by the respondent no.4 in the impugned orders.

5. Another aspect that requires to be taken note of is that the petitioner is a complainant.

6. It has been consistently held that only an aggrieved person can maintain a writ petition. In order to show that the petitioner is an aggrieved person, it must be demonstrated that he has a particular interest of his own beyond that of the

general public with regard to the subject matter of the writ petition. There must be material to show that the petitioner has suffered some injury or has been denied or deprived of a legal right. In the absence of the aforesaid, he cannot be said to be a "person aggrieved" so as to maintain the writ petition.

7. In this regard we may refer to the decision in **Ravi Yashwant Bhoir v District Collector, Raigad and others (2012) 4 SCC 407** wherein it was held that in the absence of any injury to his legal right or legally protected interest, a complainant cannot claim status of a party to an adversarial litigation.

8. For the aforestated reasons we are not inclined to entertain the present writ petition, and the same is accordingly dismissed.

(2021)01ILR A463
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ C No. 19615 of 2020

Manoj Kumar Tiwari ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dhirendra Singh, Sri Ajay Pratap Rao

Counsel for the Respondents:
A.S.G.I., Sri Dhananjay Awasthi

(A) Civil Law - Issuance of writ - A challenge to an evaluation undertaken by examining bodies, in any case, on a mere allegation that *"possibility of errors in calculation of marks cannot be ruled out..."* cannot be countenanced - must stand on sounder footing. (Para -5)

Petitioner seeks the issuance of a writ commanding the respondents to undertake a revaluation of his answer script submitted in respect of the subject- *"Community and Elementary Education"* - Petitioner participated in an entrance examination for granting admission to its D.EL.E.D. course - unsuccessful in obtaining admission - petitioned Court for reevaluation of the answer script in question - prior to approaching Court petitioner has not obtained a copy of answer script from the respondents - procedure that could have been adopted . (Para -2,3)

HELD:- An evaluation undertaken by examining bodies should not be viewed with suspicion unless it is prima facie established that it was not fair or transparent. Courts must necessarily be wary of entertaining such challenges unless it be well substantiated and found to rest on a strong pedestal which is likely to succeed.. There must be a demonstrable illegality in the evaluation undertaken and only in such rare and exceptional cases would the Court be legally justified in invoking its jurisdiction. The petitioner here has miserably failed to meet the tests as evolved.(Para - 5,8)

Writ Petition dismissed. (E-6)

List of Cases cited :-

1. C.B.S.E. Vs Aditya Bandhopadhya & ors. , (2011) 8 SCC 497

2. Ran Vijay Singh Vs St. of U.P. , (2018) 2 SCC 357

3. High Court of Tripura Vs Tirtha Sarathi Mukherjee , (2019) 16 SCC 663

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

1. Heard learned counsel for the petitioner, Sri Dhananjay Awasthi who appears for respondent Nos. 2 and 3 and Ms. Suman Jaiswal for the first respondent.

2. The petitioner seeks the issuance of a writ commanding the respondents to undertake a revaluation of his answer script submitted in respect of the subject- *"Community and Elementary Education"*. The issue itself arises in the backdrop of the petitioner having participated in an entrance examination conducted by the second respondent for granting admission to its D.EL.E.D. course. Being unsuccessful in obtaining admission to that course, he has petitioned this Court for reevaluation of the answer script in question.

3. It becomes pertinent to note that prior to approaching this Court the petitioner has not obtained a copy of the answer script from the respondents, a procedure that could have been adopted and is permissible in law in light of the law as declared by the Supreme Court in **Central Board of Secondary Education Vs. Aditya Bandhopadhya and others**1. The Court is thus left to consider the reliefs claimed in the petition solely on the basis of the following averments as made in paragraphs 9 to 12 of the writ petition which read thus:-

9. That the petitioner has solved the question paper to the best of his ability but when the statement of marks awarded to the petitioner in Sub Code No. 507 he was shocked.

10. The the petitioner apprehends that answer book of the subject Community and Elementary Education on (Subject Code No. 507) has not been properly checked/evaluated.

11. That possibility of errors in calculation of marks, cannot be ruled out, but unless any direction to ensure rechecking or scrutiny is issued the Institute may not take any step.

12. That the petitioner has good academic career, he awarded 199/500 in Purva Madhyama, 323/600 in Uttar Madhyama, 1199/2200 in Shashtri Pariksha and 590/900 in Acharya Pariksha and in result of D.EL.Ed. Course subject Nos. 501 to 514 except Code No. 507 he awarded good marks and he hopes that he will get more than 28 marks."

4. The practice of approaching this Court directly without obtaining copies of the answer scripts or seeking directions requiring examining bodies to produce answer books cannot but be deprecated in the strongest terms, discouraged and curbed. The conduct of examinations by educational authorities cannot be lightly interfered with unless the petition rests on a strong foundation and it is at least prima facie established that there has been an apparent and evident mistake in the process of evaluation. The onus and burden on this aspect lies solely on the petitioner and is one which must be discharged at the threshold. In order to establish a stark or glaring mistake in the process of evaluation it is imperative for the petitioner to establish from the record that an apparent illegality has been committed by the examiner. That cannot possibly be done unless a copy of the answer script has been obtained and the petitioner upon a perusal thereof finds a manifest error or illegality in the evaluation undertaken. The burden to prove that a fair evaluation was in fact undertaken cannot stand shifted or placed upon the examining body unless this primary fact is established by the petitioner. This essentially since the examining body

cannot be commanded to prove a fact in the negative.

5. An evaluation undertaken by examining bodies should not be viewed with suspicion unless it is prima facie established that it was not fair or transparent. Courts must necessarily be wary of entertaining such challenges unless it be well substantiated and found to rest on a strong pedestal which is likely to succeed. In any case a foray like the present cannot be entertained simply on the basis of a stated apprehension or the candidate's own assessment of performance in the examination. A challenge to an evaluation undertaken by examining bodies, in any case, on a mere allegation that *"possibility of errors in calculation of marks cannot be ruled out..."* cannot be countenanced. It must necessarily, for reasons aforenoted, stand on sounder footing.

6. More fundamentally the Court takes notes of the submission of Sri Awasthi who submits that no provision for reevaluation exists in terms of which a direction as claimed by the petitioner may be issued. While the absence of a provision for reevaluation may not completely denude the Court from examining a challenge to an evaluation process under Article 226 of the Constitution, its powers may be invoked in rare and exceptional cases and where the error or illegality is patent and manifest. The Court deems it apposite to notice the following conclusion as ultimately pronounced in **Ran Vijay Singh Vs. State of U.P**.2

30.2.If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

7. The above position was again explained in **High Court of Tripura v. Tirtha Sarathi Mukherjee**3 with the Supreme Court observing: -

20.The question however arises whether even if there is no legal right to demand re-valuation as of right could there arise circumstances which leave the Court in any doubt at all. A grave injustice may be occasioned to a writ applicant in certain circumstances. The case may arise where even though there is no provision for re-valuation it turns out that despite giving the correct answer no marks are awarded. No doubt this must be confined to a case where there is no dispute about the correctness of the answer. Further, if there is any doubt, the doubt should be resolved in favour of the examining body rather than in favour of the candidate. The wide power under Article 226 may continue to be available even though there is no provision for re-valuation in a situation where a candidate despite having giving correct answer and about which there cannot be even the slightest manner of doubt, he is treated as having given the wrong answer and consequently the candidate is found disentitled to any marks.

21.Should the second circumstance be demonstrated to be present before the writ court, can the writ court become helpless despite the vast reservoir of power which it possesses? It is one thing to say that the absence of provision for re-valuation will not enable the candidate to claim the right of evaluation as a matter of

right and another to say that in no circumstances whatsoever where there is no provision for re-valuation will the writ court exercise its undoubted constitutional powers? We reiterate that the situation can only be rare and exceptional."

8. As is evident from the above exposition of the law on the subject, there must be a demonstrable illegality in the evaluation undertaken and only in such rare and exceptional cases would the Court be legally justified in invoking its jurisdiction. The petitioner here has miserably failed to meet the tests as evolved and noticed above.

9. The writ petition consequently fails and is **dismissed**.

(2021)01ILR A466
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.12.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

U/S 482/378/407 No. 2088 of 2020

Manish Yadav ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Shailender Singh, Ankit Tiwari

Counsel for the Opp. Parties:
G.A.

(A) Code of Criminal Procedure, 1973 - Section 107, 111 - Practice & Procedure - Notice - - The material is the foundation of the exercise of power u/s 107 Cr.P.C. which is clearly lacking in the notice. The notice either should clearly disclose the material indicating the satisfaction of the Magistrate or the same should be accompanied by the Police report and other material being relied upon by the Magistrate at the time of issuing of notice, in this case both are missing. (Para 14)

Application Allowed. (E-8)

List of Cases cited :-

1. Madhu Limaye Vs Sub- Divisional Magistrate, Monghyr & ors., (1970) 3 SCC 746

2. Sheo Raj Yadav Vs St. of U.P. & 2 ors., Criminal Misc. No. 492 of 2010

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

1. Heard Sri Shailender Singh, learned counsel for the applicant as well as learned Additional Government Advocate for the State of U.P.

2. By means of present application u/s 482 Cr.P.C. the applicant has challenged the notice dated 28.07.2020, issued by Assistant Police Commissioner/Special Executive Magistrate, Lucknow purportedly issued under Section 107 Cr.P.C., directing the applicant to show cause as to why he should not be directed to execute personal bond for maintaining peace and for which purpose applicant has been directed to appear in the office of Assistant Police Commissioner, Lucknow on 24.08.2020.

3. Learned counsel for the applicant has assailed the impugned notice on the ground that no reasons have been disclosed in the said notice and from the show cause notice applicant is unable to tender any response to the same as there is no mention or whisper about the acts which may have caused breach of peace for which applicant is being held liable to.

4. A notice under Section 107 Cr.P.C. is not an empty formality but is issued with

purpose to elicit a response from a person to whom notice is issued. In absence of mentioning of any facts or any details in the show cause notice clearly disables the person to defend himself effectively or give any meaningful reply to the same. For ready reference, Section 107 Cr.P.C. is quoted hereinbelow :-

"107. Security for keeping the peace in other cases.- (1) *When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility and is of opinion that there is sufficient ground for proceedings, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties, for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.*

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act as aforesaid beyond such jurisdiction."

5. This provision is in aid of orderly society and seeks to nip in the bud conduct subversive of the peace and public tranquility. For this purpose, the Executive Magistrates are invested with large discretionary powers for the preservation of public peace and order. The justification for such provisions is claimed by the State to be in the function of the State which embraces not only the punishment of offenders but, as far as possible, the prevention of offences.

6. Section 107, is a preventive provision enabling the Executive Magistrate to prevent disturbance of the public tranquility and breach of peace, by requiring the persons who are likely to cause disturbance to public pace, to execute bond with or without surety for keeping peace. It should be mentioned that preventive action under Section 107 is not meant for substitution of punishment or for harassment or humiliation to the non-applicants who are summoned.

7. The foundation of jurisdiction for action under Section 107 is credible information from a police officer or a private person. Prior to the initiation of proceedings under Section 107, information must be given against a person from whom it is sought to take security. The condition precedent to taking security is that the Magistrate should be informed that some person is likely to commit a breach of the peace or disturb the public tranquility or to do some wrongful act that may probably occasion a breach of the peace or disturb the public tranquility. The law provides for a proceedings under Section 107, being started on information received, if in the opinion of the Magistrate there is sufficient ground for a proceeding. The Magistrate has to satisfy himself that a person is likely to commit a breach of the peace or disturb the public tranquility as mentioned in Section 107 before taking action.

8. Section 107, does not give a discretion to the Magistrate in the sense that he "may" require the person to show cause. But when he does exercise that discretion and does decide that he will issue

a notice to show cause, then that notice to show cause must be a notice which satisfies thee requirements of Section 111. Persons who are sought to be bound over to keep the peace should be given an opportunity to show cause and all the procedure laid down in Chapter VIII should be followed.

9. For taking action under Section 107, the manner provided is clearly laid down under Section 111. Issue of a preliminary notice to show cause apart from what is provided in Section 111 does not appear to be justified. Before the Magistrate two courses are open. If he is satisfied on report on information, he will immediately draw up a proceedings under Section 107, but if he is not satisfied, then he will not take any action and leave the matter as it is.

10. A show cause notice has solemn purpose to inform the person about the material for which response is being sought with regard to the acts which may constitute breach of peace for which he is being directed to file personal bond for maintaining peace. For a person who is not aware of the acts or incident for which he may or may not be culpable, it is impossible for him to reply to such a show cause notice.

11. In the case of **Madhu Limaye Vs. Sub-Divisional Magistrate, Monghyr and Others, 1970 (3) SCC 746**, it has been held by Hon'ble the Apex Court that the person proceeded against show cause notice must be informed of the allegations made against him, by giving him the substance of the information so that he may meet such allegations.

12. This Court **in Criminal Misc. Case No. 492 of 2010 - Sheo Raj Yadav Vs. State of U.P. and Two Others** (decided on 15.02.2010), while dealing with a similar issue, has observed as under

"The preliminary order contemplated under Section 111 Cr.P.C. is a judicial order and has to be prepared and drawn up cautiously and carefully in compliance with the provisions of Section 111 Cr.P.C. and the other must contain reasons of the Magistrate satisfaction. The substance of the information is the matter upon which he has to show cause. If substance of information is not given in the order under Section 111 Cr.P.C. the person against whom the order has been made will remain in confusion. The extent of information which must be set forth depends in each case upon the circumstances of that case. The basic object of preliminary order being to give the person proceeded against an opportunity to meet the allegation made against him as well as nature of the order proposed.

In the instant case, the impugned order without recording reasons show non-application of judicial mind. Notice under Section 111 Cr.P.C. containing vague apprehensions and allegations indicate pre-conceived notions. The impugned notice under challenge is void and proceedings against the petitioner are nullity and without jurisdiction as substance of information received as required is incomplete and ambiguous. Notice without substance of information vitiate the proceedings drawn on the basis of such vague notice are apparently abuse of process of Court. Failure to comply with the mandatory requirements of Section 111 Cr.P.C. vitiate the preliminary order and consequently the proceedings. The procedure followed by the learned Magistrate is not in consonance with the provisions of law."

13. Perusal of the impugned show cause notice clearly indicates that the same has been issued on printed proforma where proposed date of appearance and the name of the party has been written. It clearly indicates that such a notice has been issued without any application of mind and does not conform to the statutory provisions of Section 107 Cr.P.C..

14. The notice does not mention any act or omission on the part of the applicant which may have been considered by the Magistrate at the time of issuance of the notice. The material is the foundation of the exercise of power u/s 107 Cr.P.C. which is clearly lacking in the notice. The notice either should clearly disclose the material indicating the satisfaction of the Magistrate or the same should be accompanied by the Police report and other material being relied upon by the Magistrate at the time of issuing of notice. In the present case, both are missing and therefore, the impugned notice does not fulfill the prescription of law in this regard and therefore is liable to be set aside.

15. In the light of above, the impugned show cause notice dated 28.07.2020 (Annexure-1 to the affidavit filed in support of application), issued by Assistant Police Commissioner/Special Executive Magistrate, Lucknow is hereby set aside. It is open for the concerned Magistrate to pass fresh order in accordance with law, if he so chooses.

16. With the aforesaid directions, the application stands **allowed**.

(2021)01ILR A469
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2020

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Crl. Misc. Appl. u/s 482 No. 9961 of 2020
&
Crl. Misc. Appl. u/s 482 No. 31695 of 2019

Smt. Aruna Kori ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Vijay Singh Gour, Sri Tinku Singh

Counsel for the Opp. Parties:
A.G.A., Sri Birendra Singh

(A) Criminal Law- Indian Penal Code: Section 188 – Code of Criminal Procedure - Section 195 - The Representation of People Act, 1951: Section 123, 100 - Prosecution for offence under Section 188 IPC can only be initiated by a complaint filed by the concerned public servant and not by police report. (Para 12)

Section 195(a)(i) Cr.P.C. bars the court from taking cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless, there is a written complaint by the public servant concerned for contempt of his lawful order. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by person actuated by malice, ill-will or frivolity of disposition and to save time of the criminal courts being wasted by endless prosecutions. (Para 17)

The applicants are not charged for any other offence save Section 188 IPC. The complaint was not filed by the concerned Magistrate/Police Servant. The cognizance taken thereon, by the court below is void ab initio being in violation of the mandatory provision -Section 195 Cr.P.C. The

Representation of People Act and/or the Indian Penal Code do not provide for any punishment for corrupt practices. The remedy available to an aggrieved candidate is to get the election of the returned candidate declared void. (Para 22)

Application Allowed.(E-8)

List of Cases cited :-

1. M.S. Ahlawat Vs St.of Hary. & anr. AIR 2000 SC 168

2. Daulat Ram Vs. St. of Punj. AIR 1962 SC 1206

3. Govind Mehta Vs The St. of Bihar AIR 1971 SC 1708

4. Patel Laljibhai Somabhai Vs The St. of Guj. AIR 1971 SC 1935

5. Surjit Singh & ors. Vs Balbir Singh (1996) 3 SCC 533

6. St. of Punj. Vs Raj Singh & anr. (1998) 2 SCC 391

7. K. Vengadachalam Vs K.C. Palanisamy & ors. (2005) 7 SCC 352

8. Iqbal Singh Marwah & anr. Vs Meenakshi Marwah & anr. AIR 2005 SC 2119

9. St. of U.P. Vs Suresh Chandra Srivastava & ors. AIR 1984 SC 1108

10. Vraj Pal Singh Vs St. of U.P. & anr. Application No. 482 No. 13876 of 2015 (followed)

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

1. Heard Sri Vijay Singh Gour, learned counsel for the applicant, learned Additional Government Advocate ("AGA') for the State and Sri Birendra Singh, learned counsel for opposite party no.3/informant.

2. Learned counsel for the applicant is permitted to make necessary corrections during the course of the day.

3. On the consent of the parties, both the aforesaid applications arising from the same case crime number, based on the same allegations, are being heard and decided together.

4. The instant applications have been filed under Section 482 of Code of Criminal Procedure, 1973 (for short "Cr.P.C.') assailing the charge-sheet dated 03.03.2017 and the consequential cognizance order dated 19.05.2017, passed by the Judicial Magistrate - I, Kanpur Dehat arising from Case Crime No. 35 of 2017.

5. The facts, briefly stated, is that a first information report ("FIR') being Case Crime No.35 of 2017, under Section 188 I.P.C. and Section 123 (B) (2) of the Representation of People Act, 1951, Police Station - Rasulabad, District - Kanpur Dehat, came to be lodged by opposite party no.2, Pawan Kumar Rawat posted as F.S.T. Magistrate at Assembly Area No.205, Rasulabad, Kanpur Dehat during the Uttar Pradesh Assembly Election.

6. As per the prosecution case, allegation against the applicants is that being a candidate they conducted an election meeting/rally at a premises without taking permission from the concerned Magistrate/Authority. After investigation, the Investigating Officer ("IO') filed a charge-sheet on 03.03.2017, on which the competent court has taken cognizance.

7. It is urged that the court below has mechanically, without application of mind taken cognizance, whereas, the cognizance

is barred under Section 195(1)(i) Cr.P.C., wherein, it is categorically mandated that no court shall take cognizance of any offence punishable under Sections 172 to 188 (both inclusive) of Indian Penal Code, 1860 ("IPC'), except on a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. It is further urged that the expression "complaint' is defined under sub-section (d) of Section 2 of Cr.P.C., which means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include police report. It is further submitted that no offence has been provided under Section 123(B)(2) of the Representation of People Act, 1951, that has been made punishable under the Indian Penal Code or under the Representation of People Act. The remedy available to the aggrieved candidate is by filing election petition under Section 100 of the Representation of People Act and not by lodging first information report. In this backdrop, it is urged that the entire proceedings pursuant to the charge-sheet and cognizance taken thereon is bad in law.

8. In rebuttal, learned A.G.A. and learned counsel for the first informant have not disputed the facts, it is admitted that the opposite party no.2, the designated Magistrate appointed for the Assembly election had filed an F.I.R. alleging violation of prohibitory orders. It is also admitted that pursuant to the F.I.R., investigation was carried out and charge-sheet came to be filed by the I.O.

9. Rival submissions fall for consideration.

10. Section 195 Cr.P.C. provides for prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence. Sub-clause(1)(a) of Section 195 Cr.P.C. reads thus: (1) No court shall take cognizance-

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;"

11. Section 188 I.P.C. provides for disobedience to order duly promulgated by public servant. Section 188 is extracted:

"188. Disobedience to order duly promulgated by public servant.-- Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with

fine which may extend to two hundred rupees, or with both;

and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

12. On bare perusal of the legislative intend provided under Section 195 Cr.P.C., it is explicit that for the offence under Section 188 I.P.C., the prosecution can be initiated only on a complaint filed by the concerned public servant and not by a police report.

13. In the facts of the case at hand, applicants herein, are charged for offence under Section 188 IPC and for no other offence under the IPC. The cognizance taken on the chargesheet would thus be illegal and void in view of Section 195(1)(a)(2) Cr.P.C..

14. In **M. S. Ahlawat v. State of Haryana & Anr.**1, the Apex Court considered the matter at length and held as under :

"....Provisions of Section 195 CrPC are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section."

15. In **Daulat Ram v. State of Punjab**2, the Apex Court considered the nature of the provisions of Section 195 Cr.PC. In the said case, cognizance was taken on the police report by the Magistrate and the appellant therein had been tried and convicted, though the concerned public servant, the Tahsildar had not filed any complaint. The Court held as under :

"The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant, namely, the Tahsildar in this case. The trial was thus without jurisdiction ab initio and the conviction cannot be maintained....."

16. Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the pubic servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.PC are mandatory. Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction.

17. Thus Section 195(a)(i) Cr.PC bars the court from taking cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless, there is a written complaint by the public servant concerned for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case of contempt of the lawful authority of the public servant. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill-will or frivolity of disposition and to save the time of the criminal courts being wasted by

endless prosecutions. This provision has been carved out as an exception to the general rule contained under Section 190 Cr.PC that any person can set the law in motion by making a complaint, as it prohibits the court from taking cognizance of certain offences until and unless a complaint has been made by some particular authority or person. Other provisions in the Cr.PC like sections 196 and 198 do not lay down any rule of procedure, rather, they only create a bar that unless some requirements are complied with, the court shall not take cognizance of an offence described in those Sections. (vide **Govind Mehta v. The State of Bihar3; Patel Laljibhai Somabhai v. The State of Gujarat4; Surjit Singh & Ors. v. Balbir Singh5; State of Punjab v. Raj Singh & Anr6; K. Vengadachalam v. K.C. Palanisamy & Ors.7; and Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr.**8).

18. In the case of **State of U. P. vs. Suresh Chandra Srivastava & Ors.**9, a bench of three judges of the Supreme Court very succinctly explained that the provisions of Section 195 would affect the offences mentioned therein, and not offences which are separate and distinct from those contained in Section 195 CrPC observing as under;

"The law is now well settled that where an accused commits some offences which are separate and distinct from those contained in section 195, section 195 will affect only the offences mentioned therein unless such offences form an integral part so as to amount to offences committed as a part of the same transaction, in which case the other offences also would fall within the ambit of sec. 195 of the Code."

19. In the case at hand the applicants are not charged for any other offence save Section 188 IPC. The complaint was not filed by the concerned Magistrate/Public Servant. The cognizance taken thereon, by the court below is void abinitio being in violation of the mandatory provision-Section 195 Cr.P.C. (**Refer: Vraj Pal Singh vs. State of U.P. and another**10**)**

20. Section 123 of the Representation of People Act provides for corrupt practices. Section 123(2) is extracted:

"Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person [with the consent of the candidate or his election agent], with the free exercise of any electoral right:"

21. The remedy available for corrupt practice has been provided under Section 100 of the Representation of People Act. The grounds for declaring an election to be void is provided therein. Sub clause (b) provides that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent, the High Court shall declare the election of the returned candidate to be void.

22. The Representation of People Act, and / or the Indian Penal Code do not provide for any punishment for corrupt practices. The remedy available to an aggrieved candidate is to get the election of the returned candidate declared void.

23. In view thereof, the petition succeeds, accordingly, **allowed.**

24. The proceedings arising from aforesaid Case Crime No.35 of 2017 and the consequential congnizance order is quashed.

(2021)01ILR A474
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Appl. u/s 482 No. 15581 of 2020

Krishna Kant Dixit ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Yanendra Pandey, Sri Ramesh Kumar Patel, Sri Prateek Kumar

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

Criminal Law - Criminal Procedure Code (2 of 1974)- Section 156(3) - Complaint - when a complaint/application is filed before a Magistrate with allegation that FIR is not being registered by police regarding a cognizable offence - the Magistrate has a discretion either to direct the police to investigate the case under Section 156(3) Cr.P.C. or to proceed to examine the complainant under Section 200 Cr.P.C. (Para 6)

C.J.M. treated the application u/s 156(3) Cr.P.C. as a complaint case & fixed a date for recording of the statement of complainant under Section 200 Cr.P.C. - *Held* - no material on record to indicate that judicial discretion exercised by Magistrate was either arbitrary or perverse - merely because another view was possible it would not be an occasion for the High Court to substitute the judicial discretion exercised by the Magistrate - Order not liable to be quashed. (Para 7)

Dismissed. (E-4)

List of Cases cited:-

1. Smt. Mona Panwar Vs High Court of Judicature at Allahabad 2011 (2) ALJ 445

2. Swayam Prabha Vs St. Of U.P. & anr. 2012 (1) ALJ 204

3. Rameshbhai Pandurao Hedau Vs St. of Guj.AIR 2010 SC 1877

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Yanendra Pandey, learned counsel for the applicant as well as learned AGA for the State and perused the record.

2. The instant application has been filed by the applicant with a prayer to quash the order dated 22.7.2020 passed by Chief Judicial Magistrate, Agra in Application No.251 of 2020 (Krishna Kant Dixit vs. Nikhil Agarwal and others) under Section 406, 418, 420, 467, 468, 471, 472, 120B, 504, 506 IPC, Police Station Hari Parwat District Agra, whereby the application under Section 156(3) Cr.P.C. has been treated as a complaint case and a date has been fixed for recording of the statement of complainant under Section 200 Cr.P.C.

3. Learned counsel for the applicant submits that the order passed by the learned Magistrate has been passed in a mechanical

manner, without appreciating legal proposition and the facts as mentioned in the application under Section 156(3) Cr.P.C. It has been contended that the impugned order is wholly illegal and arbitrary and has been passed without application of mind and is against the facts on record and the learned Magistrate was bound to issue a direction for registration of the FIR and could not have treated the said application as a complaint case as police investigation was necessary.

4. Having heard the learned counsel for the applicant and the learned AGA and having perused the impugned order, this Court finds that the order by means of which the application under Section 156(3) Cr.P.C. has been treated as a complaint case, which is impugned in the present case, is a well reasoned and speaking order which shows that the learned Magistrate has applied his mind before passing the impugned order and considered all the legal and factual aspects of the matter.

5. All the contentions raised by the applicants' counsel relate to disputed questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded. In the process of invoking its inherent jurisdiction, this court cannot be persuaded to have a pre trial before the actual trial begins. The submissions made by the learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case.

6. The fact remains that when a complaint/application is filed before a Magistrate that the FIR is not being registered by police regarding a cognizable offence, the Magistrate has a discretion either to direct the police to investigate the case under Section 156(3) Cr.P.C. or to proceed to examine the complainant under Section 200 Cr.P.C. It is an established law that the discretion so exercised by the Magistrate cannot be interfered with only because some other view is also possible, the legal position in this regard is very clear.

7. In the present case, a bare perusal of the averments as made in the application under Section 156(3) Cr.P.C. and the order passed thereupon which is the order impugned in the present case shows that there is no material on record to indicate that the judicial discretion exercised by the Magistrate was either arbitrary or perverse. Thus, this Court finds that even though or merely because another view was possible it would not be an occasion for the High Court to substitute the judicial discretion exercised by the Magistrate.

8. In this regard, reference may be made to the law as laid down by the Hon'ble Apex Court in the case of **Smt. Mona Panwar Vs. High Court of Judicature at Allahabad, 2011 (2) ALJ 445.** The relevant extract of the aforesaid judgment is being quoted herein below:-

"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. The phrase "taking cognizance of" means cognizance of 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 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. 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. Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of complainant and his witnesses as mentioned in Section 200 of the Code is to ascertain whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further."

9. Similar view was taken by the Court in the case of **Swayam Prabha Vs. State Of U.P. And Others 2012 (1) ALJ 204** wherein it has been held that "as far as the argument of learned counsel for the revisionist that police investigation is a must for recovery of the looted articles is concerned, the Magistrate still has power to order investigation by police at the stage of section 202 Cr.P.C. after recording the statement of the complainant under section 200 Cr.P.C. If the Magistrate, after examining the complainant, comes to the conclusion that prima facie the statement of the complainant is credible and recovery is to be made, he can still direct investigation under section 202 Cr.P.C."

10. The Hon'ble Apex Court was pleased to observe in the case of **Rameshbhai Pandurao Hedau Vs. State of Gujrat AIR 2010 SC 1877** wherein it has been held that "the power to direct an investigation to the police authorities is

available to the Magistrate both under Section 156(3) Cr.P.C. and under Section 202 Cr.P.C. and the Magistrate can invoke under Section 156(3) Cr.P.C. even at the pre-cognizable stage."

11. Thus, the apprehension of the applicant in the present case that there would not be a proper investigation is misconceived. However, be as it may, liberty is given to the applicant that in case, he has any apprehension or is disgruntled with the investigation, he may file a proper application as per the Code of Criminal Procedure before the concerned Magistrate under the appropriate provisions and the concerned Magistrate shall decide the said application in accordance with law by reasoned and speaking order.

12. Thus, in view of what has been discussed above, no case for interference at this stage is made out by this Court in exercise of inherent power conferred under 482 Cr.P.C. jurisdiction.

13. Accordingly, in view of the observation made, the present application under Section 482 CrPC is finally disposed of. No order as to cost.

(2021)01ILR A477
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.12.2020

BEFORE

THE HON'BLE DEEPAK VERMA, J.

Crl. Misc. Appl. u/s 482 No. 18228 of 2020

Brijesh Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Shionath Jaiswal

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

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 228 - Indian Penal Code (45 of 1860) , Ss. 302, 307 - Framing of charge - Plea that charges framed without any evidence on record and medical evidence - *Held* - trial court while framing of charges u/s 228 Cr.P.C., only had to see whether, prima facie, case is made out - *Prima facie case* - a prima facie case against accused is said to be made out - when the probative value of the evidence - is such that - it is sufficient to induce the court to believe in the existence of the facts or consider its existence so probable - that a prudent man ought to act upon the supposition that those facts existed or did happen - However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence (Para 5, 6)

Dismissed. (E-4)

List of Cases cited :-

1. Mauvin Godinho Vs St. of Goa

2. Amit Kapoor Vs Ramesh Chander & anr. (2012) 9 SCC 460

3. Bhawna Bai Vs Ghanshyam & ors. (2020) 2 SCC 217

(Delivered by Hon'ble Deepak Verma, J.)

1. Heard learned counsel for the applicant; learned counsel for the opposite party no. 2 and; learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 04.03.2020 passed by learned Additional Sessions Judge, FTC, Room No.1, Mau in S.T. No.207 of 2017 (State Vs. Subhash and others) arising out of Case Crime No.234 of 2017, under Sections 302 and 307 I.P.C., P.S. Mohammadabad, District Mau framing of charges only to extent Section 307 I.P.C.

3. Learned counsel for the applicant submits that no offence under Section 307 I.P.C. is made out against the applicant and framing of charge under Section 302 and 307 I.P.C. is without any material on record. He further submitted that as per F.I.R. and material on record, no prima facie case or offence under Section 307 I.P.C. has been made out against the applicant and without any evidence on record and medical evidence, framing of charge under Section 307 I.P.C. is totally illegal and against the evidence on record.

4. Learned AGA opposed the prayer of applicant and submitted that at this stage trial court has rightly framed the charges against the applicant under Section 307 and 302 I.P.C. and framing of charges are based on evidence collected during the investigation and all the charges framed is to be scrutinized during trial, as such, no interference is required. It is further argued that while framing under Section 228 Cr.P.C., the judge is not required to record detailed reasons as to why such charge is framed. On perusal of record and hearing of parties, if the judge is of the opinion that there is sufficient ground for presuming that the accused has committed the offence triable by the Court of Session, he shall frame the charge against the accused for such offence.

5. Considering the arguments raised by learned counsel for the applicant as well as learned AGA, it is settled view that trial while framing of charges under Section 228 Cr.P.C., he had to see whether, prima facie, case is made out. In the aforesaid section, he is not required to record detailed reason as to why such charges framed.

6. Hon'ble Apex Court in the case of Mauvin Godinho Vs. State of Goa has held that the court while framing charges under Section 227 of the Code of Criminal Procedure should apply the prima facie standard. Although the application of this standard depends on facts and circumstance in each case, a prima facie case against the accused is said to be made out when the probative value of the evidence on all the essential elements in the charge taken as a whole is such that it is sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

7. The court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage.

8. The Hon'ble Apex Court in the case of **Amit Kapoor v. Ramesh Chander and another (2012) 9 SCC 460**, has held as under:-

"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the record of the case and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well-settled law laid down by this Court in State of Bihar v. Ramesh Singh

4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing, as enjoined by Section 227. If, on the other hand, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which (b) is exclusively triable by the court, he shall frame in writing a charge against the accused, as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under

Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227"

9. Hon'ble Apex Court in the case of **Bhawna Bai vs Ghanshyam and others, (2020) 2 SCC 217**, has held in para 13 and 16, which are as follows:

"13. Though the circumstances alleged in the charge sheet are to be established during the trial by adducing the evidence, the allegations in the charge sheet show a prima facie case against the accused-respondent Nos.1 and 2. The circumstances alleged by the prosecution indicate that there are sufficient grounds for proceedings against the accused. At the time of framing the charges, only prima facie case is to be seen; whether case is beyond reasonable doubt, is not to be seen at this stage. At the stage of framing the charge, the court has to see if there is sufficient ground for proceeding against the accused. While evaluating the materials, strict standard of proof is not required; only prima facie case against the accused is to be seen.

16. After referring to Amit Kapoor, in Dinesh Tiwari v. State of Uttar Pradesh and another (2014) 13 SCC 137, the Supreme Court held that for framing charge under Section 228 Crl.P.C., the judge is not required to record detailed reasons as to why such charge is framed. On perusal of record and hearing of parties, if the judge is of the opinion that there is sufficient ground for presuming that the accused has committed the offence triable by the Court of Session, he shall frame the charge against the accused for such offence"

10. In view of the observation of Hon'ble Apex Court, trial court's order is not required to be interfered, as Court

prima facie has found case under Sections 302 and 307 I.P.C. read with Section 34 I.P.C. against the applicant and has rightly framed the charge therein.

11. After having considered the submissions advanced by learned counsel for the parties and after perusing the material available on record, I do not find any good ground to interfere in the matter in exercise of inherent power under Section 482 Cr.P.C. for quashing of the impugned order.

12. The present 482 Cr.P.C. application lacks merit. It is accordingly, **dismissed**.

(2021)01ILR A481
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.01.2021

BEFORE
THE HON'BLE MANISH MATHUR, J.

Crl. Misc. Bail Appl. No. 8364 of 2017

Rajiv Pratap Singh ...Applicant
Versus
C.B.I. ...Opp. Party

Counsel for the Applicant:
Navneet Kumar Srivastava, Harish Pandey, Rajendra Kumar Dwivedi, Shantanu Mishra

Counsel for the Opp. Party:
Amarjeet Singh Rakhra, Ajai Kumar, Ajeet Pratap Singh, Anurag Kumar Singh, Vivek Kumar Rai

A. Criminal Law - Indian Penal Code,1860-Section 120-B ,302 - Arms Act, 1959-Sections 25(1)(b)(a),26,27-application-grant of third bail-undertrial remained in jail for more than 7 years-out of total 80 witnesses only 16 witnesses were examined till date nor is there any indication that they would be produced before trial court in near future-investigating agency has already completed investigation and chargesheet filed-presence of accused may not be necessary-applicant is liable to be enlarged on bail-no apprehensions against applicant of influencing witnesses and tampering with evidence-role of the accused is limited only to providing information of whereabouts of the deceased and of supplying the weapons.(Para 1 to 30)

B. The basic rule of our criminal justice system is 'bail, not jail'. The law presumes an accused to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including the right to liberty guaranteed under Article 21 of the constitution. one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper to refuse bail for the purpose of giving him a taste of imprisonment as a lesson.(Para 27 to 29)

C. In deciding bail applications apart from nature of accusation, severity of punishment, nature of supporting evidence, reasonable apprehension of tampering with witnesses, an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often it takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody.(Para 10 to 27)

The bail application is allowed. (E-5)

List of Cases Cited:

1. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr.(2004) 7 SCC 528

2. Chenna Boyanna Krishna Yadav Vs St. of Mah. & anr.(2007) 1 SCC 242

3. St. of Raj.,Jaipur Vs Bal Chand (1977) AIR SC 2447

4. Kashmira Singh Vs St. of Punj.(1977) 4 SCC 291

5. Sanjay Chandra Vs CBI (2012) 1 SCC 40

6. Arnab Manoranjan Goswami Vs St. of Mah. & ors.(CRLA 742 of 2020)

7. Ankita Kailash Khandelwal & ors. Vs St. of Mah. & ors.(2020) 10 SCC 670

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

1. Heard Sri Arvind Varma, Senior Advocate assisted by Mr. Rajendra Kumar Dwivedi, Ms. Meha Rashmi, Sri Harish Pandey and Sri Smrithi Sharma, learned counsel appearing for applicant and Sri Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation-opposite party.

2. This is third bail application of applicant Rajiv Pratap Singh (Raju Singh) with regard to case crime no.RC 1 (S) 2013/CBI/SC-1 under Sections 120-B read with Section 302 I.P.C. and Sections 25 (1) (b) (a), 26 and 27 Arms Act, P.S. CBI/SC-1/ New Delhi, District Pratapgarh.

3. The first bail application of applicant has already been rejected on merits vide order dated 23.07.2015. The second bail application was thereafter rejected vide order dated 09.08.2016 directing the trial court to finally dispose of the Sessions Trial expeditiously without granting any unnecessary adjournments and to conduct the trial in accordance with Section 309 Cr.P.C., on a day to day basis.

4. In pursuance to directions issued by this Court earlier, the CBI Court, Lucknow has furnished a status report dated 04.12.2020 with regard to sessions trial in the present case. In the said report, it has been indicated that there are a total of 80 prosecution witnesses out of which 16 witnesses have already deposed since start of the trial from 2013. It has been stated that trial could not proceed since March, 2020 due to COVID-19 pandemic. It has subsequently recommenced in October, 2020 but the prosecution witnesses have not appeared on three dates due to the pandemic.

5. The allegations in brief as mentioned in the first information report no.18 of 2013 dated 02.03.2013 are that when complainant Phool Chander Yadav along with his brother Nanhe Yadav, his wife and two daughers and brother-in-law of Nanhe Yadav, who were on their way to home, stopped their Bolero vehicle no.UP 70-W-1805 near the tea shop of Chokhe Lal at Balipur Chauraha for taking tea, Kamta Prasad Pal, his son Ajay Kumar Pal, Ajit Kumar Singh and Rajiv Kumar Singh, both sons of Hari Singh, all hailing from Village Balipur, duly armed with weapons, arrived at the scene of the incident in their Bolero vehicle no.UP-64-7555 and fired many rounds targetting Nanhe Yadav with the intenion to kill him. Due to firing, Nahhe Yadav fell on the ground. This incident was also seen by Kallu son of Mata, resident of Sheikhpur Ashik, Police Station Kunda Kotwali besides many others. Thereafter Nanhe Yadav was brought to Kunada Hospital where the doctor declared him brought dead.

6. Learned counsel for applicant has submitted that although the first bail application was rejected on merits but while rejecting the second bail application, this Court has specifically directed the CBI court to conclude the trial expeditiously. It is submitted that the applicant is in jail since 04.03.2013 and although the trial is

continuing since 2013, as yet only 16 witnesses have been examined in the past more than seven years with 64 witnesses remaining. It is further submitted that there is no possibility of trial concluding expeditiously as had been directed earlier. It is further submitted that at the time of rejection of the second bail application in 2016, only one prosecution witness had been examined and examination of the second prosecution witness was going on, which weighed heavily upon this Court for rejection of the second bail application. It is further submitted that during the time elapsed between the rejection of the second bail application and as on date, it is material factor that a new ground has cropped up which requires to be considered in this bail application.

7. Learned counsel for applicant has submitted that as per the charge sheet submitted by the Central Bureau of Investigation (hereinafter referred to as CBI), the only role assigned to applicant is of providing information with regard to whereabouts of the deceased, in pursuance of which the attack upon him was carried out. It is submitted that the aforesaid charge upon applicant is sought to be substantiated only on the testimony of the sole witness, Nitish Shukla, the alleged driver of the vehicle of applicant. Learned counsel submits that despite the long time having elapsed in the trial and 16 witnesses having been examined, the CBI has failed to produce the said Nitish Shukla for recording of his testimony till date. It is submitted that the CBI has also not indicated as to when they propose to produce Nitish Shukla for recording of his statement. As such, it is submitted that the applicant cannot be kept incarcerated for such a long time for no fault on his part.

8. Mr. Anurag Kumar Singh, learned counsel for CBI has opposed the bail application with the submission that once applicant's bail had already been rejected on merits and also on the ground of delay in conclusion of trial, the present bail application is also liable to be rejected since no new ground has been indicated or submitted, which is pre-requisite for considering the third bail application. Learned counsel has referred to numerous judgments of Hon'ble the Supreme Court indicating the law under which a third bail application can be entertained. It has been further submitted that bail cannot be granted merely on the ground of long detention or that the trial of the case had not progressed. Learned counsel further submitted that the offence indicated against the applicant are quite serious in nature and there is reasonable apprehension of witnesses being influenced and evidence being tampered with. Since some of the important witnesses had expressed apprehension of threat to life and accordingly application was filed in the Court of Special Judicial Magistrate, CBI Cases, Lucknow not to disclose the identity of certain important witnesses which was allowed by the court vide order dated 12.07.2013.

9. Upon consideration of material on record and submissions advanced by learned counsel for parties, it is apparent that conditions for entertaining the third bail application are quite stringent.

10. Hon'ble the Supreme Court in **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and another reported in (2004) 7 SCC 528** in paragraphs 11, 12 and 20 of the report has held as follows:-

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] and Puran v.Rambilas [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)"

"12. In regard to cases where earlier bail applications have been rejected there is a further onus on the court to consider the subsequent application for grant of bail by noticing the grounds on which earlier bail applications have been rejected and after such consideration if the court is of the opinion that bail has to be granted then the said court will have to give specific reasons why in spite of such earlier rejection the subsequent application for bail should be granted. (See Ram Govind Upadhyay [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] .)"

"20. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. In the impugned order we do not see any such fresh ground recorded by the High Court while granting bail. It also failed to take into consideration that at least on four occasions order refusing bail has been affirmed by this Court and subsequently when the High Court did grant bail, this Court by its order dated 26-7-2000 cancelled the said bail by a reasoned order. From the impugned order, we do not notice any indication of the fact that the High Court took note of the grounds which persuaded this Court to cancel the bail. Such approach of the High Court, in our opinion, is violative of the principle of binding nature of judgments of the superior court rendered in a lis between the same parties, and in effect tends to ignore and thereby render ineffective the principles enunciated therein which have a binding character."

11. With regard to granting of bail only on the ground of unlikelihood of trial concluding in near future, it has been held as follows in the same judgment:-

"14. We have already noticed from the arguments of learned counsel for the appellant that the present accused had earlier made seven applications for grant of bail which were rejected by the High Court and some such rejections have been affirmed by this Court also.

It is seen from the records that when the fifth application for grant of bail was allowed by the High Court, the same was challenged before this Court and this Court accepted the said challenge by allowing the appeal filed by the Union of India and another and cancelled the bail granted by the High Court as per the order of this Court made in Criminal Appeal No. 745 of 2001 dated 25-7-2001 [Rajesh Ranjan v. State of Bihar, (2000) 9 SCC 222] . While cancelling the said bail this Court specifically held that the fact that the present accused was in custody for more than one year (at that time) and the further fact that while rejecting an earlier application, the High Court had given liberty to renew the bail application in future, were not grounds envisaged under Section 437(1)(i) of the Code. This Court also in specific terms held that the condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail."

12. Similarly, in **Chenna Boyanna Krishna Yadav v. State of Maharashtra & another reported in (2007) 1 SCC 242**, it has been held as follows:-

"16.....It is true that when the gravity of the offence alleged is severe, mere period of incarceration or the fact that the trial is not likely to be concluded in the near future either by itself or conjointly may not entitle the accused to be enlarged on bail. Nevertheless, both these factors may also be taken into consideration while deciding the question of grant of bail."

13. Learned counsel for the applicant has placed reliance on judgment rendered by Hon'ble the Supreme Court in State of **Rajasthan, Jaipur v. Bal Chand reported in AIR 1977 Supreme Court 2447** in which the following has been held:-

"2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the court. We do not intend to be exhaustive but only illustrative.

3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime....."

14. He has also placed reliance on the judgment of Hon'ble the Supreme Court in **Kashmira Singh v. State of Punjab reported in (1977) 4 SCC 291** in which the following has been held in paragraph 2 of the report:-

"2. The appellant contends in this application that pending the hearing of the appeal he should be released on bail. Now, the practice in this Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Penal Code, 1860. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a Judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

15. Upon applicability of the aforesaid judgments in the present case, it is apparent that the present bail application, being the third bail application, is to be seen not only with regard to gravity of offence and other like factors but also on the ground of any change in the fact situation which requires the earlier view taken by this Court to be interfered with.

16. Upon perusal of aforesaid judgments, it is clear that Hon'ble the Supreme Court has not put an embargo upon consideration of long period of incarceration of an undertrial as a factor while considering subsequent bail applications. It is clearly seen that such a factor can be considered by the Court concerned while hearing subsequent bail applications but the said factor has to be seen along with other relevant factors as indicated in the judgments hereinabove.

17. Although in the first information report, allegation of applicant also having fired upon the deceased has been made but in the counter affidavit dated 17.12.2017 filed by the CBI , the role of applicant has been limited to providing information of whereabouts of deceased to the actual killers as has been indicated in the charge sheet filed against applicant and of supplying weapon used.

18. It is very relevant that in paragraph 25 of the counter affidavit, the CBI has doubted the veracity of the complaint itself. The said paragraph of counter affidavit is as follows:-

"25. That in reply to the averments made in para nos. 5 and 6 of the affidavit, it is submitted that in this case the FIR was registered on the written complaint of Phool Chander Yadav, brother of deceased Nanhe Yadav. However, it came to light that the complaint on the basis of which FIR was registered was written by Pawan Kumar Yadav, brother of deceased Nanhe Yadav in his own writing. He has also signed the said complaint as Phool Chander Yadav. At the time of writing the complaint, Phool Chander Yadav was not present where the complaint was being written in the early morning of 03.03.2013 after the dead body of Nanhe Yadav was taken to Pratapgarh for post mortem. This clearly establishes that a concocted version was mentioned in the complaint which was signed by Pawan Yadav posing as Phool Chander Yadav. The FIR was lodged on 03.03.2013 and not on 02.03.2013 as has been shown in the document. "

19. The CBI in its counter affidavit has assigned the role of firing upon the deceased to Ajai Kumar Pal and Vijai Kumar Pal with no role of firing being assigned to applicant whose role as per the charge sheet is limited to providing information of whereabouts of the deceased and of supplying the weapons which were used in the actual killings.

20. Aforesaid charges against the applicant have been sought to be proved by the CBI upon testimony of one Nitish Shukla and one other person as indicated in paragraph 28 of the counter affidavit, although the said other person remains unnamed. It is relevant that as per the report submitted by the CBI Court, neither of aforesaid two persons have been produced by the CBI as witness in the trial proceedings till date. The counter affidavit is also silent as to when the CBI intends to produce the said two persons as witnesses in the trial.

21. It is a relevant fact that at the time of rejection of first bail on 23.07.2015, the trial proceedings were at a nascent stage with only one prosecution witness having been examined. Even at the time of rejection of the second bail application on 09.08.2016, the fact situation had not changed with only one prosecution witness having been examined and deposition of the second prosecution witness being underway. It was in these circumstances that the second bail application was

rejected since no new good ground had been put forth by applicant. However, in view of the right of applicant to a speedy trial, direction had been issued to expedite the final decision of the Sessions Trial without granting any unnecessary adjournment and to conduct the trial in accordance with Section 309 Cr.P.C. on day to day basis.

22. It is also a rlevant fact that subsequent to order dated 09.08.2016, 15 witnesses have further been examined during the trial but as on date they do not constitute even 1/4th of the total 80 witnesses that are sought to be produced as prosecution witnesses by the CBI. The applicant has been in custody as an undertrial since 04.03.2013, i.e. more than seven and a half years.

23. The aforesaid factor clearly indicates the changed circumstances between rejection of the second bail application till today. Learned counsel for applicant therefore apprears to be quite correct in his submission that with just 16 witnesses having been examined out of a total of 80 witnesses to be produced by the CBI as prosecution witnesses, there is no hope of trial concluding even in far future, let alone the near future.

24. Although the offence with which applicant has been charged is a serious one but it is also a relevant factor to consider that the said charge being based on the testimony of two witnesses, neither of the two have been produced by the CBI in the trial, which is pending since 2013. Even counter affidavit of the CBI is silent with regard to the time frame within which the said two witnesses are to be produced in the trial proceedings. Prima facie, it appears that without the testimony of corroborating witnesses, evidence against the applicant is circumstantial at best and at present there cannot be any definitive conclusion that the offence with which the applicant is charged can be prima facie made out at this stage and would therefore be dependent upon evidence to be relied upon by CBI in future particularly by producing witnesses to support the same.

25. The CBI in its counter affidavit has stated that enlarging the applicant on bail could have an adverse effect on the trial since there is a likelihood that the applicant may try to influence the witnesses and tamper with evidence. However, except for a bland statement in the counter affidavit, there is not even a shred of prima facie evidence adduced by the CBI to support such claim. The only factor indicated in counter affidavit is that upon such apprehension, an application was filed before the trial court not to disclose the identity of certain important witnesses, which was allowed by the Court vide order dated 12.07.2013. However, it has not been indicated as to whether the application was filed by the witnesses or by CBI itself. As such, the apprehension of applicant tampering with evidence and influencing witnesses remains merely a bland statement at best, which has already been denied by the applicant in his reply.

26. The aforesaid factors clearly indicate the circumstances which have changed in the past more than four years since the date of rejection of the second bail appliation, particularly with regard to factor as to whether an undertrial can be indefinitely incarcerated during pendency of trial proceedings particularly in the present circumstances where not even 1/4th of the witnesses have been produced during the trial. Of particular importance is the

factor that even after producing 16 witnesses, the CBI has not produced the two important witnesses against applicant till date nor is there any indication that they would be produced before the trial court in near future.

27. Hon'ble the Supreme Court in **Sanjay Chandra v. Central Bureau of Investigation reported in (2012) 1 SCC 40** has held as follows:-

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty."

"22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances."

"23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

Hon'ble the Supreme Court in the said decision has further held as under:-

"40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required."

42. When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is: whether the same is possible in the present case.

"43. There are seventeen accused persons. Statements of witnesses run to several hundred pages and the documents on which reliance is placed by the prosecution, are voluminous. The trial may

take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that the accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet."

"44. This Court, in State of Kerala v. Raneef [(2011) 1 SCC 784 : (2011) 1 SCC (Cri) 409] has stated: (SCC p. 789, para 15)

"15. In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail. A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dickens's novel A Tale of Two Cities, who forgot his profession and even his name in the Bastille."

"46. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."

28. Recently, Hon'ble the Supreme Court in Criminal Appeal No.742 of 2020 (**Arnab Manoranjan Goswami v. State of Maharashtra and others**) has held as follows:-

"63. More than four decades ago, in a celebrated judgment in State of Rajasthan, Jaipur v. Balchand [(1977) 4 SCC 308], Justice Krishna Iyer pithily reminded us that the basic rule of our criminal justice system is "bail, not jail". The High Courts and Courts in the district judiciary of India must enforce this principle in practice, and not forego that duty, leaving this Court to intervene at all times. We must in particular also emphasise the role of the district judiciary, which provides the first point of interface to the citizen. Our district judiciary is wrongly referred to as the "subordinate judiciary'. It may be subordinate in hierarchy but it is not subordinate in terms of its importance in the lives of citizens or in terms of the duty to render justice to them. High Courts get burdened when courts of first instance decline to grant anticipatory bail or bail in

deserving cases. This continues in the Supreme Court as well, when High Courts do not grant bail or anticipatory bail in cases falling within the parameters of the law. The consequence for those who suffer incarceration are serious. Common citizens without the means or resources to move the High Courts or this Court languish as undertrials. Courts must be alive to the situation as it prevails on the ground - in the jails and police stations where human dignity has no protector. As judges, we would do well to remind ourselves that it is through the instrumentality of bail that our criminal justice system's primordial interest in preserving the presumption of innocence finds its most eloquent expression. The remedy of bail is the "solemn expression of the humaneness of the justice system". Tasked as we are with the primary responsibility of preserving the liberty of all citizens, we cannot countenance an approach that has the consequence of applying this basic rule in an inverted form. We have given expression to our anguish in a case where a citizen has approached this court. We have done so in order to reiterate principles which must govern countless other faces whose voices should not go unheard."

"65.....Every court in our country would do well to remember Lord Denning's powerful invocation in the first Hamlyn Lecture, titled "Freedom under the Law':

"Whenever one of the judges takes seat, there is one application which by long tradition has priority over all others. The counsel has but to say, "My Lord, I have an application which concerns the liberty of the subject', and forthwith the judge will put all other matters aside and hear it. ..."

It is our earnest hope that our courts will exhibit acute awareness to the need to expand the footprint of liberty and use our approach as a decision-making yardstick for future cases involving the grant of bail."

29. Hon'ble the Supreme Court in **Ankita Kailash Khandelwal and others v. State of Maharashtra and others reported in (2020) 10 SCC 670** has held as follows :-

"23.1. In Sumit Mehta v. State (NCT of Delhi) [Sumit Mehta v. State (NCT of Delhi), (2013) 15 SCC 570 : (2014) 6 SCC (Cri) 560] , it was observed: (SCC pp. 575-76, paras 11-15)"

"11. While exercising power under Section 438 of the Code, the court is duty-bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For the same, while granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. The object of putting such conditions should be to avoid the possibility of the person hampering the investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. So, the discretion of the court while imposing conditions must be exercised with utmost restraint."

"12. The law presumes an accused to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including the right to liberty guaranteed under Article 21 of the Constitution."

30. Keeping the aforesaid enunciations by Hon'ble the Supreme Court in mind and upon a perusal of the material on record, it is apparent that without the production of relvant witnesses against the

applicant even after seven long years, the charges levelled against the applicant at this stage, at best, are merely charges without any prima facie evidence being produced by the CBI It is also relevant that apprehension against applicant of influencing witnesses and tampering with evidence is also not borne out by any evidence on record. Even with regard to such apprehensions, Hon'ble the Supreme Court in **Ankita Kailash Khandelwal(supra)** has already held that adequate safeguards can be put in place while granting bail to an undertrial. As has been held in **Sanjay Chandra(supra),** we cannot lose sight of the fact that the investigating agency has already completed investigation and charge sheet has already been filed before the trial court, therefore presence of accused in custody may not be necessary for further investigation. It is also not the case of CBI that the applicant is required to be in custody for any other investigational purposes.

31. In view of aforesaid, this Court is of the considered opinion that the applicant is liable to be enlarged on bail pending trial.

32. Accordingly the third bail application is allowed.

33. Let applicant Rajiv Pratap Singh (Raju Singh), involved in the aforesaid 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 the following conditions:-

(a) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him to disclose such facts to the Court or to any other authority.

(b) He shall remain present before the court on the dates fixed for hearing of the case. If he wants to remain absent, then he shall take prior permission of the court and in case of unavoidable circumstances for remaining absent, he shall immediately give intimation to the appropriate court and also to the Superintendent, CBI and request that he may be permitted to be present through the counsel.

(c) He shall surrender his passport, if any (if not already surrendered), and in case, he is not a holder of the same, he shall swear to an affidavit of the said fact, to be produced before the trial court. If he has already surrendered it before the learned Special Judge, CBI, that fact should also be supported by an affidavit.

(d) It will be open to CBI to make an appropriate application for modification/recalling the order passed by this Court, if for any reason, the applicant violates any of the conditions imposed by this Court.

(2021)01ILR A492
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.01.2021

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Bail Appl. No. 20126 of 2020

Brajesh Bind @ Brajesh Kumar Bind ...Applicant

Versus

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

Counsel for the Applicant:
Sri Ganga Prasad Gupta

Counsel for the Opp. Parties:

G.A., Sri Ram Shiromani Yadav

A. Criminal Law - Indian Penal Code, 1860 - Sections 363,366,376 & Prevention of Children from sexual offences(POCSO) Act, 2012-Section 5/6-application-rejection-prosecutrix age was 17 year according to medical report-However, in her statement u/s 164 Cr.P.C.she said to have gone and married with the applicant-statement made by the prosecutrix, under her minorship having no legal sanctity-applicant is a next door neighbour-applicant is already married man-applicant's wife herself apprised about the enticing and taking of minor by the applicant-the aim and object of the Act, 2012 is to protect minor children from sexual assault-applicant committed offence of heinous nature and is every likelihood of tampering with evidence-Hence, no ground for bail.(Para 1 to 6)

The bail application is rejected. (E-5)

List of Cases Cited:

Smt. Ramsati@ Shyamsati thru her husband Vs St. of U.P. thru Principal Secy. Home Deptt. Lucknow & ors.(W.P. No. 247 of 2015)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicant and learned counsel for informant as well as learned A.G.A. and perused the record.

2. By means of this application, the accused-applicant, Brajesh Bind @ Brajesh Kumar Bind, who is said to be involved in Case Crime No. 781 of 2017, under Sections 363, 366 and 376 of I.P.C., read with Section 5/6 of Protection of Children From Sexual Offences Act, 2012 (Hereinafter in short referred to as the 'POCSO Act'), Police Station- Mungra Badshahpur, District-Jaunpur, is seeking enlargement on bail.

3. Learned counsel for accused-applicant argued that the accused-applicant is innocent; he has been falsely implicated in this very case crime number and is languishing in Jail since 13.5.2020; accused-applicant is of no criminal antecedent; there is no likelihood of fleeing from course of justice or tampering with evidence in case of release on bail; prosecutorix was major; she, in her statement, recorded, under Section 164 of the Cr.P.C., has categorically said to have gone with the applicant and married with the applicant; she is having kids; Writ Petition No.6996 of 2019, Brijesh Bind and another vs. State of U.P. and 3 others, was filed before this Court, wherein, vide order, dated 14.3.2019, a protection was granted; age of the prosecutorix has been held to be of 17 years, in the medical age determination test and there is no accusation against the applicant, rather, an admission of marriage with the applicant and voluntarily going with the applicant is there, and as such, in view of the law laid down by this Court in the case of **Smt. Ramsati @ Shyamsati through her husband vs. State of U.P. through Principal Secretary Home Department, Lucknow and others in Writ Petition No.247 of 2015, dated 7.9.2015**, no offence, under Section 363 or 366 is made out because even a minor is a competent guardian for looking after welfare of his minor wife and in the present case, prosecutorix is wedded wife of the applicant, hence, applicant is entitled for bail.

4. Learned A.G.A. as well as learned counsel for informant have vehemently opposed the prayer for bail with this contention that occurrence was of 13.9.2017, whereas, medical age determination test was of the year 2019, wherein the Medical Board has determined the age of the prosecutorix of 17 years, i.e., on the date of the occurrence, the prosecutorix was minor, that too, of 15 years of age, which was mentioned in the

first information report of about 16 years and a statement, with respect to consent or consensual relationship, made by the prosecutorix is, under her minorship, having no legal sanctity. Prosecutorix was enticed, abducted and taken by the applicant, who was next door neighbour and was also married one. It was mentioned in the first information report, itself, that the wife of the applicant herself apprised about this enticing and taking of minor by the applicant. Life of the prosecutorix as well as wife of the applicant has been put under hell by the applicant, who is saying to be in consensual living and marriage with the prosecutorix, but, this marriage or separation may be having no legal sanctity because the applicant was already a married man having his wife alive, with no judicial separation of any competent court. The aim and object of the Legislation of Protection of Children From Sexual Offences Act, 2012, is to protect minor children from sexual assault and in present case, it was a sexual assault, made by the applicant with a minor girl of 15 years, who is next door neighbour of the prosectuorix and has committed offence of this heinous nature and there is every likelihood of tampering with evidence, in case of release on bail, hence, Bail Application deserves to be rejected..

5. Having heard learned counsel for both sides and gone through materials on record, it is apparent that in the medical age determination test, prosecutorix was held to be 17 years of age in the year 2019, whereas, the offence is of the year 2017, thus, at the relevant time, she was of 15 years of age, and as such considering aim and object of the Legislation of Protection of Children From Sexual Offences Act, 2012, to protect minor children from sexual assault, heinousness of offence of rape with a minor, likelihood of tampering with evidence, in case of being released on bail, but, without expressing any opinion on merit of the case, there appears to be no ground for bail.

6. Accordingly, in view of what has been discussed above, Bail Application stands rejected.

(2021)01ILR A494
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Crl. Misc. Bail Appl. No. 39888 of 2020

Arvind **...Applicant**

Versus

State of U.P. **...Opp. Party**

Counsel for the Applicant:
Sri Amit Daga

Counsel for the Opp. Party:
A.G.A.

A. Criminal Law - Indian Penal Code,1860 - Sections 304-B, 498-A & Dowry Prohibition Act,1961-Section ¾-application-grant of bail-the entire family has been roped in, unmindful of the fact of *interse* relationship by attributing a general and omnibus role to everybody-young lady interested to open beauty parlour for additional income-she was carrying the 5-6 months pregnancy-she thought her dreams were shattered-she has hanged herself-no external injury found in the medical except foetus of a male-no evidence collected during investigation that husband abetted her or conspired or intentionally aided her.(Para 1 to 26)

The bail application is allowed. (E-5)

List of Cases Cited:

1. Ramesh Kumar Vs St. of Chatt. (2001) 9 SCC 618

2. Gurjit Singh Vs / St. of Punj.(2010) CRLA No.s 1492-1493

3. St. of W.B. Vs Orilal Jaiswal & anr. (1994) 1 SCC 73

4. Dataram Singh Vs St. of U.P. & anr.(2018) 3 SCC 22

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri Amit Daga, learned counsel for the applicant; learned A.G.A. and perused the record of the case.

2. Applicant, Arvind, who is husband, facing incarceration since 25.5.2019 in connection with Case Crime No.281 of 2019, u/s 304-B, 498-A I.P.C. and Section 3/4 of Dowry Prohibition Act, P.S.-Kotwali, District-Jhansi. He is seeking bail by means of the present bail application in aforesaid case crime.

3. Long and short of the prosecution case, as culled out from the F.I.R., is that the applicant-Arvind happens to be the husband of deceased-Ms. Poonam Kushwaha, who was the daughter of Prakash Chandra Kushwaha (the informant). On 27.6.2018 both of them were tied into nuptial knot as per Hindu Rites and Customs. Thereafter, an unfortunate incident took place whereby around 6.00 in the evening of 17.5.2019 the wife has committed suicide by hanging herself. For this incident, the informant lodged an F.I.R., on the same day i.e. 17.5.2019 at 22.57 hours. Thus, it is clear that within less than a year (11 months to be precise) of the marriage this unfortunate incident took place whereby the wife has lost her life by hanging.

4. Galvanized by the incident, her father within no time of the incident has succeeded in lodging the F.I.R., roping in all eight members of the in-laws including the husband-applicant, irrespective of their inter se relationship with the husband and their respective roles in commission of the offence. As per prevailing practice in the society now a days, a tailor-made story was stitched by mentioning that during the marriage of her daughter Poonam, the informant has spent Rs.9 lacs approximately, but her greedy husband and her in-laws were demanding Rs.5 lacs and a car as an additional dowry. On this score the deceased was severely harassed and tortured by all the named accused persons. On the fateful date and time, a call was made by his son-in-law (Arvind-Applicant) on the mobile phone of informant's daughter Neha, informing her sister has committed suicide by hanging herself and she was admitted in medical college. Soon after, the informant with his family members reached to the medical college, he saw that his daughter was lying dead. Thereafter he leveled a general and omnibus allegation for alleged torture/harassment against all the accused persons, resultantly she hanged herself. It was also revealed from the F.I.R., that at the time of incident, the deceased was carrying the pregnancy of about six months.

5. There is specific allegation of demand of Rs.5 lacs and a four wheeler as an additional dowry against all accused persons, attributing a general and omnibus role of torturing the deceased with regard to said additional dowry.

6. The autopsy of the deceased was conducted on 18.5.2019 by a panel of doctors at Post Mortem House Jhansi. As per the findings of the doctors, the deceased was 25 years of age. The doctors do not find any external injury over her person except singular ligature mark around her neck, obliquely placed. Hyoid bone was found intact. But her Uterus was detected as Gravid, in which a male foetus was present, aged about 5-6 months. As per the opinion of doctors, SHE DIED ON ACCOUNT OF ASPHYXIA AS A RESULT OF ANTE MORTEM HANGING.

7. During investigation the police has recorded the statements u/s 161 Cr.P.C. of the informant, Prakash Chandra Kushwaha; Rahul S/o informant; Geeta Devi W/o informant; Km. Neha D/o informant; Jitendra Kumar Dwivedi; Neeraj Kushwaha and Ravi Kushwaha. On a plain reading of all these statements, which are almost repetition of prosecution story as mentioned in the F.I.R., with minor and insignificant alterations. In their respective statements all these witnesses have alleged that, on account of demand of additional dowry in the shape of Rs.5 lacs cash and a four wheeler by the deceased, she was harassed and tortured on that score, and thereafter, she eventually was hanged by all her in-laws, including her husband. Only startling feature in these statements is that, none of these witnesses in their statements have revealed, that during life time she has ever made any complaint about the said torture or harassment to the informant or any other family members regarding alleged demand of additional dowry by her husband or in-laws.

8. On the above prosecution story, learned counsel for the applicant has drawn attention of the Court to the fact that the applicant is a poor Deed Writer in the chamber of one Mr. Akhilesh Sharma at the Tehsil premises of Jhansi. At the relevant point of time, the applicant was working in the chambers, whereas the deceased at the residence after bolting room from inside hanged herself.

9. Additionally, it was argued by Shri Daga, learned counsel for the applicant, that the applicant is a low paid deed writer and it is beyond his means or imagination to demand a four wheeler as he cannot afford the daily/recurring expenses of a four wheeler automobile, as alleged in the F.I.R.

10. The Court is in position to easily visualize the monthly or daily earning of a scribe of DEED and thus without referring or analyzing much on this issue that there is an unbridgeable gap in the daily/monthly earning of the applicant viz-a-viz the alleged demand of a four wheeler. In fact this is an entirely bald and speculative allegation has been levelled against applicant by the informant.

11. So far as the real reason behind taking of the ultimate step by the deceased is concerned, it has been canvassed by learned counsel for the applicant that the elder sister of the deceased was running a beauty parlor at her parental home prior to her marriage. Subsequently the deceased has took over its operation, but after her marriage the said beauty parlor got closed. The deceased has tried to persuade her husband to join her at her parent's place so that she may reopen the said beauty parlor. This offer seems to be unaccepted by her husband, due to which she got frustrated which eventually led to a serious discord and misunderstanding between the husband

and wife. Not only this, during this period she became pregnant also. It appears that being a committed entrepreneur, her pregnancy was coming in her way of achieving her target/dream of reopening the beauty parlor. In fact, the deceased was forced to live with this diagonally opposite responsibility i.e. her natural inclination to run the beauty parlor with the help and co-operation of her husband BUT instead of this, she was forced to face the liability of her pregnancy. This was indeed a dichotomous situation for her, which all likely have prompted her to take this extreme, though foolish, step of hanging herself.

12. Per contra, learned A.G.A. while opposing the bail application has drawn attention of the Court to the provisions of Section 113-A of the Indian Evidence Act and has strenuously argued that, even assuming that deceased has self immolated her by hanging herself, the presumption would go against her husband or his relatives, if she died within the seven years of marriage and her husband or his relatives had subjected her to cruelty for want of additional dowry. In that event, the court MAY PRESUME that such suicide had been abetted by her husband or by his relatives.

13. After having rival submissions, factual as well as legal aspects of the issue, let us examine the applicability and operation of Section 113A of Indian Evidence Act in the context of present case.

14. Before dissecting Section 113-A of the Indian Evidence Act and its impact upon the prosecution, it is imperative to spell out the provisions of Sections 306, 107 and 498A of I.P.C. and also Section 113-A of the Indian Evidence Act, which read thus :-

*"**306 IPC. Abetment of suicide**.--If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

*"**107 IPC. 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. Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2.--Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

*"**498A IPC. 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."

"113A of Evidence Act. Presumption as to abetment of suicide by a married woman.--*When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. Explanation.--For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860)."*

15. The provisions of Section 113A of the Evidence Act was introduced by the Criminal Law (Second) Amendment Act, 1983 with effect from 26.12.1983 to meet out the social demand to resolve the difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to anyone outside the occupants of the house. However, this provision does not create any new offence nor does it create any substantial right, but merely a matter of procedure and its retrospective operation. It gives a discretion to the Court that under a given circumstance, the courts may infer and punish the wrongdoer.

16. The beauty of law is that if a person wants to get some remedy or get the alleged offender prosecuted, then before that he has to prove the existence of certain factual situation. Thus, before the provision u/s 113-A of Evidence Act activated, the burden of proving the fact lies on the person who affirms it. Before making the provisions of Section 113-A of Evidence Act operational, following factors has to be established/ proved beyond any iota of doubt :-

1. Suicide must be committed by a married woman

2. Suicide must have been abetted by the husband or any of the relatives of husband.

3. Suicide must be committed within seven years of marriage

4. She must have been subjected to "cruelty" (as defined in Section 498A I.P.C.) by her husband or his relatives.

17. Presumption u/s 113A of Evidence Act refers to one of the three ingredients of abetment as provided in Section 107 I.P.C. i.e. instigation; conspiracy and intentional aiding of the act.

18. Thus the first requisite for attracting this section is that it should be established that the wife was subjected to "cruelty" as defined in Section 498A I.P.C. 'Cruelty' does not embrace acts of physical torture alone, even scolding or extending derogatory remarks, too would come within its purview.

19. In the celebrated judgments of Hon'ble Apex Court in the case of ***RAMESH KUMAR VS STATE OF CHHATTISGARH (2001) 9 SCC 618***, is directly on this issue. It has been mentioned that where a married woman was eliminated or was forced to commit suicide within four corners of the wall of her husband and there is no independent witness to support the prosecution case, to cope up this eventuality Section 113A of the Evidence Act was incorporated for the first time in the year 1983, adding a presumption and making the husband and his relatives responsible for this unnatural mishap. However, despite of this presumption, the Court cannot lost its sight that presumption is intended to operate against the accused in the field of a criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A of Evidence Act shows that to attract the applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the above circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. The Legislation has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive, keeping in view the employment of expression "may presume" as mentioned in the provisions itself. Secondly, the existence and availability of aforesaid circumstances shall not, like a mathematical formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the Court to abstain from drawing the presumption. The expression "all the other circumstances of the case" used in Section 113-A suggests the need to reach a "cause and effect relationship" between the cruelty and the suicide for the purpose of raising a presumption. There shall be a direct nexus/linkage in the said abetment and its afterflow by means of committing suicide by the deceased. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised, the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113-A is defined in Section-4 of the Evidence Act, which says-"Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it."

20. It would be not be out of context, while discussing the pivotal point on presumption, one must keep in mind that presumptions are of two folds, presumptions of fact and of law. Presumptions of fact are inferences logically drawn from one fact as to the existence of other facts. Presumptions of fact are rebuttable by evidence to the contrary. Presumptions of law may be either irrebuttable, so that no evidence to the contrary may be given or rebuttable. A rebuttable presumption of law is a legal rule to be applied by the Court in the absence of conflicting evidence. (Halsbury, 4th Edition paras 111, 112).

Among rebuttable presumptions there are again two folds. Section 4 of the

Evidence Act defines the words 'may presume' and 'shall presume' as follows :

(a) 'may presume' : Whenever it is provided by this Act that the Court may presume a fact, if may either regard such facts as proved, unless and until it is disproved or may call for proof of it.

(b) 'shall presume' : whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

12. In the former case, the Court has an option to raise the presumption or not, but in latter case, the Court must necessarily raise the presumption. If in the case where the Court has an option, it chooses to raise the presumption, the distinction between the two categories of presumption ceases and the fact is presumed, unless and until it is disproved.

21. In this regard, this Court lays its hand to yet another judgment of Hon'ble Apex Court in the case of **GURJIT SINGH VS STATE OF PUNJAB in Criminal Appeal Nos.1492-1493 of 2010 decided on 26.11.2019**, whereby Hon'ble Apex Court has got an opportunity to dissect the provisions of Section 113-A of the Evidence Act in the light of Sections 306, 107 and 498A I.P.C. As mentioned above in the light of three essential prerequisites the Court may presume that such suicide has been abeted by the husband or his relatives.

22. In another case of **STATE OF WEST BENGAL VS ORILAL JAISWAL AND ANOTHER, (1994) 1 SCC 73**, Hon'ble Apex Court has cautioned that the law courts should be extremely careful and cautious 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 her 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. Section 498A and 306 I.P.C. are independent and constitute different offences. Though, depending on the facts and circumstances of an individual case, subjecting a woman to cruelty may amount to an offence under Section 498A and may also, if a course of conduct amounting to cruelty is established leaving no other option for the woman except to commit suicide, amount to abetment to commit suicide. However, merely because an accused has been held liable to be punished under Section 498A IPC it does not follow that on the same evidence he must also and necessarily be held guilty of having abetted the commission of suicide by the woman concerned. Thus, as observed by the Hon'ble Apex Court, the courts should be extremely careful and cautious in assessing the facts and circumstances of each case and the evidence adduced by the prosecution for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. It has further been held that Section 498-A and Section 306 of the IPC are independent and constitute different offences. It has been observed, that dependent on the facts and circumstances of an individual case,

subjecting a woman to cruelty may amount to an offence under Section 498-A of the IPC. It has been further observed, that if a course of conduct amounting to cruelty is established leaving no other option for the woman except to commit suicide, it may also amount to abetment to commit suicide. It is further observed that, however, merely because accused had been held liable to be punished under Section 498-A of the IPC, it does not follow that on the same evidence he must also and necessarily be held guilty of having abetted the commission of suicide by the woman concerned.

23. Thus, from the above discussion it is clearly established beyond any iota of doubt that if an accused is found guilty of an offence punishable under Section 498-A of the IPC and the death has occurred within a period of seven years of the marriage, the accused cannot be automatically held guilty for the offfence punishable under Section 306 of the IPC by employing the presumption under Section 113-A of the Evidence Act. Unless the prosecution established that some act or illegal omission by the accused has driven the deceased to commit suicide, the conviction under Section 306 would not be tenable.

24. Illumined by the guidelines of Hon'ble Apex Court, mentioned above, if the Court compares the facts and circumstances of the present case, the admitted position of fact is that within seven years of marriage (11 months to be precise) the deceased Poonam committed suicide by hanging herself and from the statements of witnesses it clearly indicates that there was a demand of Rs.5 lacs and a four wheeler as alleged in the F.I.R., unmindful of the fact that the applicant is a petty scribe of the deeds in the chambers of one Mr Akhilesh Sharma in a tehsil premise and he has got no means to cope with the daily/recurring expenses of a four-wheeler. During her life time, the deceased has never made any complaint with her family members about the alleged atrocities faced by her on account of alleged additional dowry. This is also admitted that she has committed suicide by bolting the doors from inside and there is singular ligature mark around her neck, obliquely placed, suggestive of the fact that she has hanged herself. There is no mark of any other injury over her person. Yet another startling feature of the case is that the deceased was carrying the pregnancy of 6-7 months and for every married woman this is the most precious time in her life. Ignoring all these, she has taken this extreme step of committing suicide. Under circumstances, the Court has every reason to presume that the deceased seems to be a hypersensitive lady, who has taken this extreme step and has given up the pleasure of being a mother. As suggested by learned counsel for the applicant that being a young entrepreneur she was direly interested in reopening her beauty parlor and wants to open an additional source of income, but the Court cannot ignore the fact that her dreams were shattered by non co-operation of her husband. This could be a reason of discord between the husband and wife, but the Court cannot expect that it could be such a big reason where she commits suicide, moreover, when she is in the valuable phase of her life. There is no such evidence collected during investigation that it could be said that the husband at any point of time either abetted her or created any situation for her or conspired anything where she has been left with no other option but to hang herself. The entire family has been roped in, unmindful of the

fact of interse relationship by attributing a general and omnibus role to everybody. Taking the help of the above mentioned observations made by Hon'ble Apex Court, prima facie it seems that there might be a discord and bad breath between the husband and wife with regard to certain issues but rest of the attending circumstances nowhere indicates that the applicant's conduct at any point of time during her life time falls within the category of Section 107 of the I.P.C. i.e. either the husband has instigated her or hatched any conspiracy for doing any act or illegal omission pursuant to the conspiracy or intentionally aided her to act upon certain thing. Mere levelling a bald allegation of dowry harassment with regard to additional dowry the husband could be prosecuted for offence u/s 498A I.P.C. but certainly not within the four corners of Section 306 I.P.C.

25. 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, (2018)3 SCC 22*** and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

26. Let the applicant Arvind, who is 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.

27. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

28. 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.

29. 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-:

(a). 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.

(b). The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

(c). The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(d). 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.

29. However, it is made clear that any willful 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)01ILR A503
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Appl. No. 41048 of 2020

Udai Veer Singh ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Ramesh Kumar Shukla, Sri Krishna Kant Shukla

Counsel for the Opp. Party:
A.G.A., Sri S.P.S. Chauhan

A. Criminal Law - Indian Penal Code,1860 - Sections 452,406,376,504,506- application-grant of bail-prosecutrix lodged false and fabricated FIR against the applicant-she developed relationship with the applicant just to fulfil her lust and extract money-Also she stayed with the applicant in Jaya Place Hotel, Dhaulpur,Rajasthan with her own free will-husband of the prosecutrix did not defend her as she was a consenting party-when the applicant retired he refused to fulfill the lust of prosecutrix, then she lodged FIR.(Para 2 to 4)

The bail application is allowed. (E-5)

List of Cases Cited:

Dataram Singh Vs St. of U.P. & anr.(2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri R.K. Shukla, learned counsel for the applicant as well learned A.G.A. appearing for the State and S.P.S. Chauhan, learned counsel for O.P. No.2 and perused the record.

2. Applicant has moved the present bail application seeking bail in Case Crime No.358 of 2020, under Sections 452, 406, 376, 504 and 506 I.P.C., P.S. Jagdishpura, District Agra.

3. Learned counsel for the applicant submits that the applicant has been falsely implicated in the present case due to ulterior motive with the intention to harass the applicant and to defame him in the society. As per F.I.R. version as lodged by the victim on 13.07.2020 at 18:50 hours is that the Dharmendra Singh Parihar husband of the victim was doing service away from the city and the prosecutrix was living at home alone with her two children. The applicant was visitor to her house and so that was entangled in her evil design. She wanted to purchase a house for which the applicant was taking her hither and thither. On 16.10.2017 the applicant came to her house at 9-00 P.M. and had brought with him a bottle of cold drink and made her to drink due to which she became unconscious and the applicant committed rape upon her. Upon becoming conscious she found her clothes scattered and on being annoyed with the applicant showed her video clip on his mobile and threatened to viral it on internet if she had gone to police to lodge F.I.R. and the applicant also got her land at village sold and usurped the amount of sale consideration. Thereafter he got a house purchased and by making forgery he got recorded his name mentioned in place of the name of her husband. Thereafter on 02.06.2020 at 8-00 threatened the prosecutrix dragged her on the bed and committed rape upon her and fled away from there. As per the statement under Section 161 Cr.P.C. the prosecutrix reiterated the F.I.R. version. As per the statement of the prosecutrix under Section 164 Cr.P.C. she had stated that she was of 28 years of age and had studied upto Class 10th. Learned counsel for the applicant submits that medical examination was refused by the prosecutrix and she had not received any external injury.

4. Learned counsel for the applicant submits that there is vast contradiction in the F.I.R. and statements of the prosecutrix recorded under Sections 161 and 164 Cr.P.C. She is major and an ambitious and corrupt lady and due to her conduct her husband had left her and to fulfill her lust the prosecutrix has firstly developed relation with one Prem Kumar the friend of applicant and subsequently with the applicant. The prosecutrix was regularly extracting money from the applicant by one or another pretext. Though the prosecutirx had shown herself the wife of Dharmendra Singh Parihar but he did not come forward to defend her due to her illegal activity. The Investigating Officer contacted the husband of the prosecutrix on his telephone and he had clearly stated that he had not gone to his house as his wife had developed relation with Fauji i.e. the applicant. He further submits that the prosecutrix is a very clever lady and she had developed the relations with the applicant only to extract money. The prosecutrix has visited with the

applicant at Dhaulpur Rajasthan on 31.08.2017 and stayed there at Jaya Place Hotel, Dhaulpur with her own free will which shows that she was a consenting party but when the applicant retired from service on 31.05.2020 and refused to fulfill the lust of prosecutrix, she lodged the instant F.I.R. with false and fabricated facts.

5. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 21.09.2020 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

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

7. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

8. The prayer for bail is granted. The application is **allowed**.

9. Let the applicant-Udai Veer Singh involved in Case Crime No.358 of 2020, under Sections 452, 406, 376, 504 and 506 I.P.C., P.S. Jagdishpura, District Agra, be released on bail on executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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.

10. It may be observed that in the event of any breach of the aforesaid

conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

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

(2021)01ILR A506
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Crl. Misc. Bail Appl. No. 45784 of 2020

Ajeet Chaudhary ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Ajeet Srivastava, Sri Raghuvansh Misra

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

A. Criminal Law - Indian Penal Code, 1860-Section 354 r/w Section 3(1)Da, 3(1)Dha of SC/ST Act, 1989 & Prevention of Children from sexual offences(POCSO) Act, 2012-Section 7/8-inordinate delay in FIR-FIR was a result of trivial altercation between the parties-intention was to falsely implicate the applicant as the FIR lodged six days after much deliberation-material contradictions in the statement of victim u/s 161 and 164 Cr.P.C.-no independent witness of the alleged incident –school certificate relied to establish the age of victim is a fabricated document-co-accused already granted bail-no criminal history of the applicant. (Para 1 to 80)

The bail application is allowed. (E-5)

List of Cases Cited:

1. Hussain & anr. Vs U.O.I. (2020) 5 SCC 702

2. Arnab Manoranjan Goswami Vs St. of Mah. & ors.(2020) SCC OnLine 964

3. Pramod Kumar Ray & ors. Vs St. of Ori. (2017) SCC OnLine Ori 349

4. Dilip Kumar Sharma & ors. Vs St. of M.P. (1976) 1 SCC 560

5. Gudikanti Narasimhulu & ors. Vs Public Prosecutor,HC of A.P.(1978) 1 SCC 240

6. Hussain & anr. Vs U.O.I. (2017) 5 SCC 702

7. Emperor Vs H.L. Hutchinson & anr. (1931) AIR All 356

8. Ranjitsing Brahmjeetsing Sharma Vs St. of Mah. (2005) 5 SCC 294

9. Nikesh Tarachand Shah Vs U.O.I. & anr. (2018) 11 SCC 1

10. Maneka Gandhi Vs U.O.I. (1978) 4 SCC 494

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

1. The narrative is being structured in the following framework to facilitate the discussion:

I.	Defining the controversy and its origins
II.	Submissions of learned counsels
III.	Right of bail
IV.	SC & ST Act- Relevant provisions: Discussion
V.	Final Directions
VI.	Review of Compliance of Directions
VII.	Consideration of Bail Application on merits

I. Defining the controversy and its origins

2. The amendments to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 19891 made in the year 2016, brought in their wake an alteration in the practice and procedure for hearing of bail applications.

3. Learned counsels for the applicants in all connected bail applications pointed out certain anomalies in the practices of hearing of bail applications/bail appeals under the Act. This has created inconsistencies in the procedure for hearing of bail applications/bail appeals, uncertainty in the period of maturation of bail applications/bail appeals, and deferment of hearing of bail applications/bail appeals under the Act for undefined periods.

4. This issue is common to all bail applications before this Court. The individual bail applications will be decided on the respective facts of each case by separate orders.

5. Considering the importance of the issue raised by the learned counsel for the applicants in all the bail applications, the Court had requested the learned members of the Bar to assist the Court in defining and resolving the controversy.

6. Shri Manish Goyal, learned Additional Advocate General was also requested to take appropriate instructions from the State Government and make submissions before the Court.

7. Simply put the questions of law which arise for determination are these:

I. What is the agency and mode for service of notice of bail applications/bail appeal upon the victim under the Act (as amended from time to time)?

II. What is the time period for maturation of a bail application/bail appeal before the High Court which implements the mandate of the Act (as amended from time to time) and agrees with the requirements of constitutional liberties?

II. Submissions of the learned counsels for the Parties:

8. Apart from the counsels for the applicants, Shri Nazrul Islam Jafri, learned Senior Counsel assisted by Shri Mohd. Zubair Khan, Shri Vinay Saran, learned Senior Counsel assisted by Shri Pradeep Kumar Mishra, learned counsel, Shri R.P.S. Chauhan, learned counsel, Shri Santosh Kumar Tiwari, learned counsel and Shri Raghuvansh Mishra, learned counsel kindly volunteered to assist the Court. On behalf of the State Shri Manish Goyal, learned Additional Advocate General assisted by Shri Gambhir Singh, learned counsel and Shri Ankit Srivastava, learned counsel for the State have made their submissions.

9. Learned counsel for the applicants in various bail applications, Shri Ajeet Srivastava, Shri Rajesh Chandra Gupta, and Shri Devendra Saini submit that the usual procedure adopted by the Court to effect the service of the notice of bail applications upon the victim under the Act, is to issue notice to the victim by regular mode or through the Chief Judicial Magistrate of the district concerned. The procedure is not contemplated in the Act, and delays hearing of bail applications/bail appeals for varying periods.

10. Shri Nazrul Islam Jafri, learned Senior Counsel assisted by Shri Mohd.

Zubair Khan, learned counsel made the following contentions:

I. The disarray caused in the procedure for hearing of bails is primarily because of service of notice upon the victim by the process of Court, instead of direct service by the State as contemplated in the Act. Hearing of bail application is delayed for uncertain periods resulting in violation of Article 21 of the Constitution of India. The procedure and practice for bail hearing has to be rationalized urgently.

II. The right of the victim under the Act has to be balanced with the right of an accused to have his bail application heard within a reasonable period of time.

III. Learned Senior Counsel largely agrees with the timeline for maturation of bails suggested by the State Government. But efforts should always be made to reduce the time for maturation of bail applications.

IV. Learned Senior Counsel gave an account of real case studies of delays caused by the extant practice of service by Court process. In one case notice sent by the Court was not served for more than one and a half year and the bail application matured for hearing after that period.

11. Shri Vinay Saran, learned Senior Counsel assisted by Shri Pradeep Kumar Mishra, agrees with the arguments of Shri Nazrul Islam Jafri, learned Senior Counsel and further submits:

I. The bail processual framework has to be consistent with the requirements of Articles 14 and 21 of the Constitution of India.

II. The time period and procedure for maturation of the bail application has to be controlled by the fundamental rights of the accused under the Constitution, the rights of the victim under the Act, and the High Court Rules.

III. Practice of issuance of notice of bail by the Court to the victim by the court, has led to large variations in the time period for maturation of the bail applications for hearing. The process is not efficient and causes delays. Further such mode of service is not provided in the Act.

IV. The bail processual system needs to be rationalized urgently. Notice upon the victim has to be served directly by State, as specifically provided in the Act.

V. The time period of maturation of the bail applications as suggested on behalf of the State, is reasonable. Though he contends that efforts should always be made to improve the system.

12. Both learned Senior Counsels have called attention to various provisions of the Act.

13. Shri R.P.S. Chauhan, learned counsel assisted by Shri Santosh Kumar Tiwari, learned counsel made the following contentions:

I. The right of an accused seeking bail applications is conferred by statute but also effects his fundamental liberties under Article 21 of the Constitution of India.

II. All the Courts do not prescribe a uniform period for service of notice. Period and modes for service of notice varies in different Courts. This leads to inconsistency in time for maturation of bails for hearing.

III. The period of maturation of an a bail application cannot be unduly large, nor can it be vary from case to case.

14. Learned counsel has cited on the following authorities:

1. Hussain and another Vs. Union of India2

2. Arnab Manoranjan Goswami Vs. State of Maharashtra and Others3

15. Shri Raghuvansh Mishra, learned counsel adopted the arguments of learned Senior Counsels and then advanced the following additional submissions:

I. The State Government/ Special Public Prosecutor is nominated as the sole agency under the Act to effect service of the bail application upon the victim.

II. The creation of any additional agency or mode of service apart from the one prescribed under the Act would be contrary to law.

III. The Act is a criminal statute and has to be interpreted strictly.

IV. Section 15 (3) and Section 15(5) of the Act do not overlap and operate independently. Notice of bail application/bail appeal is served under Section 15(3), while Section 15(5) is invoked when the victim claims his/her right of hearing.

V. Failure of the State authorities to serve the notice upon the victim cannot deny the accused right to have his bail application/bail appeal heard within a stipulated period of time.

16. Learned counsel has placed reliance on the following cases in point:

I. Pramod Kumar Ray and Others Vs State of Odisha4

II. Dilip Kumar Sharma and Others Vs. State of Madhya Pradesh5

17. Shri Manish Goyal, learned Additional Advocate General assisted by Shri Gambhir Singh, learned counsel and Shri Ankit Srivastava, learned counsel for the State submitted as under:

I. Under the Act, the State is the sole agency vested with the duty to serve notice of bail applications/bail appeals upon the victim.

II. The State authorities need reasonable time to serve notice upon the victim.

III. The victim is also required to be afforded adequate time after service of notice to effectively tender his defence before the Court.

IV. The State machinery shall be geared up to implement the provisions of the Act in letter and spirit.

V. Upon the instructions received from the State Government, the following timeline is proposed on behalf of the State:

A. Time for service of notice upon the victim by the State agency should not be less than 96 hours.

B. Time required by the victim between the service of notice and hearing of the bail application should not be less than 72 hours.

III. <u>Right of Bail</u>

18. The right to bail has statutory origins but cannot be isolated from constitutional oversight.

19. Good authority has long entrenched the right of an accused to seek bail in the charter of fundamental rights assured by the Constitution of India. These authorities pivot the discussion.

20. Bail jurisprudence was firmly embedded in the constitutional regime of fundamental rights in ***Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh***6. Casting an enduring proposition

of law in eloquent speech, Justice V.R. Krishna Iyer held:

"Bail or jail?" -- at the pre-trial or post-conviction stage -- belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right."

21. Engagement of fundamental rights in bail jurisprudence is a constant in constitutional law.

22. The nexus of fundamental liberties of the citizens and the right of bail came to the fore in ***Hussain and another Vs. Union of India***7, when the Supreme Court was alerted to the issue of delay in consideration of grant of bail applications in the courts. In ***Hussain (supra),*** it was enjoined:

"Timeline for disposal of bail applications ought to be fixed by the High Court."

"29.1.1. Bail applications be disposed of normally within one week;"

23. Nearer home the Allahabad High Court in ***Emperor Vs. H.L. Hutchinson and another***8 stated that grant of bail is the rule and refusal is the exception on the foot of the following reasons:

"The principle to be deduced from sections 496 and 497 of the Criminal Procedure Code, therefore, is that grant of bail is the rule and refusal is the exception. That this must be so is not at all difficult to see. An accused person is presumed under the law to be innocent till his guilt is proved. As a presumably innocent person he is entitled to freedom and every opportunity to look after his own case. It goes without saying that an accused person, if he enjoys freedom, will be in a much better position to look after his case and to properly defend himself than if he were in custody. One of the complaints made by the applicants in this case is that their letters sent from the custody have been opened and inspected and censored, and, therefore, they were not in a position to conduct their defence with the aid of such friends as may he outside the prison. As I have said, it is obvious that a presumably innocent person should have his freedom to enable him to establish his innocence."

24. The Supreme Court set its face against restrictions on the power of the

courts to grant bail in ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra***9.

25. Constitutionality of onerous conditions for grant of bail imposed by Section 45 of the Money Laundering Act, 2002 was in issue in ***Nikesh Tarachand Shah Vs. Union of India and another***10. This narrative will profit from a detailed consideration of the judgment.

26. The Supreme Court in ***Nikesh Tarachand (supra)*** predicated its holding by delving into the origin of the quest for liberty in English jurisprudence:

"18. What is important to learn from this history is that Clause 39 of the Magna Carta was subsequently extended to pre-trial imprisonment, so that persons could be enlarged on bail to secure their attendance for the ensuing trial. It may only be added that one century after the Bill of Rights, the US Constitution borrowed the language of the Bill of Rights when the principle of habeas corpus found its way into Article 1 Section 9 of the US Constitution, followed by the Eighth Amendment to the Constitution which expressly states that, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". We may only add that the Eighth Amendment has been read into Article 21 by a Division Bench of this Court in Rajesh Kumar v. State [Rajesh Kumar v. State, (2011) 13 SCC 706 : (2012) 2 SCC (Cri) 836] at paras 60 and 61."

27. The enquiry into the constitutional correctness of the assailed provisions began with the tests for violation of Article 14 "both in its discriminatory aspect and its manifestly arbitrary aspect".

28. The discussion then proceeded to understand the scope and effect of Article 21 of the Constitution of India on the offending provisions for grant of bail. This enquiry was overlaid with a consideration of authorities "on the concept of due process in our constitutional jurisprudence whenever the court has to deal with a question affecting life and liberty of citizens".

29. Finally in ***Nikesh Tarachand (supra)***, onerous conditions for grant of bail in Section 45 (1) of the Prevention of Money Laundering Act, 2002, were declared unconstitutional being violative of Articles 14 and 21 of the Constitution of India:

"46. We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature."

30. The following statement of law in the epoch making decision of ***Maneka Gandhi vs. Union of India***11 will fortify this narrative:

"81... Procedure established by law", with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex necessitate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with "do or die" patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? An enacted apparition is a constitutional illusion. Processual justice is writ patently on Article 21. It is too grave to be circumvented by a black letter ritual processed through the legislature."

31. More recently in ***Arnab Manoranjan Goswami Vs. State of Maharashtra and Others***12. The status of liberty in our constitutional value system, realities of the criminal justice process, and nature of the right of bail came up squarely for consideration.

32. The Supreme Court in ***Arnab Goswami (supra)*** was cognizant of the tendency to misuse criminal law and held unequivocally that the courts have to ensure that criminal law does not become "weapon for the selective harassment of the citizens".

33. The self imposed fetters on grant of bail under Article 226 of the Constitution of India were removed. The first principles of writ jurisdiction for upholding the fundamental liberties of the citizens were reiterated:

"..However, the High Court should not foreclose itself from the exercise of the power when a citizen has been arbitrarily deprived of their personal liberty in an excess of state power.

71. While considering an application for the grant of bail under Article 226 in a suitable case, the High Court must consider the settled factors which emerge from the precedents of this Court."

34. Reinforcing the connection between the concept of liberty and the process of criminal law, the Supreme Court in ***Arnab Goswami (supra)***, determined the characteristics of liberty and delineated the duties of courts across the spectrum:

"Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum - the district judiciary, the High Courts and the Supreme Court - to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum - the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting."

74. Human liberty is a precious constitutional value, which is undoubtedly subject to regulation by validly enacted legislation.

"...Our courts must ensure that they continue to remain the first line of defense

against the deprivation of the liberty of citizens. Deprivation of liberty even for a single day is one day too many. We must always be mindful of the deeper systemic implications of our decisions."

35. Constitutional courts have to constantly be at the vanguard of the defence of liberties of citizens.

Provisions for bail in High Court Rules:

36. The process of maturation of a bail application before it is placed before the Court, is contained in Rule 18 of Chapter 18 of the Allahabad High Court Rules. The relevant part of Rule-18 (as amended on 19.09.2018) is reproduced below:

"[(3) Save in exceptional circumstances-

(a) No bail application shall be placed before the Court unless notice thereof has been given to the Government Advocate and a period of two days has elapsed from the date of such notice.

(b) If the application for bail has not been moved within seven days after the expiry of the aforesaid period of two days the applicant or his counsel shall give two days previous notice to the Government Advocate as to the exact date on which such application is intended to be moved.

(c) Where the prayer for bail is contained in a petition of appeal or application for revision, notice thereof may be given to the Government Advocate the same day prior to the hearing of such petition or application and the fact of such previous notice having been given, shall be endorsed on such petition or application. Alongwith such notice a certified copy or one attested to be true by the counsel, of the Judgment appealed from or sought to be revised shall also be given to the Government Advocate.]

(emphasis supplied)"

37. Thus under the Allahabad High Court Rules, the time to run various procedural formalities before a bail is placed before the court is two days.

38. The provision has an interesting history. The time period for maturation of the bail application under unamended Rule 18 of the Allahabad High Court Rules was ten days.

39. A bail processual framework violates fundamental rights and personal liberties of an accused guaranteed under Articles 14 and 21 of the Constitution of India in the following situations:

A. Provisions with an unreasonably large time for maturation of a bail application;

B. Procedures where the time period for hearing of a bail application is undefined;

C. Practices causing indefinite deferment of hearing of a bail application.

D. Failure of police authorities to provide timely instructions to the Government Advocate before the hearing of bail application.

40. Such provisions and practices are vulnerable to a constitutional challenge.

41. Attributes of the processual framework of bails which are in accord with Articles 14 and 21 of the Constitution of India are these. Bail applications have to be processed expeditiously and placed before the court for hearing in a reasonable and definite time frame. The procedure for

processing the bail application needs to be consistent, and the time period for hearing of the bail application has to be certain.

42. The proposition that a bail application cannot be under procedural incubation for an unreasonable time, is the sequitor of the preceding tenets of constitutional law. These were at the heart of the efforts made by Shri Haider Rizvi, a public spirited lawyer to reform the bail procedures in this Court, and make them consistent with Articles 14 and 21 of the Constitution of India. Efforts of Sri Haider Rizvi, learned counsel bore fruit when the necessary amendments were made to Rule 18 of the Allahabad High Court Rules, reducing the period of notice of bail from ten days to two days.

IV. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)Act, 1989 : Relevant Provisions and Discussion

43. The Constitution of India asserts the equality of all its citizens. However, the founding fathers were equally conscious of inequalities which blight our society. Many sections of our society are downtrodden and oppressed because of historical reasons. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (as amended from time to time), is a recognition of the fact of inequalities in our society; and a reflection of the resolve to do equal justice.

44. The controversy in hand requires a determination of statutory mandate of relevant provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (as amended from time to time). Determination of statutory mandate is an exercise in interpretation of the statute. The statutory mandate can be distilled by understanding the legislative intent, surveying the relevant provisions of the enactment, examining the words employed by the legislature, and being guided by settled canons of statutory interpretation.

45. The relevant extract of statements of objects and reasons of the Act is reproduced below:

*"**Statement of Objects and Reasons**- The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted with a view to prevent the commission of offences of atrocities against the members of the Scheduled Castes and Scheduled Tribes and to establish Special Courts for the trial of such offences and for providing relief and rehabilitation of the victims of such offences.*

2. Despite the deterrent provisions made in the Act, atrocities against the members of the Scheduled Castes and Scheduled Tribes continue at a disturbing level. Adequate justice also remains difficult for a majority of the victims and the witnesses, as they face hurdles virtually at every stage of the legal process. The implementation of the Act suffers due to (a) procedural hurdles such as non-registration of cases ;(b) procedural delays in investigation, arrest and filing of charge-sheets; and (c) delays in trial and low conviction rate"

46. The provisions of the Act (material to the controversy) shall now be considered.

47. Section 2 (bd) defines the "Exclusive Special Court", Section 2(d) defines the "Special Courts", while Section 2 (ec) defines "victim":

"(bd) "Exclusive Special Court" means the Exclusive Special Court established under sub-section (1) of section 14 exclusively to try the offences under this Act;"

"(d) Special Court means a Court of Session specified as a Special Court in section 14;"

"(ec) "victim" means any individual who falls within the definition of the "Scheduled Castes and Scheduled Tribes" under clause (c) of sub-section (1) of section 2, and who has suffered or experienced physical, mental, psychological, emotional or monetary harm or harm to his property as a result of the commission of any offence under this Act and includes his relatives, legal guardian and legal heirs;"

48. Appeal against an order granting or refusing bail under the Act is regulated by Section 14 (A) of the Act, which is extracted hereinunder:

"[14A. Appeals. - (1) Notwithstanding anything contained in the Code of Criminal Procedure,1973, an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in sub-section (3) of section 378 of the Code of Criminal Procedure, 1973, an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

(3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.]"

49. Rights of victim and witnesses and provisions for grant of bail have merited special attention from the legislature in Section 15 of the Act. Section 15 (A) (3) and (5) being central to the controversy are reproduced hereunder:

"(3) A victim or his dependent shall have the right to reasonable, accurate, and timely notice of any Court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act."

"(5) A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing."

50. Section 15 A (3) has two limbs: The first is the nomination of the agency to inform the victim about such proceedings under the Act before the Court. The second limb provides for "reasonable, accurate and

timely notice" of any criminal proceedings including a bail application/bail appeal to the victim or his dependent. Section 15(A) 3 visualizes some elements of process of maturation of bail, for being placed before the Court. However, it does not disclose any time frame for the same.

51. The legislature has employed the word "shall'.

52. The word "shall" mostly denotes the mandatory intent of the legislature ***(see State of Haryana Vs. Raghuvir Dayal13***) Considering the context of the statute and the preceding discussion the provisions are mandatory.

53. The Orissa High Court in ***Pramod Kumar Ray and Others Vs State of Odisha14***, has held the provisions to be mandatory.

54. The first principle of interpretation of criminal statutes of strict construction of language of the enactment, was relied upon by the Supreme Court in ***Dilip Kumar Sharma Vs State of M.P.15 :***

"23. It is well settled that such a penal provision must be strictly construed ; that is to say, in the absence of clear compelling language the provision should not be given a wider interpretation and no case should be held to fall within which does not come within the reasonable interpretation of the statute. (M.V. Joshi V. M.U. Shimpi) If two construction are possible upon the language of the statute, the Court must choose the one which is consistent with good sense and fairness and eschew the other which makes ti operation unduly oppressive, unjust or unreasonable, or which would lead to strange, inconsistent results or otherwise introduce an element of bewildering uncertainty and practical inconvenience in the working of the statute."

55. The position which thus emerges is that under the Act the State Government or Special Public Prosecutor is nominated as the sole agency with the exclusive statutory duty to inform the victim about the bail proceedings. Any practice to create an intermediate agency or alternative method for service of notice upon the victim should be avoided.

56. Direct responsibility for service of bail notice upon the victim under the Act is upon the State. The Act does not contemplate sending of bail notice to the victim by the Court. At least not till the State fails in its duty to serve notice. Further, issuance of notice by the Court does not have added efficacy in these cases, since ultimately service upon victim is effected only by the State agencies.

57. The discussion shall now move to the second most critical aspect of the controversy. The time line during which the bail application matures, for being placed before the court for hearing. And the time period which will give "reasonable accurate and timely notice" to the victim.

58. While determining the aforesaid time line, the Court has to correlate and balance the mandate of statutory rights of the victim, with the imperative of constitutional liberties of the accused.

59. In the opinion of this Court, the time line suggested by the Sri Manish Goyal, learned Additional Advocate General upon specific instructions from the State Government seems to be reasonable and just. This time line implements the

mandate of the statute and upholds the demands of constitutional liberties. Though efforts can always be made to streamline functioning, improve the efficiency of the system.

60. Before finalizing the time line, another issue which was raised at the bar has to be adverted to.

61. In case State fails to serve notice upon the victim for various reasons, what would be the fate of the stipulated time line. The definition of victim under the Act is inclusive. The State is in possession of material details of the victim for service. Further State has the resources and the responsibility to serve notice. It is always open to the State to adopt different modes of service including publication in the newspapers.

62. Failure to serve notice of bail upon the victim, is failure of the State to perform its statutory function. The accused cannot be visited with penal consequences for the default of the State. The erring officials have to be proceeded against as per law. Placement of the bail application/bail appeal before the court cannot be deferred for non service of notice after the expiry of the time line stipulated below.

63. There is another aspect of the matter. A person may simply evade service in the certain knowledge that failure to serve shall defer the hearing of the bail application and extend the period of detention. This would be an abuse of the process of law and breach the fundamental right of liberty of the accused under Article 21 of the Constitution of India.

64. It was also urged on the foot of Section 15(5) of the Act, that in case the State cannot serve the notice within the stipulated period of time, it may move an application for enlargement of the time. For the reasons in the preceding part of the narrative this contention is being noticed only to be rejected.

65. Section 15(5) of the Act cannot be put in service for extension of the notice period. The said provision comes into play only where the victim exercises his right to be heard, when the bail is placed before the Court after its period of maturation. Section 15(5) of the Act is a stage subsequent to Section 15 (3) of the Act.

66. While the rights of the victim as contemplated under the statute have to be upheld at all times, service of notice of bail application/appeal cannot be unduly delayed by the State, nor can the victim cause indefinite deferment of the hearing of the bail application.

67. The discussion now turns to the interpretation of phrase "reasonable, accurate and timely notice to the victim" under Section 15(3) of the Act. The phraseology employed by the Legislature is comprehensive and the intent is unmistakable. The victim has to be given adequate time to prepare his defence, prior to placing of the matter before the Court. The time period of 72 hours between the receipt of notice by the victim and hearing of the bail application fully satisfies the statutory requirement.

V. Final Directions

68. In light of the preceding narrative, the following directions are issued.

69. The bail application/bail appeal under the Act shall be placed before the Court in strict adherence to the following time line and procedure:

(I) The notice of the bail application/ bail appeal under the Act shall be served upon the Government Advocate before 12:00 PM of any working day.

(II) The State Government shall ensure that service of notice of the bail application/ bail appeal is effected upon the victim not later than 96 hours after the receipt of the said notice.

(III) The victim will be entitled to 72 hours after the receipt of notice of bail.

(IV) Save in exceptional circumstances which are accepted by the Court, the bail application/ bail appeal under the Act shall be placed before the Court immediately after the expiry of 168 hours/7 days from the time of service of notice of bail application/bail appeal upon the Government Advocate as aforesaid.

(V) The report of the service of notice of bail application/ bail appeal shall be submitted by the State authority before the court showing due compliance of the provisions of Section 15(3) of the Act.

(VI) In case the counsel for the applicant does not move the bail application/bail appeal as per the current procedure to enable it to be placed before the Court 7 days after the initial service of notice, this procedure shall be followed. The applicant or his/ her counsel shall give 96 hours of notice to the Government Advocate as to the exact date on which such application is intended to be moved. The State shall thereafter cause such notice to be served again upon the victim so as to enable him to have "accurate, notice of the proposed bail application".

(VII) During this period of 7 days notice of the bail application under the Act, the police authorities shall ensure that appropriate instructions are available with the Government Advocates to assist the Court at the hearing of the bail application/bail appeal.

(VIII) The S.S.P/ D.C.P/S.P. (in districts where there is no post of S.S.P) of the concerned district shall be the nodal officer, who shall supervise the staff charged with the duty of actually serving the notice upon the victim and to provide instructions and relevant material to the Government Advocate on the bail application. In case, there is default on part of such official, the S.S.P./ D.C.P/ S.P. of the concerned district shall take immediate action in accordance with law against such erring official.

(IX) Before parting the Court cannot but take notice of the fact that we live in the age of information technology. The process of law cannot move at a bullock cart pace in the age of information technology. Institutions have to upgrade with the latest technological developments. Fruits of technology have to be put in the service of the people. In the legal process technology can play a critical role in effectuating the fundamental rights of the citizens in particular, and in upholding the process of law in general. The State Government and the Bar are stakeholders in the matter. On behalf of the State, it has been submitted that the office of the Government Advocate does not have the infrastructure and trained personnel to accept and process e-notices of bail applications.

(X) Accordingly, the State Government is directed to ensure that requisite infrastructure and trained personnel in the High Court (Office of Government Advocate), as well as in police stations are available to process the traffic of notices by e-mail. The bail application/

bail appeal may be served upon the Government Advocate by e-mail. In case the notice is fully accurate and contains all the relevant annexures, the said service by e-mail shall be sufficient service upon the State.

(XI) In the event of service of notice of bail application/bail appeal upon Government Advocate by e-mail, the time limit for effecting service of the said notice by the State upon the victim shall be 72 hours and not 96 hours. The bail application in such cases shall be placed before the Court in 144 hours/6 days.

(XII) The option of e-filing of notice of bail applications/bail appeals under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, shall be made effective w.e.f. 01.05.2021.

VI. Review of Compliance of Directions

70. The Director General of Police shall create a State Level Committee headed by Officer not below than the rank of Additional Director General of Police. The aforesaid committee shall review the working and implementation of the above said directions, streamline procedures, study the possibility of further reducing the time period of notice of bail appeals/bail applications upon the victims, and also examine the action taken against the concerned officials for violating the directions.

71. The Committee shall submit its report on annual basis before the State Government and make appropriate recommendations.

72. Expeditious service of notice of bail application/bail appeal will give an early intimation about the said proceedings to the victim. By providing the victim with early information about the notice of bail proceedings, the rights of the victim under Section 15-A (3) of the Act will be realized.

73. The review of the implementation of the directions of the Court shall also assist the Government in framing appropriate schemes for the victim to access justice as contemplated in Section 15(11) of the Act read with Rule 14 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1995. The provisions are extracted hereinunder for ease of reference:

"15(11). It shall be the duty of the concerned State to specify an appropriate scheme to ensure implementation of the following rights and entitlements of victims and witnesses in accessing justice so as--

(a) to provide a copy of the recorded First Information Report at free of cost;

(b) to provide immediate relief in cash or in kind to atrocity victims or their dependents;

(c) to provide necessary protection to the atrocity victims or their dependents, and witnesses;

(d) to provide relief in respect of death or injury or damage to property;

(e) to arrange food or water or clothing or shelter or medical aid or transport facilities or daily allowances to victims;

(f) to provide the maintenance expenses to the atrocity victims and their dependents;

(g) to provide the information about the rights of atrocity victims at the time of making complaints and registering the First Information Report;

(h) to provide the protection to atrocity victims or their dependents and witnesses from intimidation and harassment;

(i) to provide the information to atrocity victims or their dependents or associated organisations or individuals, on the status of investigation and charge sheet and to provide copy of the charge sheet at free of cost;

(j) to take necessary precautions at the time of medical examination;

(k) to provide information to atrocity victims or their dependents or associated organisations or individuals, regarding the relief amount;

(l) to provide information to atrocity victims or their dependents or associated organisations or individuals, in advance about the dates and place of investigation and trial;

(m) to give adequate briefing on the case and preparation for trial to atrocity victims or their dependents or associated organisations or individuals and to provide the legal aid for the said purpose;

(n) to execute the rights of atrocity victims or their dependents or associated organisations or individuals ***at every stage of the proceedings under this Act and to provide the necessary assistance for the execution of the rights*** (emphasis supplied)

Rule 14. Specific responsibility of the State Government.--(1) The State Government shall make necessary provisions in its annual budget for providing relief and rehabilitation facilities to the victims of atrocity, as well as for ***implementing an appropriate scheme for the rights and entitlements of victims and witnesses in accessing justice as specified in sub-section (11) of Section 15-A of Chapter IV-A of the Act.***

(emphasis supplied)

(2). The State Government shall review at least twice in a calendar year, in the month of January and July the performance of the Special Public Prosecutor and Exclusive Special Public Prosecutor specified or appointed under Section 15 of the Act, various reports received, investigation made and preventive steps taken by the District Magistrate, Sub-Divisional magistrate and Superintendent of Police, relief and rehabilitation facilities provided to the victims and the reports in respect of lapses on behalf of the concerned officers.

VI. Consideration of Bail Application on merits:

74. Matter is taken up in the revised call.

75. The office report indicates that the notices have been served upon the victim. None appears on behalf of the victim. The bail application is being heard on its merit.

76. A first information report was lodged against the applicant as Case Crime No. 137 of 2020 at Police Station-Karkanda, District Ghazipur, on 12.05.2020 under Sections 354 I.P.C, read with Sections 3(1)Da, 3(1) Dha of SC/ST Act and Section 7/8 of POCSO Act.

77. The bail application of the applicant was rejected by learned Special Judge (POCSO Act)-1, Ghazipur, on 23.10.2020.

78. The applicant is in jail since 12.10.2020 pursuant to the said F.I.R.

79. Sri Ajeet Srivastava, learned counsel for the applicant contends that the F.I.R. was lodged six days after the incident. The F.I.R. is a result of a trivial altercation between the adults of the family. The F.I.R. was lodged six days after much deliberation and with a view to falsely implicate the applicant. There are material

contradictions in the statements of victim under Sections 161 and 164 Cr.P.C. There is no independent witness of the alleged incident. The school certificate relied to establish the age of the victim is a fabricated document. The applicant claims parity with the cases of other co-accused persons, namely, Sonu Chaudhary and Kishan Chaudhary, who have been granted bail by this Court on 02.11.2020 in Criminal Misc. Bail Application No. 31204 of 2020 (Sonu Chaudhary and another Vs. State of U.P.). It is also asserted that apart from the above said case the applicant does not have any criminal history.

80. Learned A.G.A. has opposed the bail application.

81. The submissions on behalf of the applicant clearly make out a case for grant of bail. In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is **allowed.**

82. Let the applicant- **Ajeet Chaudhary** be released on bail in Case Crime No. 137 of 2020 under Sections 354 and 506 I.P.C. read with Sections 3(2) (5)-A SC/ ST Act and 7/8 of POCSO Act, registered at Police Station- Karkanda, District Ghazipur, registered on 12.05.2020 at Police Station- Karkanda, District Ghazipur, on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates 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 of the Indian Penal Code.

(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. is issued and the 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 of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) 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 party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

(vi) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vii) 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.

(2021)01ILR A522
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2021

BEFORE

THE HON'BLE ABDUL MOIN, J.

Contempt No. 106 of 2021

Mohd. Asif Naseer ...Applicant
Versus
West Watch Co. & Anr. ...Opp. Parties

Counsel for the Applicant:
Anurag Srivastava, Kabir Ahmad Khan

Counsel for the Opp. Parties:

(A) Contempt of Courts Act, 1971: Section 10 - The High Court can exercise the power under Section 10 of the Act of 1971 where there is no provision under the Criminal Procedure Code or the Code of Civil Procedure for execution of the orders or for compliance of such orders. In other words, where there is an effective remedy for enforcing the order then the High Court would be justified in declining to entertain the contempt petition. (Para 9)

In the instant case, an execution case has already been filed and the applicant has already got a remedy of having an order passed by the Prescribed Authority executed consequently the present contempt petition would not be maintainable. (Para 10)

Contempt Petition Rejected. (E-8)

List of Cases cited :-

E Bapanaiah Vs K.S. Raju (2015) 1 SCC 451 *(followed)*

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Sri Navneet Kumar Awasthi holding brief of Sri Anurag Srivastava, learned counsel for the applicant.

2. Present contempt petition has been filed alleging non-compliance of the judgment dated 05.02.2016 passed in Rent Appeal No.45 of 2011 in re:West Watch Company vs. Mohd. Asif Naseer, a copy of which has been filed as Annexure-3 to the contempt petition.

3. Learned counsel for the applicant contends that the applicant who is a landlord had filed a suit before the Judge, Small Causes Court which was numbered as P.A. Case No.10 of 2008 in re: Mohd. Asif Naseer vs. West Watch Company, against the tenant West Watch Company. The said case was decided vide order dated 04.10.2011, a copy of which is Annexure-2 to the contempt petition, whereby the tenant was directed to vacate the premises within thirty days and certain other orders were also passed. The tenant being aggrieved with the said judgment filed Rent Appeal No.45 of 2011 in re: West Watch Company vs. Mohd. Asif Naseer, before the Additional District Judge, Lucknow, which was dismissed vide judgment and order dated 05.02.2016, a copy of which is Annexure-3 to the contempt petition.

4. The tenant still being aggrieved filed Writ Petition No.3457 (R/C) of 2016 in re: West Watch Company vs. Addl. District Judge before this Court, which was allowed vide judgment and order dated 04.03.2016, a copy of which is Annexure-4 to the contempt petition, and the orders of the Prescribed Authority dated 04.10.2011 and Additional District Judge dated 05.02.2016 were set-aside.

5. The applicant/landlord being aggrieved with the order dated 04.03.2016 filed a S.L.P. which was registered as Civil Appeal No.2375 of 2020 and the Apex Court vide judgment and order dated 24.04.2020 allowed the civil appeal and set-aside the judgment of the writ Court and affirmed the order passed by the Prescribed Authority as affirmed by the appellate authority. However, the tenant was given six months' time to vacate the premises.

6. When the premises were not vacated despite the order passed by the Apex Court as well as the Prescribed Authority, present petition has been filed under Section 10 of the Contempt of Courts Act, 1971 (For short, 'Act of 1971') alleging contempt of the judgment and order dated 05.02.2016 passed in Rent Appeal No.45 of 2011.

7. Learned counsel for the applicant contends that he has already filed an Execution Case No.62 of 2020 against the tenant for execution of the order dated 04.10.2011 passed by the Prescribed Authority. He also contends that despite having filed the execution case, present contempt petition would also be maintainable under Section 10 of the Act of 1971.

8. Having heard learned counsel for the applicant and having perused the records, what is apparent is that the present contempt petition filed under Section 10 of the Act of 1971 despite admittedly an execution case having been filed by the applicant would not be maintainable as per law laid down by the Apex Court in the case of **E. Bapanaiah vs. K.S. Raju reported in (2015) 1 SCC 451** wherein it has been 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." *(Emphasis by this Court)*

9. From 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 of 1971 can be exercised where there is no provision under the Criminal Procedure Code or the Code of Civil Procedure for execution of the orders or for compliance of such orders meaning thereby that where there is an effective remedy for enforcing the order then the High Court would be justified in declining to entertain the contempt petition.

10. In the instant case, it is admitted by learned counsel for the applicant that an execution case has already been filed by him. The Apex Court in the case of ***K.S. Raju (supra)*** has already held that a civil contempt can be filed under the provisions of Section 10 of the Act of 1971 where there is no remedy for having an order executed. As in the instant case it is admitted that an execution case has already been filed and the applicant has already got a remedy of having the order passed by the Prescribed Authority executed consequently the present contempt petition would not be maintainable.

11. Taking into consideration the aforesaid facts and circumstances of the case, present contempt petition is **dismissed.**

(2021)01ILR A524
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.01.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 44 of 2020

Kamlesh Kumar & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Rajiva Dubey, Sumit Kumar Srivastava

Counsel for the Respondents:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 304(2)/34-challenge to-conviction-enmity between the appellant and deceased due to land dispute-no specific role assigned to appellant's father by the prosecution witnesses to casue injury by lathi-father acquitted-while the appellant caused only one blow on the head of the deceased without any premeditation with lathi at the time of occurrence-accused has no criminal history- the conviction of the appellant is maintained-sentence of 4 years reduced to a R.I. of 3 years-(Para 1 to 38)

B. Apex Court evolved the theory of proportionality in awarding the sentence, subject to minimum sentence provided by the Legislature. There are several factors, which may be taken into consideration for awarding quantum of sentence, for example- gravity and seriousness of offence, age and number of offenders, number of deceased, injured persons nature of weapons, nature of injuries, criminal antecedents of accused, motive , cause intention of offence etc. (Para 32)

The appeal is partly allowed. (E-5)

List of Cases Cited:-

1. Masalti & ors. Vs St. of U.P.,(1965) AIR SC 202

2. Mohabbat Vs St. of M.P.,(2009) 13 SCC 630

3. Behari Prasad & ors. Vs St. of Bih.,(1996) SCC (Cri.) 271

4. St. of M.P. Vs Saleem @ Chamaru,(2005) AIR SC 3996

5. Ramashraya Chakravarti Vs St. of M.P.,(1976) SC 392

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

1. This appeal under Section 374 (2) Code of Criminal Procedure, 1973 (hereinafter referred to as Code) has been preferred against the judgment and order dated 20.01.2020, passed by VIth Additional Sessions Judge, Lakhimpur Kheri, in Sessions Trial No.207/1992 arising out of Case Crime No.71/90, Police Station-Phardhan, District-Kheri, whereby the appellants-Kamlesh Kumar and Chotey Lal (hereinafter referred to as appellants) have been convicted and sentenced for the offence under Section 304 (2) read with 34 I.P.C. for four years rigorous imprisonment each.

2. The prosecution case, in brief, is that the appellant-Kamlesh Kumar is son of the appellant-Chotey Lal, resident of Village-Rousa, P.S.-Fardhan, District-Lakhimpur Kheri. The deceased-Ram Avtar was neighbour to the appellants. There was enmity between the deceased-Ram Avtar and the appellants due to land dispute. On 22.05.1990 at about 2:00 p.m., Ram Kishore (P.W.-2), brother of the informant, Ram Kishan (P.W.-1) and Rajesh Kumar, son of Ram Avtar (deceased) had gone to take water from hand pump. At the time of occurrence, Ram Kishore (P.W.-2) was operating the hand pump and Rajesh Kumar was taking water with hollowed palm (Chhullu). Meanwhile, Sunita, daughter of the appellant-Chotey Lal, came there and put soil (dust) in the hollowed palm (Chullu) of Rajesh Kumar and thereafter hot talk started between them. Meanwhile, the appellants-Kamlesh Kumar, Chotey Lal and co-accused-Ram Vilas (since deceased) appeared with lathi and started to beat Rajesh Kumar and Ram Kishore (P.W.-2). Upon hearing a noise, Ram Avtar and Maya Devi (P.W.-3) came there to save Rajesh Kumar and Ram Kishore (P.W.-2) but the appellants and co-accused-Ram Vilas (since deceased) also beaten them. Appellant-Kamlesh Kumar attacked on the head of the deceased-Ram Avtar with lathi, whereby he fell down and became unconscious. The said occurrence was seen by Rama Kant son of Girija Dayal, Sarafat Ali son of Karim and Kanhaiya Lal son of Kunj Bihari, resident of Parsehra Khurd, P.S.-Neemgaon and when so many people raised alarm, the appellants and co-accused-Ram Vilas (since deceased) by threatening fled away from the place of occurrence towards their house.

3. Ram Kishan (P.W.-1) got the first information report (Ext.Ka-1), prepared by one Parmesh Chandra Tiwari and carried the injured persons including Ram Avtar by tractor to police station-Fardan and lodged the report. On the basis of the said information, case crime No.71 of 1990, under Sections-308, 323, 504 and 506 I.P.C. was registered on 22.05.1990 at 3:45 p.m. by Constable-Narendra Nath Tiwari. The injured persons, including the deceased-Ram Avtar were sent for medico legal examination and for treatment to District Hospital, Lakhimpur Kheri where Ram Avtar was admitted due to critical condition but he died after sometime. The medico legal examination of other injured

person namely Rajesh Kumar and Ram Kishore (P.W.-2) and Maya Devi (P.W.-3) was conducted by Emergency Medical Officer on 23.05.1990 between 00:30 a.m. to 00:50 a.m. The death information report of the deceased was sent to concerned police station. S.I.-Munna Lal Bajpayee conducted the inquest proceeding and prepared the inquest report (Ext.-Ka-2) in the presence of punch witnesses including Ram Kishan (P.W.-1). The dead body of the deceased was sealed and was sent for post-mortem examination to District Hospital, Lakhimpur Kheri.

4. Dr. Y. B. Chand (P.W.-4) conducted the post-mortem examination of the deceased-Ram Avtar on 23.05.1990 at about 4:00 p.m. and prepared the post-mortem report (Ext.-Ka-3). According to him, the deceased was aged about forty years and had died one day before, rigor mortis passed off from both upper limbs and post-mortem staining was present on back of deceased. According to him further, the following ante mortem injury was found at the time of examination :

"(1) Lacerated would 1 c.m. x ½ cm x bone deep on the right side of the head 4 cm above to right eye brow.

(2) Contused swelling 15 cm x 5 cm on the left side of head and above left ear."

5. According to P.W.-4, clotted blood was present around the bony part of the head of the deceased and both the temporal and parietal as well as occpital bones were fractured in many pieces ; membrane and brain tissues were lacerated. According to him, the said ante mortem injury would have been caused by blunt object i.e. lathi on 22.02.1990 at about 2:00 p.m. and deceased had died due to shock and haemorrhage as a result of ante mortem injuries.

6. After conclusion of the investigation, charge sheet was submitted against the appellants and co-accused-Ram Vilas (since deceased) by Investigating Officer, S.H.O.-Harpal Singh, under Sections-304, 323, 504 & 506 I.P.C., 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 copy of relevant police papers, as required under Section 207 of the Code, committed the case to the Court of Sessions, Lakhimpur Kheri for trial.

7. The learned trial Court after hearing the counsel for both the parties framed charges for the offence under Sections 304, 323, 504 and 506 I.P.C. against the appellants including the co-accused-Ram Vilas (since deceased) from which they denied and claimed for trial.

8. The prosecution in order to prove its case, examined Ram Kishan (P.W.-1), Ram Kishore (P.W.-2), Maya Devi (P.W.-3) and Dr. Y. B. Chand (P.W.-4).

9. During trial, co-accused-Ram Vilas (since deceased) had died and after conclusion of the trial, the statement of the appellants were recorded under Section 313 of the Code wherein they denied the prosecution story as well as evidence produced by the prosecution and stated that they are innocent and had been falsely implicated. They further stated that after purchasing the house and landed property by them from one Ram Chandra, uncle of the informant filed civil suit for the said property, which was decreed in favour of

the appellants and due to that enmity, they had been falsely implicated.

10. Learned trial Court after hearing the learned counsel for both the parties and considering the material available on record, convicted and sentenced the appellants as above by the impugned judgment. Aggrieved by the said judgment, the appellants have preferred this appeal.

11. Heard Sri Sumit Kumar Srivastava, learned counsel for the appellants and Sri G. D. Bhatt, learned A.G.A. for the State.

12. Learned counsel for the appellants has submitted that the appellants are innocent and have been falsely implicated. Learned counsel further submitted that the scriber of F.I.R. was not examined by the prosecution. Learned counsel further submitted that alleged place of occurrence is surrounded by the Abadi where so many people were supposed to be present at the place of occurrence but none of the independent witnesses were examined by the prosecution. Learned counsel further submitted that doctor who examined the injuries of Ram avtar (deceased) before his death, injuries of P.W.-2 and P.W.-3, was not examined by the prosecution. Learned counsel further submitted that no allegation has been made against the appellant-Chotey Lal, his son and another co-accused-Ram Vilas (since deceased) to cause any injury to the deceased but the trial Court has convicted the appellant-Chotey Lal also. Learned counsel further submitted that Investigating Officer has also not been produced by the prosecution and, as such, the appellants have been denied their valuable right to cross-examine the Investigating Officer. Learned counsel further submitted that the trial Court, without considering the evidence and material available on record, convicted the appellants in cursory manner and the impugned judgment is illegal and is liable to be set aside.

13. Per Contra, learned A.G.A., vehemently opposing the submissions made by the learned counsel for the appellants, has submitted that the occurrence was happened nearby the house of the prosecution witnesses, as such, the presence of prosecution witnesses, at the place of occurrence, is natural. Learned A.G.A. further submitted that the first information report (Ext.Ka-1) was prepared by one Parmeshchandra Tiwari whose name has also been mentioned as scriber of the written report. Learned A.G.A. further submitted that there is no delay in lodging the F.I.R. as well as in medico legal examination and since the deceased had become unconscious at the time of occurrence and died during his treatment, his ante-mortem injury was proved by Dr. Y. B. Chand (P.W.-4), non examination of other medico legal expert, who had seen the injuries of the deceased, will not affect the prosecution story. Learned A.G.A. further submitted that the prosecution case is supported by Ram Kishan (P.W.-1), Ram Kishore (P.W.-2), brothers of the deceased and Maya Devi (P.W.-3) wife of deceased whose presence at the time of occurrence were natural and reliable and only on the ground that no independent witness was examined by the prosecution, their testimony cannot be disbelieved. Learned A.G.A. further submitted that the judgment passed by trial Court is well reasoned, well discussed and requires no interference, the appeal is liable to be dismissed.

14. I have considered the rival submissions made by learned counsel for both the parties and perused the record.

15. Ram Kishan (P.W.-1) has stated that on the day of occurrence at about 2:00 p.m., Ram Kishore (P.W.-2) and Rajesh Kumar had gone to take water on public hand pump. Ram Kishore (P.W.-2) was operating hand pump and Rajesh Kumar was drinking water with hallowed palm (Chullu) and in the meantime, Sunita, daughter of appellant-Chotey Lal, came there and put dust in the palm (Chullu) of Rajesh Kumar which ensued to hot altercation between them. He further stated that thereafter the appellants-Kamlesh Kumar, Chotey Lal and co-accused-Ram Vilas (since deceased) appeared there with lathi and by hurling abuses, they started to beat Rajesh Kumar and Ram Kishore (P.W.-2). He further stated that his sister-in-law, (bhabhi) Maya Devi and brother-Ram Avtar (deceased) came there to intervene the dispute but all the appellants and other co-accused also beat them. He further stated that the appellant-Kamlesh Kumar had caused injury by lathi on the head of Ram Avtar (deceased), who became unconscious. He further stated that upon hearing the noise, Rama Kant, Srafat Ali and Kanhaiya came there but appellants and co-accused fled away. He further stated that after the occurrence, he carried the injured, by tractor-trolly of one Parmesh Chandra, to police station and got the written information (Ext.-Ka-1) prepared by Parmesh Chandra and after putting his signature, filed at concerned police station. He further stated that injured were carried to hospital for treatment where Ram Avtar (deceased) was admitted but died during his treatment. He further stated that inquest report (Ext.-Ka-2) was prepared in police station.

16. Ram Kishore (P.W.-2), supporting the prosecution story, as stated by Ram Kishan (P.W.-1) has also stated that at the time of occurrence, he was operating the public hand pump ; Rajesh Kumar was drinking water with hallowed palm (Chullu) and meanwhile, daughter of appellant-Chotey Lal came there from toilet and put her dirty palm in the plam of Rajesh Kumar which ensued hot altercation between them. Thereupon appellants-Chotey Lal, Kamlesh and co-accused-Ram Vilas (since deceased) came there and started to beat them by kicks and fits. He further stated that menawhile, his elder brother-Ram Avtar (deceased) and his sister-in-law, Maya Devi (P.W.-3) came there. He further stated that the appellants along with co-accused also beat them. He further stated that co-accused-Ram Vilas (since deceased) had caused injury to him by lathi on his right arm and the appellant-Kamlesh Kumar had caused injury on head of the Ram Avtar (deceased) by lathi. He further stated that on hearing the noise, Ramakant, Parmesh Chandra, Saraft Ali and Kanhaiya also reached at the place of occurrence but the appellants and co-accused fled away from the place of occurrence. Stating that all injured persons were carried to police station by his brother-Ram Kishan (P.W.-1) where information was given and thereafter medico legal examination was also conducted at hospital, he further stated that Ram Avtar had died after 1-1/2 hours.

17. Maya Devi (P.W.-3), corroborating the prosecution story as stated by P.W.-1 and P.W.-2, has stated that on the hearing noise, when she reached with her husband (deceased) at public hand pump, she saw that the appellants-Kamlesh Kumar and Chotey Lal and co-accused-Ram Vilas (since deceased) were beating by lathi to her son Rajesh Kumar and brother-in-law (devar) Ram Kishore (P.W.-2). She further stated that meanwhile her

another brother-in-law (devar), Ram Kishan (P.W.-1) also reached there and he was also beaten by the appellants and co-accused-Ram Vilas (since deceased). She further stated that the appellant-Kamlesh Kumar had caused injury on the head of her husband (deceased) by lathi whereby he fell down and became unconscious. She also stated that the appellant-Chotey Lal slapped and beaten her by lathi. She further stated that her brother-in-law got the first information report (Ext.-Ka-1) written by one Parmesh Chandra and carried all injured persons including deceased to concerned police station where information was lodged and their injuries were examined but her husband died during his treatment.

18. Admittedly, in this case, neither Investigating Officer, who investigated the case nor constable who lodged the first information report on the basis of the written report (Ext.-Ka-1), filed by Ram Kishan (P.W.-1), was examined by the prosecution. The alleged occurrence was happended on 22.05.1990 at about 2:00 p.m. as stated by prosecution witnesses i.e. P.W.-1, P.W.-2 and P.W.-3. According to these witnesses, just after the occurrence they reached the concerned police station to lodge the F.I.R. and for medical treatment and the F.I.R. was lodged on same day. Inquest report (Ext.-Ka-2) was prepared on 23.05.1990 at about 12:30 a.m. wherein it had been specifically mentioned that the report of the said occurrence was lodged on 22.05.1990 at about 17:45 p.m. at police station Fardhan, District-Lakhimpur Kheri under Sections-308, 323, 504, 506 I.P.C. Thus, in this case, there is no delay in lodging the F.I.R. So far as the non examination of scriber of F.I.R. is concerned, it is well settled of law that if the prosecution case is supported by eye-witnesses and F.I.R. was lodged without any delay, the non examination of the scriber will not affect the veracity of the prosecution case.

19. So far as the submissions made by learned counsel for the appellants that the place of occurrence is surrounded by Abadi where so many people were supposed to be present at the place of occurrence but none of the independent witnesses were examined, is concerned, it is settled principle of law that testimony of relative witnesses, if their presence on spot are natural and their statement are trustworthy, should be preferred on the testimony of other witness, because relative witnesses do not implicate false person, leaving real culprit and if it is alleged by accused person, they have to show as why the prosecution witness has falsely implicating him by leaving real culprit.

20. It is very pertinent to quote at this very stage the law laid down in ***Masalti and others vs. State of U. P., AIR 1965 SC 202***, wherein Court said as under :

".....But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how 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 is partisan cannot be accepted as correct....."

21. Similarly, in ***Mohabbat vs. State of M.P., (2009) 13 SCC 630***, Court held as under :

".....Relationship is not a factor to affect credibility of a witness. It is more often than not a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

22. Now coming to the facts and circumstances of this case, in the first information report, it has been mentioned that at the time of occurrence, Ram Kishore (P.W.-2) was present with his nephew-Rajesh Kumar and Maya Devi (P.W.-3) and Ram Avtar (deceased) had also appeared to intervene the occurrence. It is also mentioned that hearing the noise, Ramakant, Ram Kishore (P.W.-2), Sarafat Ali and Kanhaiya Lal had also appeared at the place of occurrence and saw the occurrence. Ramakant, Sarafat Ali and kanhaiya Lal were not examined. Ram Kishore (P.W.-2) has stated that these witnesses had been influenced by the appellants for Rs.2000/- and were not willing to give evidence. During trial, Ram Kishan (P.W.-1), Ram Kishore (P.W.-2) and Maya Devi (P.W.-3) were examined as eye-witnesses. They are nearest relative i.e. brother and wife of deceased. Their presence at the place of occurrence cannot be said as unnatural. The occurrence was taken in broad day light near the house of these witnesses as well as appellants. These prosecution witnesses in their cross-examintaion had specifically stated that at the time of occurrence, they reached the place of occurrence and saw the occurrence. Nothing has been come out in their cross-examination which creates any doubt regarding their presence at the place of occurrence. It can not be expected that prosecution witness, leaving the real culprit of broad day light occurrence, would falsely implicate the other person for death of their nearest relative.

23. In my view in the light of law laid down by Hon'ble Supreme Court in ***Masalti (supra) and Mohabbat (supra)***, the testimony of prosecution witnesses cannot be discarded only on the ground that they are relative of the deceased and independent witnesses were not examined.

24. So far as the next argument of learned counsel for the appellants that medico legal expert, who examined the injuries of Ram Avtar (deceased) for the first time before his death was not examined, is concerned, Ram Kishan (P.W.-1) had stated that after the occurrence the injured were carried to hospital and Ram Avtar got admitted in hospital. In cross-examination, he had clearly stated that they had carried Ram Avtar to district-Lakhimpur (District headquarter) and reached there at 5:00-6:00 p.m. where the Ram Avtar had died after one hour. Record shows that after death of deceased Ram Avtar, his dead body was sent for post-mortem examination. Dr. V. K. Dixit (P.W.-4) conducted the post-mortem and stated that deceased had died due to head injuries, caused on 22.05.1990 at 2:00 p.m. Thus, the prosecution case, so far it relates with cause of death of deceased-Ram Avtar, is supported with medical evidence and there is force in the submission of learned counsel for appellants.

25. So far as the submission of learned counsel for the appellants regarding non examination of Investigating Officer, is concerned, in this case, the prosecution has failed to examine the Investigating Officer and other police officials. Record shows that application for summoning the Investigating Officer, filed by the prosecution, was rejected by the trial Court. Thus it can not be said that prosecution had knowingly failed to examine the Investigating Officer. It is settled principle of criminal jurisprudence that any particular or specific number of witness is not required to prove the prosecution case. Investigating Officer, in prosecution case, specially based on direct evidence of eyewitness, normally is only formal witness. His examination is necessary only in such cases where material contradiction has been occurred between the statement of witnesses, recorded during trial and their statement, under Section 161 of the Code, recorded by the Investigating Officer or where prosecution has relied on such evidence which was collected, recovered or observed by Investigating Officer himself during investigation and his non examination causes failure of justice or adverse effect to accused. Hon'ble Supreme Court in ***Behari Prasad and others vs. State of Bihar, 1996 SCC (Crl.) 271***, where the prosecution case was in conformity with F.I.R. and medical evidence but Investigating Officer was not examined, has held as under :

".....In the facts of the case, it appears to us that the involvement of the accused in committing the murder has been clearly established by the evidences of the eyewitnesses. Such evidences are in conformity with the case made out in FIR and also with the medical evidence. Hence, for non-examination of Investigating Officer, the prosecution case should not fail. We may also indicate here that it will not be correct to contend that if an Investigating Officer is not examined in a case, such case should fail on the ground that the accused were deprived of the opportunity to effectively cross-examine the witnesses for the prosecution and to bring out contradictions in their statements before the police. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal strait-jacket formula should be laid down that non-examination of Investigating Officer per se vitiates a criminal trial*. These appeals, therefore, fail and are dismissed. The appellants who have been released on bail should be taken into custody to serve out the sentence."* ***(Emphasis supplied)***

26. Coming to the facts and circumstances of this case again, the prosecution case is based on direct ocular evidence of three eye-witnesses, whose presence on the place of occurrence were natural, and is also supported with medical evidence of P.W.-4. During their examination before trial Court, no material contradiction was put by defence counsel from their statement recorded under Section 161 of the Code. Furthermore, Investigating Officer had not collected or recovered any material evidence for prosecution case. Learned counsel for the appellants has failed to show that how the appellants had been prejudiced by non examination of Investigating Officer. Thus, the submission of learned counsel for the appellants has got no force.

27. Now the question arises whether the prosecution has succeeded to prove its case against both the appellants. In this case, the appellants along with another co-

accused-Ram Vilas (since deceased) were implicated in the said occurrence. Co-accused-Ram Vilas (since deceased) had died during the trial. In first information report (Ext.-Ka-1) no specific role has been assigned to the appellant-Chhote Lal and co-accused-Ram Vilas (since deceased). It has been alleged that both the appellants including co-accused-Ram Vilas (since deceased) hurled abuses and beaten the Rajesh Kumar and Ram Kishore (P.W.-2) and when Ram Avtar (deceased) and his wife Maya Devi (P.W.-3) tried to intervene the occurrence, they were also beaten by them. Meanwhile, the appellant-Kamlesh Kumar caused fatal injury on the head of the deceased whereupon he fell down and became unconscious. It is also pertinent to note at this juncture that Rajesh Kumar was not examined by the prosecution and doctor who examined the injuries of Rajesh Kumar, Ram Kishore (P.W.-2) and Maya Devi (P.W.-3) was also not examined by the prosecution. Ram Kishan (P.W.-1), (informant) had neither received any injuries nor stated that the appellants and co-accused-Ram Vilas (since deceased) had made any attempt to cause any injury to him. In cross-examination, he has clearly admitted that at the time of occurrence, he was at his house and upon hue and cry when he rushed to place of occurrence, saw that injured after receiving injuries were lying on the road. He has also stated that during the occurrence, fatal injury to deceased was caused by only appellant-Kamlesh Kumar. He also admitted that only one injury was caused on the head of the deceased except that no injury was caused to him (deceased). Ram Kishore (P.W.-2) in examination-in-chief, has not stated that the appellant-Chhotey Lal was carrying lathi. He did not specially state that appellant-Chhotey Lal had caused any injury to any person by lathi. Stating that appellants and co-accused Ram Vilas (since deceased) had beaten him by fits and kicks and co-accused-Ram Vilas had beaten him by lathi, he further stated that only the appellant-Kamlesh Kumar had caused injury on the head of the deceased whereupon he fell down and became unconscious. Maya Devi (P.W.-3), in her examination-in-chief, has stated that only the appellant-Chotely Lal had slapped and beaten by lathi to her. She has not stated on which part of the body the said injury was caused by the appellant-Chotey Lal. Although, she further stated that due to injury she became unconscious but no prosecution witness had stated that Maya Devi (P.W.-3) had received such grievous injury whereby she became unconscious. Thus, it is clear that there is serious contradiction between the statement of prosecution witnesses regarding the role of the appellant-Chotely Lal as no specific role has been assigned to him by the prosecution witnesses to cause injury by lathi. Admittedly, co-accused-Ram Vilas (since deceased) had died during trial. Both the appellants-Chhotey Lal and Kamlesh have been convicted under Section 304-II I.P.C. i.e. only for causing the death of deceased-Ram Avtar. None of them have been convicted and sentenced for offence under Sections-323 or 307 I.P.C. for causing any injuries to prosecution witnesses. The appellant-Chotey Lal is father of the appellant-Kamlesh Kumar and his presence, at the time of occurrence, to participate in the said occurrence and to cause the death of Ram Avtar (deceased) and to cause any injury to other prosecution witnesses is doubtful, particularly, when the prosecution has failed to prove the medico legal evidence (injury report) of injured prosecution witnesses. Thus, the prosecution has failed to prove its case beyond reasonable doubt against the

appellant-Chotey Lal but in view of the facts and circumstances of this case, the prosecution has succeeded to prove its case against the appellant-Kamlesh Kumar who has been convicted and sentenced by the trial Court for offence under Section 304 (II) I.P.C. Thus, the conviction of the appellant-Kamlesh Kumar, requires no interference.

28. Now coming to the question of sentence, whether the sentence passed by the trial Court is just proper, or not ?.

29. Learned counsel for the appellant has submitted that the appellant-Kamlesh Kumar has no criminal history and at the time of occurrence, he was just 25 years old and according to prosecution story, only one injury was caused to the deceased by the appellant-Kamlesh Kumar. Learned counsel further submitted that the occurrence was happened in the year 1990 i.e. thirty years ago and at present, he is aged about 55 years and therefore, a lenient view is required to be adopted in awarding the sentence to the appellant-Kamlesh Kumar.

30. The appellant-Kamlesh Kumar has been convicted for the offence under Section 304-II and sentenced for four years rigorous imprisonment.

31. From perusal of Section 304 II I.P.C., it transpires that accused convicted under Section 304 II I.P.C. may be sentenced for a term which may extend to ten years or with a fine or both.

32. In India no guidelines has been provided by the Legislature for determination of quantum of sentence. Judiciary, especially Hon'ble Supreme Court, has evolved the theory of proportionality in awarding the sentence, subject to minimum sentence provided by the Legislature. There are several factors, although not exhaustive, which may be taken into consideration for awarding quantum of sentence, for example; gravity and seriousness of offence, age and numbers of offenders, age and number of deceased including injured persons, nature of weapons used in offence, educational and social background of accused, nature of injuries caused to deceased or injured persons, criminal antecedents of accused, motive, cause or intention of offence, weapons carried by deceased or injured persons if any, injuries caused to accused person or any member of his side if any, and duration of pendency of trial or appeal.

33. It is settled principle of sentencing and penology that undue sympathy in awarding the sentence with accused is not required. The object of sentencing in criminal law should be to protect the society and also to deter the criminals by awarding appropriate sentence. In this regard Hon'ble Supreme Court has observed in ***State of Madhya Pradesh vs. Saleem @ Chamaru, AIR 2005 SC 3996*** which is as under:-

"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".

34. 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"

35. Admittedly, the occurrence was happened thirty years back in the year 1990 and in the statement, recorded in the year 2000, under Section 313 of the Code, the age of the appellant-Kamlesh Kumar was recorded as thirty five years. In addition to above, the appellant-Kamlesh Kumar, at the time of occurrence, had suddenly appeared without any premeditation with lathi and had caused only one blow on the head of the deceased. Learned counsel further submitted that the appellant-Kamlesh Kumar has no criminal history.

36. Looking into the facts and circumstances of the case, I am of the view that the conviction of the appellant-Kamlesh Kumar for the offence under Section 304-II requires no interference and is accordingly maintained. But in view of the law laid down by Hon'ble Supreme Court in ***Saleem @ Chamaru (supra) and Ramashraya (supra)***, the sentence of four years awarded to the appellant-Kamlesh Kumar for the said offence is reduced to a rigorous imprisonment of three years.

37. The appellant-Kamlesh Kumar is on bail. His bail bond is cancelled and sureties are discharged. He is directed to surrender forthwith before the concerned lower Court to serve out the aforesaid sentence. The period of sentence under gone by the appellant, shall be set off as per the provision of Section 428 of the Code.

38. So far as the appellant-Chhotey Lal is concerned, the prosecution has failed to prove its case beyond reasonable doubt against him, therefore, he is acquitted. The impugned judgment so far it relates with conviction of appellant-Chhotey Lal is set aside. His bail bond is cancelled and sureties are discharged.

39. Keeping in view the provision of Section 437-A of the Code, appellant-Chhotey Lal 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, he, on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

40. Appeal is ***partly allowed*** and the impugned judgment and order is modified to above extent.

41. Let a copy of this judgment along with lower court record be sent to the concerned trial Court for necessary information and compliance.

(2021)01ILR A535
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.01.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1450 of 2003

Satya Narain & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Raza Zaheer, R.U. Verma, S.P. Singh, Sheo Prakash Singh, Vijay Kumar Yadav

Counsel for the Respondent:
G.A.

Criminal Law - Code of Criminal Procedure, 1973- First Information Report- Ante- Timing- It is settled principle of law that first information report is the first version in the shape of complaint, lodged by the aggrieved persons at concerned police station, in order to get the investigating agency into motion and to take action against the guilty person. If it is lodged promptly without any unreasonable delay, it strengthen the prosecution story whereas if it is lodged after unreasonable and unexplained delay, it loses the veracity of the prosecution story.

Where the FIR is lodged belatedly and the delay is unexplained and unreasonable , it can be presumed by the court that the FIR is ante-timed but the same depends upon the facts of each case.

Admittedly the first information report is not in writing of the (P.W.-1), though, he was educated and was able to write the same-The contradiction between F.I.R. (Ext.-Ka-1) and statements of these prosecution witnesses further creates doubt in the F.I.R. as well as prosecution story. The time of occurrence, including the time of lodging the F.I.R. is doubtful. It is ante-timed, hence, the prosecution story is doubtful.

An ante-timed FIR that fails to corroborate the testimony of the witnesses renders the story of the prosecution doubtful.

Admittedly no person had received any injury although the P.W.-1 had stated that two bombs were thrown upon them by the appellants and the bombs were fallen and exploded just 1-2 step away from him-Neither causing any injury to any person nor causing any damage to the crops in the field where (P.W.-1) was harvesting, further creates doubt in the prosecution story.

The oral testimony of the witnesses of the prosecution would be rendered doubtful where the same lacks corroboration from the medical evidence or other evidences.

Evidence Law - Indian Evidence Act, 1872- Section 114(g)- Section 134- Withholding of vital evidence by the prosecution- presumption against- Witnesses are nephew, uncle and cousin of (P.W.-1). Their presence would be natural but the prosecution has neither produced them nor placed any justification for their non examination. Although the prosecution is not bound to produce so many prosecution witnesses and the prosecution case can succeed only on the evidence of a single witness if he is reliable, but non examination of such witnesses, without any justification whose presence at the time of occurrence was natural and examination such witnesses

whose presence has been doubtful, further creates doubtful in the prosecution case- The prosecution has not examined the Investigating Officer who collected the sample of ashes of crops and residue of exploded bombs and further recovered ashes or residue of bombs were neither produced before the trial Court nor were sent for chemical examination to prove whether it was ashes of crops or not or whether it was residue of any exploded bombs. Failure of prosecution to produce such important evidence, further creates doubt in prosecution story.

Although it is the quality and not the quantity of evidence that is important but where the prosecution withholds vital evidence then the court may take an adverse inference against the prosecution.

Criminal Appeal allowed. (E-2)

Case law/ Judgements relied upon-

1. Mohan Lal Gehani Vs St. of M.P., AIR 1982 SC 839
2. Sudarshan Vs St. of Mah., 2014 Cri LJ 3232 (SC)

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

1. The instant criminal appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code'), has been preferred against the judgment and order dated 04.09.2003, passed by IInd Additional Sessions Judge, Faizabad in Sessions Trial No.26 of 2001, arising out of Case Crime No.123 of 1999, under Sections-307/504/506/435 and 427 I.P.C., P.S.-Tanda, District-Ambedkar Nagar, whereby the appellants-Satya Narain, Amarjeet, Pawan Kumar and Ashok Kumar (hereinafter referred to as appellants) have been convicted and sentenced for offence under Section 307 read with 34 I.P.C. for four years rigorous imprisonment and fine of Rs.2000/- each and for offence under Section 435 read with 34 I.P.C. for two years rigorous imprisonment and fine of Rs.1000/- each. It has been further directed that the appellants will have to undergo six months imprisonment for both the offences. All the sentences of the appellants will run concurrently.

2. The prosecution case, in brief, is that the informant (Ram Milan) (P.W.-1) and the appellants are resident of Village-Shapur Kurmaul, Police Station-Kotwali Tanda, District-Ambedkar Nagar and civil suits pertaining to agricultural land i.e. Gata Nos.1095, 1096, 1047, 1146, 1230, 1065, were pending between them to which both parties were claiming as Bhumidhar with transferable rights along with possession. On 05.05.1999, Ram Milan (P.W.-1) was harvesting his wheat crops since 6:00 a.m. along with his nephew-Devdhar, uncle-Ramashray and cousin-Ramajore. Meanwhile, the appellants-Satya Narain, Ashok Kumar, Pawan Kumar and Amarjeet came there at about 12:30 a.m. The appellants-Satya Narain and Amarjeet were carrying bombs, the appellant-Ashok Kumar was carrying a katta (countrymade pistol) whereas the appellant-Pawan Kumar was carrying lathi. Upon exhortation of the appellant-Pawan Kumar, all the appellants hurled abuses and threatened to kill Ram Milan (P.W.-1) and his family members who were harvesting the crops ; the appellants-Satya Narain and Amarjeet threw the bomb with intention to kill them ; and the appellant-Ashok Kumar fired with Katta (countrymade pistol). Hearing the explosion of bomb, firing of Katta (countrymade pistol) and alarm raised by the informant of his family members, Ram Daur (P.W.-2), Ram Charitra (P.W.-3) and Ramajore and so many co-villagers came

there and saw the occurrence. The appellants fled away from the place of occurrence by setting ablaze the field of wheat and sugarcane crops. A typed written information (Ext.-Ka-1) was lodged by the informant (Ram Milan) (P.W.-1) at Police Station-Tanda at about 4:35 p.m. which was entered into General Diary (Ext.-Ka-3) by S.I., Sheetla Prasad Upadhyaya (P.W.-4), the then Head Constable, who registered Chik F.I.R. (Ext.-Ka-2), as Case Crime No.123/99 under Sections-307, 435, 504, 506, 427 I.P.C., against the appellants.

3. Investigation of the case was handed over to S.I., Bhuvneshwar Prasad (not examined), who visited the place of occurrence, collected sample of exploded bomb and ashes, prepared its recovery memo (Ext.-Ka-4 and Ext.-Ka-5), prepared site plan (Ext.-Ka-6) and after conclusion of investigation, filed charge sheet (Ext.-Ka-7) against the appellants, for offence under Sections-307, 435, 504, 506, 427 I.P.C., 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 copy of relevant police papers as required under Section 207 of the Code, committed the case to the Court of Sessions, Faizabad for trial.

4. The learned trial Court framed charges for the offence under Sections 307 read with 34, 504, 506 and 435 I.P.C against the appellants to which they denied and claimed for trial.

5. The prosecution, in order to prove its case, examined Ram Milan (P.W.-1), Ram Daur (P.W.-2), Ram Charitra (P.W.-3), S.I. Sheetla Prasad Upadhyaya (P.W.-4) wherein P.W.-1 to P.W.-3 are witnesses of facts and P.W.4 is formal witnesses.

6. After conclusion of the prosecution evidence, the statement of the appellants were recorded under Section 313 of the Code wherein they denied the prosecution evidence alleging that they have been falsely implicated due to previous enmity.

7. After conclusion of the trial, learned trial Court convicted and sentenced the appellants as above by the impugned judgment. Aggrieved by the impugned judgment, the appellants have preferred this appeal.

8. Heard Sri Sheo Prakash Singh, learned counsel for the appellants and Sri Brijendra Singh-I, learned A.G.A. for the State.

9. Learned counsel for the appellants has submitted that the appellants are innocent and have been falsely implicated due to previous enmity of civil disputes. Learned counsel further submitted that all the witnesses are interested witnesses and were not present at the time of occurrence. Learned counsel further submitted that in the said occurrence, no injury was caused either to Ram Milan (P.W.-1) or his family members. Learned counsel further submitted that the alleged residue of exploded bomb was not sent for chemical examination in order to prove whether it was residue of exploded bomb or not. Learned counsel further submitted that the first information report (in short F.I.R.) was not written by any person and the same was prepared on type writer machine by typist which shows that the F.I.R. was ante-timed and was lodged after due consultation. Learned counsel further submitted that all the appellants are family members and are aged about 50-70 years having no criminal history. Learned counsel further submitted that the trial Court, without considering the

material and evidence available on record, has passed the impugned judgment, which is against the settled principles of criminal jurisprudence and is liable to be set aside.

10. Per contra, learned A.G.A., vehemently opposing the submissions made by learned counsel for the appellants, has submitted that in this case, the F.I.R. was lodged without any delay and the prosecution case cannot be thrown only on the ground that the prosecution witnesses are relative of the informant. Learned A.G.A. further submitted that just twenty days before the said occurrence, an order for interim injunction against the appellants and in favour of the informant was passed by the concerned Court whereby the appellant had annoyed, set fire to crops of the informant and caused the alleged offence. Learned A.G.A. further submitted that the appellants had not denied the factum of destruction of crops in their statement under Section 313 of the Code and it cannot be presumed that the informant by setting fire on his crops, would falsely implicate the appellants. Learned A.G.A. further submitted that the impugned judgment is well reasoned and well discussed having no infirmity and is liable to be affirmed.

11. I have considered the rival submissions made by both the parties and perused the record.

12. Admittedly, both the parties were belligerent at the time of occurrence in civil dispute pertaining the disputed land and the name of Ramashray, father of appellant-Satya Narain was recorded on the disputed land as Bhumidhar which was set aside by Deputy Director of Consolidation vide order dated 12.04.1999. In addition to above, the informant (P.W.-1) had also filed Civil Suit No.227 of 1999 (Ram Milan and others vs. Satyanarayan) wherein vide interim injunction order dated 15.04.1999, passed by Civil Judge (J.D.), Tanda, District-Ambedkar Nagar, the appellants were injected to interfere in the peaceful possession of informant. From perusal of two records, filed by the informant (P.W.-1) before the trial Court on 11.10.2002, it appears that before the order dated 12.04.1999, passed by Deputy Director of Consolidation, Faizabad, the appellants were recorded as tenure holder and whose name was deleted by the aforesaid order.

13. Ram Milan (P.W.-1) has stated that on 05.05.1999, he was harvesting his wheat crops which was situated 60-70 meters towards north of his house since 6'o clock with his nephew-Devdhar, uncle-Ramashray and cousin-Ram Ajor. Meanwhile, the appellants came there at about 12:30 p.m. The appellants-Satya Narain and Amarjeet were carrying bombs, the appellant-Ashok Kumar was carrying katta (countrymade pistol) and the appelant-Pawan Kumar was carrying lathi. He further stated that upon exhortation of the appellant-Pawan Kumar, all the appellants hurled abuses with intention to kill them ; the appellants, carrying bomb, threw upon them ; and the appellant-Ashok Kumar, carrying katta (countrymade pistol), fired upon them. He further stated that upon hearing the noise, Ram Charita (P.W.-3), Ram Daur (P.W.-2) and Ramajore (co-villager), who were also harvesting the field with him (P.W.-1) but had gone to drink water, reached there. He further stated that the appellants, by hurling abuses, reached at chak No.1230 wherein wheat crops was sown, they set fire around (charo taraf) by match box and also set fire in another chak no.1047, wherein wheat

crops was also sown, and thereafter they fled away. He further stated that about 45 minutes was taken in extinguishing the fire and thereafter he went Tanda through pagdandi (footpath) by hiding his identity (lukte chipate), dictated a written report to one typist and after putting his signature on the typed written report (Ext.-Ka-1), he filed it at concerned police station. In cross-examination, he admitted that he had not shown the place of occurrence to Investigating Officer. He further admitted that after the occurrence, he did not go to concerned police station directly and after getting report typed, he appeared at concerned police station with typed report (Ext.-Ka-1). He further admitted that no person had received any injury in the said occurrence. He further admitted that there was enmity of civil dispute with the appellant regarding Chak Nos.1146, 1230, 1047, 1065, 1095, 1096 and 1134. He further admitted that he had not mentioned in the F.I.R. either number of disputed field or number of said field wherein the occurrence was taken place. He further admitted that at the time of occurrence, he had taken 2-5 steps back out from the place of occurrence but did not flee away from there. He further stated that the appellants had threw bomb from a distance of 20-21 meters which had fallen just one feet near to him. He denied the suggestion that after explosion of bombs, he fled away from the place of occurrence. Stating that firstly the appellant had set fire in wheat crops and thereafter sugarcane crops, he further admitted that the appellant had set fire from one side only. He further stated that he had not mentioned in the F.I.R. that he had gone at concerned police station by hiding (lukte chipate) his identity.

14. Ram Daur (P.W.-2) has stated that at the time of occurrence, he was threshing (dauri) his wheat crops since 10'o clock at his threshing floor (khaliyan), situated towards east of Ram Milan's (P.W.-1) chak. Stating that at the time of occurrence, Ram Milan (P.W.-1), Ramashreay and Devdhar were harvesting wheat crops in their chak, he further stated that at about 12:00 p.m. the appellants came there, the appellants-Satynarayan and Amarjeet threw bombs at Ram Milan (P.W.-1) and others family members, with intention to kill them and the appellant-Ashok Kumar fired Katta upon them but no one received any injury. He further stated that upon hearing the noise, he, Ram Charitra (P.W.-3) along with other people, reached there and thereafter the appellants fled away from the place of occurrence by setting fire in wheat crops and sugarcane crops situated east to place of occurrence. In cross-examination, he admitted that father of the appellants belong to his common ancestor. Stating that at the place of occurrence, he had seen that the appellants throwing the bomb and firing with katta (countrymade pistol), he further stated that he had seen the empty cartridges and residue of exploded bomb. Stating further that fire was set on only two chaks which expanded due to month of May (Chait month) in two other chaks also, he denied that fire was set from four side. He further admitted that the appellant had not fled away after throwing the bomb and firing with katta (countrymade pistol) even till the extinguishing the fire. Stating further that 1-1/2 hour would have been taken to extinguish the fire, he further stated that appellants fled away from the place of occurrence when people reached there. He further stated that Investigating Officer had come in the evening on the place of occurrence and after collecting the ashes, sutli and residue of exploded bomb, had taken his signature on a paper at 6:00-7:00 p.m.

15. Ram Charitra (P.W.-3)- has also stated that at the time of occurrence, Ram Milan (P.W.-1), Devdhar, Ramashray, Ramajore were harvesting their wheat crops and he was threshing wheat at his Khaliyan. Stating further that the appellants-Satyanarayan and Amarjeet, Ashok Kumar and Pawan Kumar appeared at about 12'o clock in the chak of Ram Milan, hurled abuses ; the appellant-Ashok Kumar fired with katta (countrymade pistol) ; the appellants-Satyanarayan and Amarjeet threw bomb upon Ram Milan (P.W.-1) and others with intention to kill them whereas the appellant-Pawan Kumar, carrying lathi, was exhorting. Stating that no injury was caused to any person, he further stated that Ram Daur (P.W.-2) also reached there and saw the occurrence. He further stated that as they arrived, the appellants fled away by setting fire in the wheat and sugarcane crops of Ram Milan (P.W.-1). In cross-examination, he admitted that 1-2 hours would have been taken in extinguishing the fire . He further admitted that after throwing the bomb and firing with katta (countrymade pistol), when the appellants set fire on crops, he (P.W.-3) reached there and thereafter the appellants fled away.

16. Sheetla Prasad Upadhyaya (P.W.-4) had stated that on 05.05.1999, he was posted as Head Constable at Police Station-Tanda, District-Ambedkar Nagar and entered the written information lodged by Ram Milan (P.W.-1) and registered a Criminal Case Crime No.123/1999 under Sections-307, 504, 435, 506 and 427 I.P.C. against the appellants. He also proved a recovery memo (Ext.-Ka-4 and Ext.-Ka-5), residue of exploded bomb, site plan of place of occurrence (Ext.-ka-6) and charge sheet (Ext.-Ka-7) filed by S.I.-Bhuvneshwar Prasad (Investigating Officer).

17. It is settled principle of law that first information report is the first version in the shape of complaint, lodged by the aggrieved persons at concerned police station, in order to get the investigating agency into motion and to take action against the guilty person. If it is lodged promptly without any unreasonable delay, it strengthen the prosecution story whereas if it is lodged after unreasonable and unexplained delay, it looses the veracity of the prosecution story. Sometimes it is seen that the first information report is lodged after much delay with due deliberation and consultation but in order to show the reliability of first information report, the time of lodging the F.I.R. is shown much earlier to its actual time because the first informant or his legal advisor or police personnel knew that delay in lodging the F.I.R., will destroy the reliability of the prosecution story. There is no settled criteria to determine as to whether the F.I.R. was anti timed or not and it varies to facts and circumstances of each case. For example, if the informant was educated and able to write the F.I.R. but instead of going to police station to lodge the F.I.R., he went to another place to consult and F.I.R. was prepared with the help of machine i.e. typewriter etc. and thereafter had gone to police station and from the fact and circumstances of the case, it appears that actual time between occurrence and time of lodging the F.I.R. was more than time shown by prosecution, similarly, if it is proved that name of accused or witness or any facts were not known to the informant at the time of lodging the F.I.R. and it had come after the time shown in lodging the F.I.R., it can be said that the F.I.R. was lodged by delay after the time, which was shown in lodging the F.I.R. by concealing such delay to avoid to give explanation.

18. Hon'ble Supreme Court, in ***Mohan Lal Gehani vs. State of Madhya Pradesh, AIR 1982 SC 839*** where the name of accused was not known to the informant till the time of lodging of F.I.R. and it came in knowledge, after the time mentioned in the F.I.R. but his name was shown in the first information report, held that prosecution story was not reliable as F.I.R. was ante time.

19. Hon'ble Supreme Court in ***Sudarshan vs. State of Maharashtra, 2014 Cri LJ 3232 (SC)*** where the informant after the occurrence did not go to the police station to lodge the F.I.R. but went to an Advocate at a distance of 15 kms. from the place of occurrence, for consultation and the copy of F.I.R. was not sent to the concerned Magistrate, held the F.I.R. was anti-timed and the prosecution story was not reliable.

20. Coming to the facts of this case, admittedly the first information report is not in writing of the Ram Milan (P.W.-1), though, he was educated and was able to write the same. Stating that after the occurrence he had not gone directly to the concerned police station to make complaint or to lodge the F.I.R., he admitted that before approaching the concerned police station to lodge the F.I.R., he had approached a person to dictate him the occurrence and get written report typed and thereafter, putting his signature had gone to police station. Stating that said occurrence was started at about 12:30 p.m., he further stated that 45 minutes was taken to extinguishing the fire whereas Ram Daur (P.W.-2) and Ram Charitra (P.W.-3) have admitted that 1-1/2 hrs. would have been taken in extinguishing the fire.

21. From perusal of chik F.I.R. (Ext.-Ka-2), it is clear that the place of occurrence is situated 5 kms. away from the concerned police station. Ram Milan (P.W.-1) has also stated that due to fear, he had not gone Tanda by road and he, by hiding (lukte chipate) his identity, had reached at Tanda through pagdandi (footpath). According to prosecution, the said occurrence was taken at about 12:30 p.m. in the month of May. Generally, during this period, summer temperature is presumed too high that people do not harvest wheat crops at this time, they usually start the harvesting at or before sunrise and conclude before 11-12'o clock in order to avoid heat stroke. In addition to above, if fire was set on four fields of wheat crops including sugarcane crops by the appellants which damaged the crops of worth Rs.5000-6000/- in the year 1999, it means that the fire was caught in huge area of the crops and the statement of prosecution witneses that the said fire was put off in only 45 minutes as stated by P.W.-1 or within one and half hour as stated by P.W.-2 and P.W.-3 is not reliable.

22. Further, in F.I.R. (Ext.-Ka-1), it was mentioned by P.W.-1 that the appellants appeared at the place of occurrence and due to previous enmity of civil suits, they hurling abuses, threw bombs, whereupon Ram Milan (P.W.-1) and his family members, harvesting the crops, fled away from the place of occurrence, in order to save their lives and thereafter the appellant-Ashok Kumar fired with Katta (countrymade pistol). Thus, in the F.I.R. (Ext.-Ka-1), it was not mentioned that only appellants-Amarjeet and Satya Narain were carrying bombs and Pawan Kumar was carrying lathi whereas all the eye-witnesses i.e. P.W.-1, P.W.-2 and P.W.-3 had stated that only appellant-Amarjeet and Satya Narain were carrying bombs and the appellant-Pawan Kumar was

carrying lathi. P.W.-1 further stated that after explosion of bombs, he had not fled away from the place of occurrence. The contradiction between F.I.R. (Ext.-Ka-1) and statements of these prosecution witnesses further creates doubt in the F.I.R. as well as prosecution story.

23. In view of the above discussion, it appears that either the alleged wheat crops were put on fire at any time before the time, as alleged by the prosecution or the first information report was lodged after due consultation and deliberation and was not lodged on 05.05.1999 at about 16:15 p.m. rather it was lodged after the said time as mentioned in Ext.-Ka-2 and Ext.-ka-3. Thus, in my view, the time of occurrence, including the time of lodging the F.I.R. is doubtful. It is ante-timed, hence, the prosecution story is doubtful.

24. In addition to above, admittedly no person had received any injury although the P.W.-1 had stated that two bombs were thrown upon them by the appellants and the bombs were fallen and exploded just 1-2 step away from him. None of the prosecution witness stated that any fire was caught in the field wherein Ram Milan (P.W.-1) and his family members were harvesting the wheat crops. In my opinion, if the bombs were exploded just 1-2 feet away from Ram Milan (P.W.-1) and his family members wherein wheat crops was also lying, it would have either caused some serious injury to them or had damaged the wheat crops also. Neither causing any injury to any person nor causing any damage to the crops in the field where Ram Milan (P.W.-1) was harvesting, further creates doubt in the prosecution story.

25. In addition to above, in F.I.R. (Ext.-Ka-1) it has also been mentioned that upon hearing the noise, Ram Daur (P.W.-2), Ram Chaitra (P.W.-3) and one Ramajore came there and saw the occurrence. In this report, it has not been mentioned that these witnesses were harvesting the crops with Ram Milan (P.W.-1) whereas P.W.-1, during examination, stated that Ram Daur (P.W.-2) Ram Chaitra (P.W.-3) and Ramajore were harvesting the crops with him (P.W.-1) ; they had gone to drink water and upon hearing the noise, they came there and saw the occurrence but Ram Daur (P.W.-2) and Ram Charitra (P.W.-3) had stated that at the time of occurrence, they were threshing their own wheat crops at their threshing floor (khaliyan). Thus, the statement of P.W.-1, that Ram Daur (P.W.-2) and Ram Charitra (P.W.-3) were harvesting the crops with Ram Milan (P.W.-1) and at the time of occurrence, they had gone to drink water and upon hearing the noise come back, is contradictory to the statement of Ram Daur (P.W.-2) and Ram Charitra (P.W.-3) and also with the fact mentioned in F.I.R. which makes the prosecution case further doubtful in the present case where there is enmity between the appellants and Ram Milan (P.W.-1).

26. Further in the first information report (Ext.-Ka-1) it has been clearly mentioned that when the bombs were thrown by the appellants upon Ram Milan (P.W.-1) and his family members, P.W.-1 along with his family members fled away from the place of occurrence but P.W.-1 has stated that he had not fled away from the place of occurrence after the explosion of bomb. According to prosecution, Devdhar, Ramashray and Ramajore were also harvesting the wheat crops with Ram Milan (P.W.-1). These witnesses are nephew, uncle and cousin of Ram Milan (P.W.-1). Their presence would be natural but the prosecution has neither produced

them nor placed any justification for their non examination. Although the prosecution is not bound to produce so many prosecution witnesses and the prosecution case can succeed only on the evidence of a single witness if he is reliable, but non examination of such witnesses, without any justification whose presence at the time of occurrence was natural and examination such witnesses whose presence has been doubtful, further creates doubtful in the prosecution case.

27. In addition to above, the prosecution has not examined the Investigating Officer who collected the sample of ashes of crops and residue of exploded bombs and further recovered ashes or residue of bombs were neither produced before the trial Court nor were sent for chemical examination to prove whether it was ashes of crops or not or whether it was residue of any exploded bombs. Failure of prosecution to produce such important evidence, further creates doubt in prosecution story.

28. In the light of above discussion, I am of the view that the prosecution has miserably failed to prove its case beyond reasonable doubt. The impugned judgment and order passed by trial Court is liable to be set aside and the appellants are entitled to be acquitted.

29. I am, therefore, unable to uphold the conviction and sentence of the appellants. The impugned judgment and order, passed by the Trial Court, is accordingly set aside. The appellants are acquitted. Consequently appeal is ***allowed.***

30. The appellants are on bail, their bail bonds are cancelled and sureties are discharged.

31. Keeping in view the provision of Section 437-A of the Code, appellants are 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, appellants on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

32. A copy of this judgment along with lower court record be sent to Trial Court by FAX for immediate compliance.

(2021)01ILR A543
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2020

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Crl. Misc. Recall Application No. 3 of 2020
In
Criminal Revision No. 1649 of 1989
Connected with
Criminal Revision Nos. 1511 of 1992, 904 of 1995, 415 of 1996, 712 of 1997, 1202 of 2000 & 57 of 1996

Yaqoob Husain & Ors. ...Applicants
Versus
State of U.P. ...Opp. Party

Counsel for the Applicants:
Sri V.P. Srivastava, Ms. Sufia Saba, Sri K.M. Tripathi, Sri Shadab Ali

Counsel for the Opp. Party:
A.G.A.

A. Criminal Law - Code of Criminal Procedure,1973-Section 401/397 & Indian Penal Code,1860-Sections 323/34 and

324/34-recall application-rejection-counsel not appeared-order cannot be recalled-Bar expressed u/s 362 Cr.P.C. is clear, that once the court had signed its judgment, it shall not alter or review the same-legislature intentionally put a safeguard-if any leverage is granted, orders are permitted to be recalled on the ground of absence of counsel, it would cause great chaos-in the present case final orders have been passed on merits by the court after perusal of the records and application of mind, though the counsel for the revisionist in respective cases were not present-the prayer for recall is rejected.(Para 1 to 46)

The application is rejected. (E-5)

List of Cases Cited:

1. Asit Kumar Kar Vs St. of W.B. & ors.(2009) 2 SCC 703

2. Vishnu Agarwal Vs St. of U.P. & anr.(2011) 14 SCC 813

3. Santosh Vs St. of U.P.(2009) 16 SCC 400

4. CBI Vs St. of U.P. & ors.(2015) 11 ADJ 739

5. Mithai Lal Vs St. of U.P. & ors. (2008)

6. Raj Narain & ors. Vs The St. (1959) AIR Alld. 315

7. St. of Ori. Vs Ram Chander Agarwala & ors.(1979) 2 SCC 305

8. New India Assurance Co. Ltd. Vs Krishna Kumar Pandey,Manu/SC/1923/2019

9. Chandrabali & anr. Vs St.(1979) Cri.L.J. 1218

10. Smt. Sooraj Devi Vs Pyare Lal & anr.(1981) 1 SCC 500

11. Hari Singh Mann Vs Harbhajan Singh Bajwa & ors.(2001) 1 SCC 169

12. St. of Ker.Vs M.M.Manikantan Nair (2001) 4 SCC 752

13. R. Annapurna Vs Ramadugu Anantha Krishna Sastry & ors.(2002) 10 SCC 401

14. St.Reprtd. by DSP,SB CID,Chennai Vs K.V. Rajendran & ors.(2008) 8 SCC 673

15. Sunita Jain Vs Pawan Kumar Jain & ors.(2008) 2 SCC 705

16. Surya Baksh Singh Vs St. of U.P.(2014) 14 SCC 222

17. Mohd. Zakir Vs Shabana & ors.(2018) 15 SCC 316

18. Sanjeev Kapoor Vs Chandana Kapoor & ors.(2020) AIR SC 1064

19. Parveen Vs St. of Har.(2020), CRLA No.s750-751 of 2020

20. Smt. Farhana Vs St. of U.P. & anr.(2012), Crl. Rev. No. 2930 of 2012

21. K.S. Panduranga Vs St. of Karn. (2013) 3 SCC 721

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. In all these seven criminal revisions, application for recalling the final order passed by coordinate Bench of this Court has been moved on the ground that the same was passed due to non presence of the counsel for the revisionists, as such, all the matters are being heard and decided by a common order, and Criminal Revision No.1649 of 1989 is taken as the leading case.

2. In Criminal Revision No.1649 of 1989, the order dated 31.07.2019, which is sought to be recalled, is extracted here as under:

"1. Called in revise. None appeared to press this revision. In the circumstances, I myself have perused the record.

2. This criminal revision under Section 401 read with Section 397 Cr.P.C. has been filed aggrieved by judgment and order dated 04.07.1989 passed by 4th Additional Munsif Magistrate, Moradabad in Case No. 507 of 1988 convicting and sentencing revisionists under Sections 323/34 and 324/34 I.P.C. Thereagainst accused-revisionists preferred Criminal Appeal No. 83 of 1989 which has been dismissed by Sessions Judge, Moradabad vide judgment and order dated 08.11.1989. This revision has been filed challenging both the aforesaid orders.

3. Having gone through the record, I do not find any manifest error or otherwise illegality, procedural or otherwise, so as to justify interference in criminal revision.

4. Dismissed.

5. The revisionists Yaqoob Husain and Kamal Anwar are on bail. Their bail bonds and surety bonds are cancelled. The Chief Judicial Magistrate, Moradabad shall cause them to be arrested and lodged in jail to serve out sentence passed against them. The compliance shall be reported within two months.

6. Certify this judgment to the lower Court immediately."

3. In the recall application the ground taken is that the revisionist was enlarged on bail in the year 1989 and thereafter this case was looked after by his uncle who was in contact with the concerned advocate. As the counsel was designated as senior advocate, he lost in touch and the matter was finally decided on 31.07.2019. It is contended that the said order be recalled and the criminal revision be restored to its original number.

4. In other revisions, which are also decided on various dates in the absence of counsel, similar prayer has been made for recalling the order passed by coordinate Bench and the matter be restored for decision afresh.

5. On behalf of the applicants-revisionists Sri Sanjeev Pandey, Sri Sunil Kumar, Sri Awadhesh Prasad Pandey, Sri Girish Tiwari, Sri Akhilesh Tripathi, Ms. Sufia Saba and Sri Shiva Ji Singh Sisodiya, Advocates, appeared and advanced their submissions. Sri D.K. Srivastava, learned A.G.A. appeared for the State.

6. The sole question which emerges for consideration is, as to whether in view of bar of Section 362 Cr.P.C., the judgment or order rendered/passed by any coordinate Bench can be recalled though passed in the absence of counsel ?

7. Addressing on this question, Sri Sanjeev Pandey submitted that bar, as contained in Section 362 Cr.P.C., is in regard to altering or reviewing the judgment or order, while in the present case the revision was decided in absence of counsel, thus, it was not a judgment or order and it can be recalled, as no prayer for review or altering the judgment has been made.

8. Reliance has been placed upon a decision of the Apex Court in case of **Asit Kumar Kar vs. State of West Bengal and Others (2009) 2 SCC 703**. Relevant paras 7 and 8 of the judgment is extracted here as under :

"6. There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but

simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

7. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Excise Licensees' Association v. Raghabendra Singh and Ors. (2007) 11 SCC 374 cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences."

9. Reliance was also placed upon a decision in the case of **Vishnu Agarwal vs. State of Uttar Pradesh and Another (2011) 14 SCC 813**. Relevant para 6 of the judgment is extracted here as under :

"6. In our opinion, Section 362 cannot be considered in a rigid and over technical manner to defeat the ends of justice. As Brahaspati has observed:

"Kevalam Shastram Ashritya Na Kartavyo Vinirnayah Yuktiheeney Vichare tu Dharmahaani Prajayate"

which means:

The Court should not give its decision based only on the letter of the law.

For if the decision is wholly unreasonable, injustice will follow."

10. Reliance has also been placed upon decision of **Santosh vs. State of U.P. (2009) 16 SCC 400**. Relevant paras 2, 3 and 4 of the judgment is extracted here as under :

"2. Though many points were urged in support of the application it is not necessary to go into those in detail.

3. While issuing notice on 7.11.2008 it was indicated that the matter may be remitted to the High Court for fresh hearing as the revision petition was dismissed in the absence of learned Counsel for the appellant. During the hearing of the application learned Counsel for the appellant indicated various reasons for which there was non appearance on the day the matter was taken up. That being so, it would be appropriate to set aside the impugned order and remit the matter to the High Court for a fresh consideration on merits.

4. To avoid unnecessary delay let the parties appear before the High Court on 24.3.2009 so that a date of hearing can be fixed. The Hon'ble Chief Justice of the High Court is requested to post the matter before an appropriate Bench. The appeal is allowed."

11. He next submitted that in case of **Central Bureau of Investigation vs. State of U.P. and others 2015(11) ADJ 739**, this Court relying upon decisions, cited above, recalled the order and restored the revision. Relevant part of the order are extracted here as under :

"In view of the aforesaid discussion this Court is of the firm view that Section 362 Cr.P.C. only bars a "review" of the order. It does not bar "recall" of any order specially if the order has been passed ex parte against the principle of natural justice.

Accordingly, the recall application is allowed. The order dated 7.3.2013 is recalled. List this matter alongwith Crl. Revision No. 3385 of 2008 (old Crl. Revision (Defective) No. 457 of 2008) before the appropriate bench in the next cause list."

12. Reliance has also been placed upon a decision in case of **Mithai Lal vs. State of U.P. and others** decided on 12.9.2008 wherein the recall application

was allowed relying upon the decision of a Full Bench of this Court.

13. Sri Sunil Kumar, Advocate, adding further to the argument made by earlier counsel, submitted that in view of sub-section (2) of Section 401 Cr.P.C., no order under this section shall be made to the prejudice of the accused or other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

14. Thus reading Section 362 along with sub-section (2) of Section 401 Cr.P.C., though the power of altering or reviewing of the judgment does not vest with the Court once it is signed, but, the power of recall exist so as to give effect to sub-section (2) of Section 401 Cr.P.C. According to him, the decision by the Court in the absence of the counsel of the revisionist amounted to prejudice being caused to the accused and was in the teeth of sub-section (2) of Section 401 Cr.P.C.

15. Apart from making the said submission, no other submission was advanced while all the other counsel appearing on behalf of different parties endorsed the argument advanced by two counsels.

16. Sri D.K.Srivastava, learned A.G.A. while setting note for his argument placed before the Court judgment of Full Bench of this Court in the case of **Raj Narain and others vs. The State AIR 1959 Allahabad 315**, wherein by a majority view, it was held that the power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehearing the same exist in the High Court, while the then Chief Justice Hon'ble O.H.Mootham gave his minority view that the power of review or recall does not exist.

17. Learned A.G.A. then submitted that the judgment in **Raj Narain and others (supra)** was considered by the Apex Court in case of **State of Orissa vs. Ram Chander Agarwala and others (1979) 2 SCC 305** wherein the minority view of this Court was upheld and the Court held that High Court was not competent to review or revise its own judgment in view of the bar as contained in Section 369 Cr.P.C., as it was then. Relevant para 20 of the judgment are extracted here as under :

"Before concluding we will very briefly refer to cases of this Court cited by counsel on both sides. 1958 S.C.R. 1226 relates to the power of the High Court to cancel bail. The High Court took the view that under Section 561A of the Code, it had inherent power to cancel the bail, and finding that on the material produced before the Court it would not be safe to permit the appellant to be at large cancelled the bail, distinguishing the decision in 1945 Law Reports and 72 Indian Appeals (supra) and stated that the Privy Council was not called upon to consider the question about the inherent power of the High Court to cancel bail under Section 561A. In Sankatha Singh v. State of U.P. (1962) (2) Supp. 817, this Court held that Section 360 read with Section 424 of the CrPC specifically prohibits the altering or reviewing of its order by a court. The accused applied before a succeeding Sessions Judge for re-hearing of an appeal. The learned Judge was of the view that the appellate court had no power to review or restore an appeal which has been disposed of. The Supreme Court agreed with the view that the

appellate court had no power to review or restore an appeal. this Court, expressing its opinion that the Sessions Court had no power to review or restore an appeal observed that a judgment, which does not comply with the requirements of Section 369 of the Code, may be liable to be set aside by a superior court but will not give the appellate court any power to' set it aside himself and rehear the appeal observing that "Section 369 read with Section 424 of the Code makes it clear that the appellate court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error. Reliance was placed on a decision of this Court in Superintendent and Remembrancer of Legal Affairs W.B. v. Mohan Singh (supra) by Mr. Patel, learned Counsel for the respondent wherein it was held that rejection of a prior application for quashing is no bar for the High Court entertaining a subsequent application as quashing does not amount to review or revision. This decision instead of supporting the respondent clearly lays down, following Chopra's case (supra) that once a judgment has been pronounced by a High Court either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgment as there are no provisions in the Criminal Procedure Code which would enable the High Court to review the same or to exercise revisional jurisdiction. This Court entertained the application for quashing the proceedings on the ground that a subsequent application to quash would not amount to review or revise an order made by the Court. The decision clearly lays down that a judgment of the High Court on appeal or revision cannot be reviewed or revised except in accordance with the provisions of the Criminal Procedure Code. The provisions of Section 561A of the Code cannot be invoked for exercise of a power which is specifically prohibited by the Code."

18. Reliance was also placed in case of **New India Assurance Co. Ltd. vs. Krishna Kumar Pandey, Manu/SC/1923/2019** wherein the Apex Court while considering the scope of revisional jurisdiction under Section 397 Cr.P.C. and the bar of Section 362, held that High Court cannot venture to do something which it was not empowered to do and granted benefit where in the garb of correction, the judgment was modified. Relevant para 12 of the judgment are extracted herein as under :

"The case on hand is one where the Respondent secured an order from the High Court, behind the back of his employer that his conviction will not have an impact upon the service career of the Respondent. The High Court did not have the power to pass such an order. If at all, the High Court could have invoked, after convicting the Respondent, the provisions of the Probation of Offenders Act, 1958, so that the Respondent could take shelter, if eligible, Under Section 12 of the said Act. In this case, the High Court ventured to do something which it was not empowered to do. Therefore, the Respondent cannot take umbrage Under Section 362 of Code of Criminal Procedure. The second reason why the argument of the learned Senior Counsel for the Respondent is fallacious is that the Respondent himself was a beneficiary of what he is now accusing the Appellant of. As we have stated earlier, the criminal revision petition filed by the Respondent in Cr.R. No. 402 of 2012 was disposed of by the High Court by a judgment dated 29.06.2012. Thereafter the

Respondent moved a Miscellaneous Application in Criminal case No. 8951 of 2012 purportedly for the correction of the order. There was neither an arithmetical nor a clerical error in the judgment of the High Court, warranting the invocation of Section 362 Code of Criminal Procedure. The Respondent cleverly borrowed the language of Section 362 Code of Criminal Procedure to affix a label to his petition and the High Court fell into the trap. After having invited an order, which, by the very same argument of the Respondent, could not have been passed, it is not open to the Respondent today to contend that there was no jurisdiction for the High Court to pass such an order. It is nothing but a case of pot calling the kettle black."

19. I have learned learned counsel for the parties and perused the material on record.

20. The question, which has cropped up for consideration, as to the maintainability of recall application in view of bar of Section 362 Cr.P.C., had been under consideration for long time. The Apex Court as well as different High Courts had been constantly addressing and adjudicating on the question of bar of Section 362 Cr.P.C.

21. Before this Court, the controversy for the first time erupted before their Lordships in the year 1958 when the old Criminal Procedure Code was in existence and the question, which was referred to the Full Bench was,

"whether this Court has power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same? If so, in what circumstances?"

22. The Full Bench constituted in **Raj Narain and others (supra)** by a majority view, held as under :

"105. Our answer to the question referred is as follows:

1. That this Court has power to revoke, review, recall or alter its own earlier decision in a criminal revision and rehear the same.

2. That this can be done only in cases failing under one or the other of the three conditions mentioned in Section 561-A, namely:

(i) for the purpose of giving effect to any order passed under the Code of Criminal Procedure;

(ii) for the purpose of preventing abuse of the process of any Court;

(iii) for otherwise securing the ends of justice."

23. While Chief Justice Mootham was of the view that as soon as a judgment in a criminal revision is signed and sealed, Court becomes functus officio and has no power to revoke, review, recall or alter the order it has already made. Relevant para 16 of the judgment in **Raj Narain and others (supra)** is extracted here as under :

"In all these cases there is, I think, as assumption, express or implied, that the provisions of the Code are subject to S. 561A. That assumption, for reasons which I have, endeavoured to state, I think to be unfounded. In my opinion this Court, as soon as its judgment in a criminal revision case has been signed and sealed, becomes functus officio and has no power to revoke, review, recall or alter the order it has already made. I assume of course that that order was made in the exercise of its jurisdiction: if for any reason the Court makes an order without jurisdiction that

order or judgment is a nullity and the application in which it was made must be reheard."

24. While deciding a similar controversy, the Hon'ble Supreme Court in **State of Orissa vs. Ram Chander Agarwala and others (supra)** while considering the scope of Section 369 Cr.P.C., as it was then, upheld the minority view of Chief Justice Mootham and held that once judgment was pronounced by High Court either in exercise of appellate or revisional jurisdiction, no review or revision can be entertained against that judgment as there is no provision in the Criminal Procedure Code.

25. In case of **Chandrabali and another vs. State 1979 Cri.L.J. 1218**, the Division Bench of this Court had a occasion to consider the scope of Section 362 (Section 369 of old Act) and held as under :

"8. It may be pointed out that even if there was any ambiguity regarding the applicability of Section 369 of the Code to judgments passed by this Court the same has been completely removed by the provision made in Section 362 of the new Code viz. Cr. P.C. 1973. Section 352 of the new Code provides as follows:

"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."

Section 369 of the old Code provided as follows:

"Save as otherwise provided by this Code or by any other law for the time being in force, or in the case of a High Court, by the Letters Patent or other instrument constituting such High Court, no court when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

"Thus under Section 362 of the new Code a judgment which has been signed can be altered or reviewed only for correcting a clerical or arithmetical error. No such error has been pointed out in present petition and, therefore, the judgment passed by Hon'ble S.K. Kaul, J. cannot be altered, reviewed or substituted. The same view was taken by V.N. Varma. J. in Badri Prasad Rastogi v. State of U.P. 1979 All LJ 59 we are in respectful agreement with the view taken by the learned Judge.

9. We may also point out that in the Full Bench case of Raj Narain (supra) it was observed in the majority judgment that Section 561 A, did not authorise this Court to rehear a case where the applicant or appellant was not heard due to some fault of his or his counsel. Thus the applicant cannot gel any assistance even from the majority judgment in Raj Narain's case (supra) which on this point has not been overruled by their Lordships of the Supreme Court. Thus the applicant in the case on hand will not be entitled to claim rehearing even if we were to hold that the applicant could invoke inherent jurisdiction of this Court reserved under Section 482 of the Cr. P.C."

26. In case of **Smt. Sooraj Devi vs. Pyare Lal & Another (1981) 1 SCC 500** the Apex Court while considering the scope of Section 482 Cr.P.C. and bar imposed by Section 362 Cr.P.C. held that attempt to invoke that power can be of no avail. Relevant para 5 of the judgment is extracted here as under :

"The appellant points out that he invoked the inherent power of the High

Court saved by Section 482 of the Code and that notwithstanding the prohibition imposed by Section 362 the High Court had power to grant relief. Sankatha Singh v. State of U.P. AIR1962SC1208 . It is true that the prohibition in Section 362 against the Court altering or reviewing its judgment is subject to what is "otherwise provided by this Code or by any other law for the time being in force". Those words, however, refer to those provisions only where the Court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the Court is not contemplated by the saving provision contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail."

27. Similarly in **Hari Singh Mann vs. Harbhajan Singh Bajwa and others (2001) 1 SCC 169** the Apex Court while considering the scope of Section 362 Cr.P.C., held as under :

"10. Section 362 of the Code mandates that 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. The Section is based on an acknowledge principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision become functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. The reliance of the respondent on Talab Haji Hussain's case (supra) is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts under Section 561A (Section 482 of the new Code) has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. It is not disputed that the petition filed under Section 482 of the Code had been finally disposed of by the High Court on 7-1-1999. The new Section 362 of the Code which was drafted keeping in view the recommendations of the 41st Report of the law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment but also to the final orders other than the judgment."

28. It has been constant view of the Apex Court that only a clerical or arithmetical error can be corrected and no more, in view of bar of Section 362 Cr.P.C. The same view was reiterated in **State of Kerala vs. M.M.Manikantan Nair (2001) 4 SCC 752**. Relevant para 6 of the judgment is extracted here as under :

"The Code of Criminal Procedure does not authorise the High Court to review its judgment or order passed either in exercise of its appellate, revisional or original jurisdiction. Section 362 of the Code prohibits the court after it has signed its judgment or final order disposing a case from altering or reviewing the said judgment or order except to correct a clerical or arithmetical error. This prohibition is complete and no criminal court can review its own judgment or order after it is signed. By the first order dated 31.05.2000, the High Court rejected the prayer of the respondent for quashing the criminal proceeding. This order attained its

finality. By the impugned order, the High Court reversed its earlier order and quashed the criminal proceeding for want of proper sanction. By no stretch of imagination it can be said that by the impugned order the High Court only corrected any clerical or arithmetical error. In fact the impugned order is an order of review, as the earlier order was reversed, which could not have been done as there is no such provision under the Code of Criminal Procedure, but there is an interdict against it."

29. Similarly, in **R.Annapurna vs. Ramadugu Anantha Krishna Sastry and others (2002) 10 SCC 401**, the Apex Court had held that High Court had no power to recall or review its own order. Relevant para 5 of the judgment is extracted here as under :

"When appellant came to know of the said order, she moved the High Court with a prayer to recall the said order, but that was dismissed on the premise that the High Court has no power to recall or review its own order. To that extent, the High Court was correct. Hence, the special leave filed by the appellant challenging the order passed on the recall petition SLP (Crl.) No. 976/1998 has been dismissed by us."

30. Similar view was taken in **State Represented by DSP, SB CID, Chennai vs. K.V. Rajendran and others (2008) 8 SCC 673**. Relevant para 5 of the judgment is extracted here as under :

"22. As noted hereinearlier, Section 362 of the Code prohibits reopening of a final order except in the cases of clerical or arithmetical errors. Such being the position and in view of the expressed prohibition in the Code itself in the form of Section 362, exercise of power under Section 482 of the Code cannot be exercised to reopen or alter an order disposing of a petition decided on merits.

.....

25. As noted hereinearlier, Section 362 of the Code prohibits a Court from making alternation in a judgment after the final order or Judgment was signed by the Court disposing of the case finally except to correct clerical or arithmetical errors. In our view, therefore, Section 362 of the Code cannot apply in the facts and circumstances of the present case. There was no clerical or arithmetical error in the order."

31. In **Sunita Jain vs. Pawan Kumar Jain and others (2008) 2 SCC 705** the Apex Court held as under :

"31. The section makes it clear that a Court cannot alter or review its judgment or final order after it is signed except to correct clerical or arithmetical error. The scheme of the Code, in our judgment, is clear that as a general rule, as soon as the judgment is pronounced or order is made by a Court, it becomes functus officio (ceases to have control over the case) and has no power to review, override, alter or interfere with it.

32. No doubt, the section starts with the words "Save as otherwise provided by this Code". Thus, if the Code provides for alteration, such power can be exercised. For instance, Sub-section (2) of Section 127. But in absence of express power, alteration or modification of judgment or order is not permissible.

33. It is also well settled that power of review is not an inherent power and must be conferred on a Court by a specific or express provision to that effect. (Vide Patel Narshi Thakershi and Ors. v. Shri

Pradyumansinghji Arjunsinghji (1971) 3 SCC 844). No power of review has been conferred by the Code on a Criminal Court and it cannot review an order passed or judgment pronounced."

32. In **Surya Baksh Singh vs. State of Uttar Pradesh (2014) 14 SCC 222**, the Apex Court while laying down guidelines, had held that High Court cannot dismiss an appeal for non prosecution simplicitor without examining the merits. Their Lordships further held that the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent. Further Court can dispose of the appeal after perusing the record and judgment of the trial court, and also if the case is decided on merits in the absence of the appellant, the higher Court is the remedy in the situation. Relevant para 24 of the judgment is extracted here as under :

"It seems to us that it is necessary for the Appellate Court which is confronted with the absence of the convict as well as his Counsel, to immediately proceed against the persons who stood surety at the time when the convict was granted bail, as this may lead to his discovery and production in Court. If even this exercise fails to locate and bring forth the convict, the Appellate Court is empowered to dismiss the appeal. We fully and respectfully concur with the recent elucidation of the law, profound yet perspicuous, in K.S. Panduranga v. State of Karnataka (2013) 3 SCC 721. After a comprehensive analysis of previous decisions our learned Brother had distilled the legal position into six propositions: (SCC p.734, para 19)

*"19.1.**that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;***

*19.2. **that the Court is not bound to adjourn the matter if both the Appellant or his Counsel/lawyer are absent;***

*19.3. **that the Court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;***

*19.4. **that it can dispose of the appeal after perusing the record and judgment of the trial court.***

19.5. That if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the Appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

*19.6. **That if the case is decided on merits in the absence of the Appellant, the higher court can remedy the situation."***

33. In case of **Mohammed Zakir vs. Shabana and Ors. (2018) 15 SCC 316**, the Apex Court held that however patent error is there, the order can only be corrected in the process known to law and not under Section 362 of the Code of Criminal Procedure. Relevant para 4 of the judgment is extracted here as under :

"The High Court should not have exercised the power Under Section 362 Code of Criminal Procedure for a correction on merits. However patently erroneous the earlier order be, it can only be corrected in the process known to law and not Under Section 362 Code of Criminal Procedure The whole purpose of Section 362 Code of Criminal Procedure is only to correct a clerical or arithmetical error. What the High Court sought to do in the impugned order is not to correct a clerical or arithmetical error; it sought to

rehear the matter on merits, since, according to the learned Judge, the earlier order was patently erroneous. That is impermissible under law. Accordingly, we set aside the impugned order dated 28.04.2017."

34. In a recent decision in case of **Sanjeev Kapoor vs. Chandana Kapoor & Ors. AIR 2020 SC 1064**, His Lordship Ashok Bhushan, J. while dealing with the bar of Section 362 held as under :

"18. The Legislative Scheme as delineated by Section 369 of Code of Criminal Procedure, 1898, as well as Legislative Scheme as delineated by Section 362 of Code of Criminal Procedure, 1973 is one and the same. The embargo put on the criminal court to alter or review its judgment is with a purpose and object. 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.

35. During the course of argument a recent judgment dated 16.11.2020 rendered by Hon'ble Apex Court in **Criminal Appeal Nos.750-751 of 2020 Parveen vs. State of Harayana** was placed, where a criminal revision was dismissed for want of prosecution and not on merit, and their Lordships were of the view that a revision cannot be dismissed in default and the same was restored to its original number. Relevant paras 7 and 8 of the judgment are extracted here as under :

"7. The High Court, in our view, was manifestly in error in rejecting the revision in default, on the ground that the appellant's advocate had remained absent on the previous four occasions. Since the revision before the High Court arose out of an order of the conviction under the Arms Act, the High Court ought to have appointed an Amicus Curiae in the absence of counsel, who has been engaged by the Legal Services Authority, Rohtak. The liberty of a citizen cannot be taken away in this manner.

8. In the circumstances, we are of the view that it would be appropriate to allow this appeal and set aside the impugned orders of the High Court dated 11 February 2020 and 16 July 2020. CRR No.1316 of 2018 is restored to the file of the High Court. Since during the pendency of the Special Leave Petition, the appellant was admitted to bail by this court and the appellant was on bail during the pendency of the revision before the High Court, the order enlarging the appellant on bail shall continue to remain in operation pending the disposal of the revision by the High Court. The appellant shall cooperate in the disposal of the revision."

36. Coordinate Bench of this Court in **Criminal Revision No.2930 of 2012 (Smt. Farhana vs. State of U.P. and Another)** vide order dated 02.4.2019 had held once an order was signed by the Court disposing of a case, no Court shall alter or review the same except to correct a clerical or arithmetical error.

37. Tracing out the legislative history of an enactment in the earlier Code, Section 369 was similar to Section 362 of the

present Code of Criminal Procedure, 1973. The minority view taken by the Full Bench of this Court in **Raj Narain and others (supra) was upheld by the Supreme Court in case of State of Orissa vs. Ram Chander Agarwala and others (supra)** and since then it has been constant view of the Apex Court that once the judgment or order is pronounced and signed by the Court, it becomes functus officio and the power is only limited to the correction of clerical and arithmetical error and nothing beyond that.

38. Recalling the order would amount to setting aside the earlier order passed by the coordinate Bench and restoring the case for rehearing afresh. Reliance placed by the learned counsels representing revisionists upon decision in case of **Asit Kumar Kar (supra)** was in relation to writ petition filed under Article 32 of the Constitution of India, wherein their Lordships of Supreme Court held that there was a distinction between a petition under Article 32, a review petition and a recall while the present recall applications had been filed in criminal revisions, wherein final orders have passed on merits by the Court after perusal of the records and application of mind, though the counsel for the revisionist in respective cases were not present. The order itself indicates that the Judge had perused the record and after going through the same, passed the judgment. Recalling the order would amount to reviewing/rehearing the same. Thus, the case relied upon is of no help.

39. Now coming to the case of **Vishnu Agarwal (supra)** relied upon by the revisionists, from the perusal of the same it appears that relying upon the decision of **Asit Kumar Kar (supra)** the Court had recalled the order. The Supreme Court in case of **Surya Baksh Singh (supra)** had clearly laid down the legal position into six proposition wherein it is provided that Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent. Further the Court after perusing the records and judgment of Trial Court can dispose of the case. Lastly, it was propounded that if the case is decided on merits, in the absence of appellant, the higher Court can remedy the situation.

40. Thus in all the cases before this Court, the Court had proceeded to decide after going through the records as mandated in the above case, and passed judgment in the absence of counsel for the revisionists. Now the only remedy left, as per the decision of **Surya Baksh Singh (supra),** is of approaching the higher Court and no recall application is maintainable before this Court for remedifying the situation.

41. The argument raised as to sub-section (2) of Section 401 Cr.P.C. as to prejudice being caused to accused as he did not have opportunity of being heard either personally or by pleader in his own defence is of no avail, as the Apex Court had in depth dealt with such situation where matters are being placed on Board and no one turns up to press the same and had laid down guidelines in case of **Surya Baksh Singh (supra).**

42. The Apex Court in **K.S.Panduranga vs. State of Karnataka (2013) 3 SCC 721** had even held that it is not obligatory on the part of Appellate Court in all circumstances to appoint amicus curiae in a criminal appeal to argue on behalf of accused. Relevant para 15 of the judgment is extracted here as under :

"On a studied perusal of the said decision, it is noticeable that the Court has stated about the role of the lawyer and the role of the Bar Association in the backdrop of professional ethics and norms of the Constitution. It has been categorically held therein that the professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee and the lawyer is not otherwise engaged and, therefore, no Bar Association can pass a resolution to the effect that none of its members will appear for a particular accused whether on the ground that he is a policeman or on the ground that he is a suspected terrorist. We are disposed to think that in Mohd. Sukur Ali (supra), the aforesaid case was cited only to highlight the role of the Bar and the ethicality of the lawyers. It does not flow from the said pronouncement that it is obligatory on the part of the Appellate Court in all circumstances ***to engage amicus curiae in a criminal appeal*** *to argue on behalf of the accused failing which the judgment rendered by the High Court would be absolutely unsustainable."*

43. Simply because the counsels had not appeared in the revised call, the decision rendered by the coordinate Bench after perusing the record cannot be rendered otiose and the order cannot be recalled. Bar expressed under Section 362 Cr.P.C. is clear, that once the Court had signed its judgment or final order, disposing of a case, it shall not alter or review the same except to correct clerical or arithmetical error.

44. This bar has been provided by the legislature intentionally so as to put a safeguard that the final judgment and orders are not altered or reviewed now and then. Apex Court has also felt that if any leverage is granted and the orders are permitted to be recalled on the ground of absence of counsels, it would cause great chaos and thus has propounded six legal propositions wherein the Courts can decide the cases in absence of counsel only after perusal of record and the same can be remedified only by the higher Court.

45. Thus, in view of the law laid down by the Apex Court, no judgment or order can be altered, reviewed or recalled in view of bar under Section 362 Cr.P.C.

46. In the result, all the recall applications are hereby **rejected.**

(2021)01ILR A556
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

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

Habeas Corpus Writ Petition No. 61 of 2020

Anmol Shivhare ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.K. Mishra

Counsel for the Respondents:
G.A.

A. Constitution of India,1950-Article 226-unlawful custody of minor son-rule nisi issued-minor was produced before the court-wife walked out on her lawfully wedded husband without a divorce, and married with another person-However,mother acted in an immoral way to walk out on her husband-but, the tender age of 5 years old boy tends to go with her mother on asking question before the court.(Para 1 to 21)

The petition is disposed of. (E-5)

List of Cases Cited:

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

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

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

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

1. This is a habeas corpus writ petition effectively brought by Ram Kumar Gupta in the name of his son Anmol Shivhare, complaining that his minor son aforesaid is in the unlawful custody of Smt. Sanyogita @ Gunja, the minor's mother. He prays that the minor be ordered to be produced before this Court and emancipated in the manner that his custody be entrusted to Ram Kumar Gupta, relieving the minor from the mother's custody.

2. This petition was admitted to hearing on 04.11.2020 and a rule nisi was issued, ordering the minor to be produced before this Court on 17.11.2020. The minor was produced before this Court as ordered. On the date of return, the minor's father, Ram Kumar Gupta and the minor's mother, Smt. Sanyogita @ Gunja also appeared in compliance with the Court's direction to that effect, carried in the order dated 04.11.2020. The Court has interacted with the minor Anmol Shivhare, his mother Sanyogita @ Gunja and the minor's father, Ram Kumar Gupta.

3. Heard Sri R.K. Mishra, learned counsel for the petitioner and Smt. Sanyogita who appeared in person.

4. Smt. Sanyogita, on being specifically asked, if she has instructed a counsel to represent her, declined and addressed the Court herself.

5. In answer to the rule nisi, no return in the form of a counter affidavit has been filed by or on behalf of Sanyogita @ Gunja, respondent no. 5. Thus, the facts before the Court are those that figure in the writ petition and the others the Court has gathered from the parties while interacting with them during hearing.

6. The facts are that Ram Kumar Gupta and Sanyogita were married according to Hindu rites on 8th December, 2009 at Kanpur Nagar. After marriage, Sanyogita came over to her matrimonial home and the two parties cohabited as man and wife. In time, a son was born to the parties. He was born on 07.08.2015. His name is Anmol Shivhare. Ram Kumar Gupta left his native place for Gurgaon, Haryana in search of better prospects to earn his livelihood. He landed in a private job there. He set up residence at Mohammadpur, Sector 37, Gurugram (earlier called Gurgaon), Haryana. Once established there, Gupta invited his wife along with his young son to stay there. The family moved together and settled at Gurugram. The minor, Anmol was admitted to a certain Divya Niketan Public School, Mohammadpur Jharsa, Gurugram, Haryana. He was enrolled in Class-1. The family were living a peaceful life or so it was thought by Gupta.

7. It is said in the writ petition by Gupta that all of a sudden, on 03.10.2019, Sanyogita went away somewhere taking along the parties' minor son, Anmol. Gupta lodged a first information report on 04.10.2019 at Police Station Sector 37,

Gurugram. It was registered as Case Crime No. 295 of 2019, under Section 346 I.P.C. The Police investigated the matter. They found that Sanyogita along with the minor son of parties was staying with one Balram s/o Memwar Singh, a resident of Lahrauli Gate, Police Station Baldeo, District Mathura. The police from Gurugram came over to Police Station Baldeo, District Mathura and Sanyogita was called over. Her statement was recorded under Section 161 Cr.P.C. She was, thereafter, produced before the Magistrate so that her statement under Section 164 Cr.P.C. could be recorded. She said in both her statements that she had married Balram and also produced a marriage certificate dated 22.05.2018 from the Arya Samaj, Block Khera, Firozabad. A copy of that certificate is available on the record of this petition. The police on the basis of Sanyogita's statements under Section 161 and 164 Cr.P.C. submitted a final report to the Magistrate concerned, proposing closure of the investigation. Gupta, however, says that Sanyogita's marriage to Balram is a nullity because it is a second marriage in the lifetime of her husband. Apparently, she has not secured any kind of dissolution of her marriage with Gupta. She has not secured a decree of divorce or annulment. Gupta says further that upon coming to know of this claim of Sanyogita about a second marriage, he went over to Balram's house and attempted to meet his wife. He particularly tried to meet his son, the minor detenue Anmol. He moved an application to the Station House Officer, Police Station Baldeo, District Mathura asking the police to recover his son and deliver him the child's custody, but to no avail. Gupta says that Sanyogita has married a second time, and therefore, she has lost her right to Anmol's custody. The minor's custody with Sanyogita, in the home of a stranger, has been dubbed as unlawful. Gupta says that the minor's life in the stranger's home is at risk. The minor has a bleak future. It is the minor's welfare that he may be placed in his father's custody, who is his natural guardian, in preference to the mother, who has walked out on her lawfully wedded husband without a divorce, and staying in a live-in relationship with a stranger. This Court must remark here that these facts stare in the face beckoning an answer as to where the minor Anmol's welfare would be best secured.

8. Mr. R.K. Mishra, learned counsel appearing for Gupta, submits that notwithstanding the preference about custody indicated by the proviso to Section 6(a) of the Hindu Guardianship and Maintenance Act, 1956 (for short, "the Act of 1956') for the mother, in case of a minor below the age of five years, the facts here ought to persuade this Court to take a different view. Mr. Mishra says that this is not a case where the mother has secured a divorce or an annulment of marriage in accordance with law and honourably left her husband's home to marry another man. It is a case where the mother has acted in an immoral way to walk out on her husband, without telling anyone where she intends to go. She has not secured an end to her marriage with Gupta and has gone over to live with another man, Balram under the colour of a marriage solemnized with him. The mother's marriage to Balram is void under the law as her husband is alive and her marriage to Gupta subsists. She is, therefore, virtually in a live-in relationship with a stranger. The minor's welfare in a stranger's home is not at all secure. Rather, the minor's life is in peril, if Balram were to think that Anmol is an unwelcome presence and an unwanted burden on his resources. He submits that even if Balram has no

criminal propensities so as to imperil the minor's life, the lack of affection from the bread winner of the home, where the minor is living, would certainly cast a dark shadow on the minor's future. The minor requires not only food, shelter and clothing but also an intent attention to his eduction - both literary and moral. Sanyogita, apart from the fact that she has no resources of her own to provide for the minor, would be under the perpetual influence of Balram, with whom she stays. Balram and the minor, being utter strangers, the very sensitive and concerned grooming that a young child requires would be a causality. It is, therefore, submitted that in all these circumstances, the minor ought to be relieved from his mother's custody and entrusted to his father.

9. In reply, the mother has said that she dissociated herself with her first husband, Gupta because he would torture her over triflings. He was unkind to the child also. She says that the child is young and requires her care. She has all the motherly affection for the child. She submits that she can raise him well, taking care of all his needs. She has emphasised that the minor's welfare is absolutely secure in her new home and her husband Balram Chaudhary is a good man, who has all the fatherly affection for Anmol. At this stage, this Court must remark that the submissions on behalf of Sanyogita being without assistance of legal counsel, the Court undertook to discharge somewhat of an inquisitorial role. The submissions from the mother came through mostly during interaction with parties. During the course of interaction with the minor's mother, she described Balram Chaudhary as her husband and Gupta as her former husband. She candidly acknowledged that Anmol was Gupta's son. She also told the Court that she has begotten another son of her wedlock to Balram, as she has chosen to describe her relationship. The other son is an infant of five to six months. About Gupta, she said that he would torture her everyday over triflings. On being asked how Gupta treated his son, Anmol, she said: "very badly'. She told the Court to Gupta's face, that Anmol once had a burn injury to his hand, but because of Gupta's unkind attitude, the child had to be taken for necessary medical aid and treatment by subterfuge. The Court put specific questions to Sanyogita about Gupta's outlook towards his son, which were answered by her in the terms indicated hereinabove.

10. She told the Court that her present husband earns his living by driving a Taxi. She also said that he wholeheartedly agrees to bear the minor's financial and other responsibilities. The Court further inquired whether the child was attending school. In answer, Sanyogita said, "Yes, but presently he is not attending school on account of the Covid-19 pandemic'. The Court inquired of her about her educational qualifications, to which she said that she had left her B.A. Course incomplete.

11. The Court interacted with Gupta in considerable detail. He told the Court that he does service for an occupation with the Kanpur Plastic Factory, which is located at Dada Nagar, Kanpur. It is near Panki. He earns a salary of Rs. 9,500/- per mensem, overtime wages, apart. Upon the Court asking him if he had remarried, he answered in the negative. Upon the Court further asking Gupta, if he intended to remarry, he said that for the present, he has not considered the matter. The Court then inquired of Gupta if he could raise the minor, considering that he is a very young

child, Gupta said that he would be able to do that. The Court's impression of Gupta's stand about raising the minor was that it was a rather reluctant and hesitant response. Gupta informs the Court that he has done his graduation. It would be apposite to extract verbatim, the relevant questions put to Gupta and their answers during interaction. These read:

Q. Aapka naam?

A. Ram Kumar Gupta.

Q. Aap kya karte hain?

A. Naukari Kanpur Plastic Factory me. Kanpur, Dada Nagar me. Ye Panki ke paas hai.

Q. Aapki kitni salary hai?

A. Rs. 9,500/-, over time alag se.

Q. Aapne doosri shadi ki hai?

A. Nahi.

Q. Aap dusari shadi karenge?

A. Abhi vichar nahi kiya.

Q. Aap bachche ko kaise palenge, bachcha bahut chhota hai?

A. Paal lenge.

Q. Aap kitna padhe hai?

A. Graduation complete hai.

12. The Court interacted with the minor, Anmol. He is a young child aged a little over five years. The child on being asked his name kept quite. He appears to be lost deep in some thoughts. He did not appear to be very attentive. Bearing in mind the child's tender age, the Court interacted with the child at close quarters with a view to ascertain whether he was comfortable in his mother's custody. This Court attempted to elicit from the child in a subtle manner, if there is any truth to the mother's allegation about his father, Gupta being unkind to him. The child hardly said anything by word of mouth. Without uttering a word, he had tears welling in his eyes. He turned away and headed back to his mother, without answering any question. He appears to be attached to the mother. Walking back to her, he embraced his mother. The Court then drew the child's attention to his father, who was present in Court. The father attempted to touch the child, to which he sharply reacted, shunning the father's touch. At this juncture, the Court again called the child over and asked him, if he would like to go back to his father. Again, he did not speak anything. Instead, he nodded his head vigorously in refusal. The father asked the child to tell him who he was. The child said: "Koi Nahi'. This was the first word spoken by him since he appeared in Court. He spoke this word of refusal, when beckoned by his father.

13. This Court may re-emphasise that the child is young and it was certainly not the endeavour of the Court to know his intelligent preference about the choice of his guardian. The Court wished to know, again, as already said, if there was any truth to Sanyogita's allegations about Gupta being an unkind father. Again, whatever the Court says is no condemnation of the father or a perennial certification to the mother to hold the minor's custody, till he turns an adult. It is the Court's endeavour for the present to find out where the minors welfare would be best subserved.

14. It is by now well nigh settled that though the Act of 1956 and the Guardian and Wards Act, 1890 speak about the rights of the natural guardian, their appointment and declaration and also their rights to the minor's custody, the decision about the guardianship of a minor or his/her custody, which could be distinct from guardianship, is not so much about the guardian's right, as about the minor's welfare. If there is one principle that has become almost

immutable in guardianship and custody disputes, it is this: the welfare of the minor is of paramount importance. A fortiorari everything else is subordinated to that consideration. The various injunctions about guardianship and custody, carried in different statutes and texts, embodying personal laws of parties, have all to take a back-seat and what rules is the principle about the minors welfare being the paramount consideration.

15. The legislative edict, carried in the proviso to Section 6(a) of the Act of 1956, is an expression of trust in the mother, that up to the age of five years, ordinarily a minor's interest would be better secured by the mother. This trust expressed in the mother is something that emanates from human nature. Five years is not a statutory cut off date after which the right, as it were, gets divested from one and vested in the other. The age mentioned in the proviso to Section 6(a) is no calibrated formula. It indicates a thought that young children are presumed to be better cared for by the mother, unless something is shown in the circumstances to outweigh that precipitate experience of mankind spread across eons.

16. In this connection, reference may be made with great profit to the decision of the Supreme Court in **Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318**. It has been held there:

"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."

17. There is a very illuminating reference about the mother's priceless role in securing the minor's welfare to be found in a decision rendered by Rajul Bhargava, J. in **Habeas Corpus Writ Petition No. 3921 of 2018, Aharya Baranwal and 3 others vs. State of U.P. and 2 others, in the order dated 22.05.2019**. His Lordship's reference to a passage from Bailey on habeas corpus, deserves to be noticed in that decision, about the context here. In Aharya 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)

18. It must be remarked that the rather very vexed question about a child's custody torn between parents, who have chosen to part ways, has no answer to fit all situations. Provisions of different statutes and guidance in various authorities are but guides to reach a just conclusion in a particular case. What cannot be lost sight of, as said earlier, is that the principle about the welfare of the child being of paramount consideration cannot be given a go by. In this connection, reference may be made to the remarks of their Lordships of the Supreme Court in **Nil Ratan Kundu vs. Abhijit Kundu, (2008) 9 SCC 413**. It has been held in **Nil Ratan Kundu (supra):**

"52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

19. Considering the overall behaviour of the minor towards his parents, this Court feels that at this age, depriving the minor of his mother's company, might have an adverse impact on his overall development. This, inturn would derogate from the minor's welfare.

20. Here, this Court, on a careful consideration of the matter, finds that the minor, though above the age of five years, is still a child of tender years. He may not be an infant, who needs to be weaned away from his mother, but he still needs the tender care that the mother alone can

provide. The fact that the mother has walked away from her husband's home without securing a divorce and entered into a new relationship with Balram Chaudhary, which she represents and ostensibly believes to be a second marriage, may be something that the law and the society frown upon, but, in itself, is something not so depraved or immoral as to deprive the mother of her special place in the minor's life. The mother indicated that she was treated with cruelty by Gupta and that is why she walked out on him. That is not this Court's concern. It is this Court's concern, however, to determine whether the minor would be safe and his welfare ensured in his mother's new home. The way the minor's mother has detailed her circumstances in Balram Chaudhary's home, this Court feels that the minor, for the present, is well adapted into his mother's new family. In that family there is a new member, who is a consanguine brother to the minor. Sanyogita's younger son is begotten of Balram Chaudhary. In the opinion of this Court, Balram Chaudhary, Sanyogita and the two children, who are half brothers, are a family with reasonably good bonds, that can be trusted to secure the minor's welfare. On the other hand, Gupta is engaged in earning his livelihood and back home there may not be anyone, even half as able to take care of the minor at this young age as his natural mother. Sanyogita has also indicated that she is all inclined to raise the minor and ensure good education to him. By contrast, Gupta's reaction to the proposal of raising a young child was rather reluctant. He also said that for the present he has not considered a second marriage. If he does in future, of course, subject to a divorce, the minor might have a step mother. That might be more detrimental to the minor's welfare than a stepfather, who goes away to work. It is a prospect which has not yet come by. Nonetheless, it is a prospect that has to be borne in mind. Thus, so far as the dominant and substantial part of the minor's custody and care are concerned, this Court is of opinion that these would be better secured in the mother's hands, in comparison to the father. At the same time, the minor cannot be deprived of the company of his father.

21. The circumstances in which Gupta and Sanyogita are placed are not very conventional. Therefore, ensuring visitation rights to the father has to be ensured bearing in mind the subtler aspects of human behaviour. The rights of the minor to his father's company have to be ensured at all costs.

22. This Court is, therefore, of opinion that Sanyogita @ Gunja would be obliged to take the minor to his father's home at Kanpur once in two months, on any Sunday of the month. The child will stay with his father from 10:00 am to 5:00 pm. During this time, Sanyogita would have to stay close by, if she is not comfortable staying at Gupta's home. During this interaction, the father shall extend all courtesy to Sanyogita, and Sanyogita, likewise, will facilitate the meeting between the minor and his father. In case, during the period of stay, the minor needs his mother, Gupta will be free to inform her over cellphone and the mother shall take care of the minor's requirements. Reasonable expenses for the onward and return journey by Sanyogita and the minor shall be borne by Gupta, payable at the time of each scheduled visit.

23. It is in these terms that the rule nisi issued in this case is **disposed of**. There shall be no order as to costs.

(2021)01ILR A564
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.01.2021

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Habeas Corpus Writ Petition No. 16907 of 2020

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

Counsel for the Petitioners:
Adarsh Kumar Maurya, Archana Singh

Counsel for the Respondents:

A. Constitution of India,1950 - Article 226 - unlawful custody of dentenu/daughter by father- she converted into Hindu religion and married to her husband who Belongs to Hindu religion-both appeared before the court-her father accepted her decision as she is adult-marriage solemnized under Special Marriage Act, 1954-the said Act requires a 30 days notice to be published and invite objections from the public at large-such notice would be an invasion in privacy and violative of fundamental rights-such notice shall be optional-if the party intends it can make a request to the Marriage Officer to publish or not to publish a notice. (Para 1 to 49)

B. The law would be assessed not with reference to its object but on the basis of its effect and impact on the fundamental rights. The mere fact that the law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself. (Para 22 to 44)

The petition is disposed of. (E-5)

List of Cases Cited:

1. Shakti Vahini Vs U.O.I. & ors.(2018) 7 SCC 192

2. Satyawati Sharma Vs U.O.I. (2008) 5 SCC 287

3. Kashmir Singh Vs U.O.I.,(2008) 7 SCC 259

4. Lata Singh Vs St. of U.P. & anr.,(2006) 5 SCC 475

5. Arumugam Servai Vs St. of T.N.,(2011) 6 SCC 405

6. Bhagwan Dass Vs St. (NCT of Delhi),(2011) 6 SCC 396

7. Vikas Yadav Vs St. of U.P. & anr.,(2016) 9 SCC 541

8. Asha Ranjan Vs St. of Bih.,(2017) 4 SCC 397

9. Shafin Jahan Vs Asokan K.M. & ors.,(2018) 16 SCC 368

10. Justice K.S. Puttaswamy(Retd.) & anr. Vs U.O.I. & ors.,(2017) 10 SCC 1

11. A.K. Gopalan Vs St. of Madras,(1950) AIR SC 27

12. Kharak Singh Vs St. of U.P.,(1963) AIR SC 1295

13. Maneka Gandhi Vs U.O.I.,(1978) 1 SCC 248

14. M.P. Sharma Vs Satish Chandra,(1954) AIR SC 300

15. Rustom Cavasjee Cooper Vs U.O.I.,(1970) 1 SCC 248

16. Ram Jethmalani Vs U.O.I.,(2011) 8 SCC 310

17. Navtej Singh Johar & ors. Vs U.O.I. (2018) 10 SCC 1

18. Ashok Gupta Vs St. of U.P.,(1997) 5 SCC 201

19. Githa Hariharan Vs RBI,(1999) 2 SCC 228

20. N. Kannadasan Vs Ajoy Khose,(2009) 7 SCC 1

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. The present Habeas Corpus Petition is filed by Petitioner no.1-wife through Petitioner no.2-husband, claiming that detenue-Petitioner no.1, Smt. Safia Sultana, who after converting to Hindu religion and renamed as Smt. Simran, married Petitioner no.2 as per Hindu rituals. However respondent No.4, her father, is not permitting her to live with her husband. They both are adults, duly married with their free will and desire to live together. Thus the custody of the detenue by her father is illegal. The Court directed for the presence of the detenue and her father. They both appeared in person, wherein, the Petitioner no.1 accepted the averments aforesaid and had shown her desire to live with her husband. The Respondent no.4-father of the detenue also fairly accepted that since she is an adult, has married with her choice and wanted to live with her husband, he also accepts her decision and wished both of them best for their future.

2. This matter could have come to an end at this stage, but, for the views expressed by the young couple while interacting with the Court on their personal appearance, the young couple expressed that they could have solemnized their marriage under the Special Marriage Act, 1954 but the said Act requires a 30 days notice to be published and objections to be invited from the public at large. They expressed that any such notice would be an invasion in their privacy and would have definitely caused unnecessary social pressure/interference in their free choice with regard to their marriage. The personal laws do not impose any such condition of publication of notice, inviting and deciding objections before solemnizing any marriage. They further state that such a challenge is being faced by a large number of similarly situated persons who desire to build a life with a partner of their own choice. Learned counsel for petitioners also stated that the situation may become more critical with notification of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, as the same prohibits conversion of religion by marriage to be unlawful. Learned counsel for petitioners further argues that looking into the changing pattern of the society, amendments made to the Special Marriage Act, 1954 as well as the law declared by the Supreme Court in the last around a decade with regard to privacy, liberty and freedom of choice of a person, provisions of Special Marriage Act, 1954, directing publication of a notice before marriage and inviting public objections, require a revisit to understand whether now with the said change they are to be treated as mandatory or directory in nature.

3. It is further submitted that such young couples are not in a position to raise these issues before solemnizing their marriages as any litigation further attracts unnecessary attention which invades into their privacy and also causes unnecessary social pressure upon them with regard to their choice of a life partner.

4. Since, the issues raised by the petitioners and their counsels involves right of life and liberty of a large number of persons, therefore, this Court is duty bound to consider their submissions. Suffice would be to refer to the judgment of the Supreme Court in ***Shakti Vahini vs. Union of India and others***1. The relevant paragraph reads:

"44. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the constitutional courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement."

5. As the issue involves interpretation of a Central Act, Sri Surya Bhan Pandey, learned Assistant Solicitor General of India was also requested to assist the Court. Heard Sri Adarsh Kumar Maurya, Smt. Archana Singh, learned counsels for petitioners, Sri S.B. Pandey, learned Assistant Solicitor General assisted by Sri Amresh Rai and Sri Santosh Kumar Mishra, learned AGA-I for the State.

6. For the purpose of the present case, following sections of Special Marriage Act, 1954 are of relevance:

"4. Conditions relating to solemnization of special marriages*: Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:—*

(a) neither party has a spouse living;

(b) neither party—

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

5. Notice of intended marriage*: When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the form specified in the Second Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given.*

6.Marriage Notice Book and publication*: (1) The Marriage Officer shall*

keep all notices given under section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the Marriage Notice Book, and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

(2) The Marriage Officer shall cause every such notice to be published by affixing a copy thereof to some conspicuous place in his office.

(3) Where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the Marriage Officer to whom the notice has been given under section 5, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing, and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place in his office.

7. Objection to marriage: *(1) Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of section 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in section 4.*

(2) After the expiration of thirty days from the date on which notice of an intended marriage has been published under sub-section (2) of section 6, the marriage may be solemnized, unless it has been previously objected to under sub-section (1).

(3) The nature of the objection shall be recorded in writing by the Marriage Officer in the Marriage Notice Book, be read over and explained if necessary, to the person making the objection and shall be signed by him or on his behalf.

8. Procedure on receipt of objection: *(1) If an objection is made under section 7 to an intended marriage, the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdrawn by the person making it; but the Marriage Officer shall not take more than thirty days from the date of the objection for the purpose of inquiring into the matter of the objection and arriving at a decision.*

(2) If the Marriage Officer upholds the objection and refuses to solemnize the marriage, either party to the intended marriage may, within a period of thirty days from the date of such refusal, prefer an appeal to the district court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the district court on such appeal shall be final, and the Marriage Officer shall act in conformity with the decision of the court.

46. Penalty for wrongful action of Marriage Officer: *Any Marriage Officer who knowingly and wilfully solemnizes a marriage under this Act,—*

(1) without publishing a notice regarding such marriage as required by Section 5, or

(2) within thirty days of the publication of the notice of such marriage, or

(3) in contravention of any other provision in this Act, shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both."

7. The society has an ever changing phenomenon. It keeps changing with time as per its new needs, expectation and other changing aspects. The very purpose of law is to serve the society as per its requirements; therefore, the law also keeps evolving with the changes in society. Thus, it would be appropriate, before coming to the Special Marriage Act, 1954 and its present relevance, to briefly visit the history and development of the law with regard to civil marriages in India.

8. A Bill was introduced by Sir Henry Maine for the first time proposing a law for inter-cast and inter-religion marriages in India. The proposed Bill permitted any two citizens of India to marry under the same instead of their respective personal laws. The Bill was vehemently opposed in the legislature and was vastly modified before it was enacted and enforced on 22nd March 1872 as "Special Marriage Act, 1872 (Act of 1872)". The law, as passed, provided that any two persons after declaring complete severance from their respective faith can marry under the Act of 1872. The Act of 1872 was amended in the year 1923 and thereafter it became permissible for the individuals to marry under the same without renouncing their religion.2 Section 2 of the Act of 1872 provided the conditions to be fulfilled before any marriage could be performed. Section 6 of the said Act provided procedure for a public notice to be made and thereafter Sections 7 and 8 and further sections provided the procedure for deciding the objections, if any, filed against the proposed marriage which could be filed by any person.

9. With the independence of India and coming into force of a secular Constitution in January, 1950, the Parliament proceeded to revisit the personal laws and laws with regard to marriages and thus along with other enactments, it also passed the Special Marriage Act, 1954 (Act of 1954). Under the Act of 1954 any two Indians living wheresoever, and whether professing the same or different religions (or no religion at all), could solemnize their marriage provided that they fulfilled the conditions provided under Section 4 of the said Act. Act of 1954 also provided that an existing marriage, solemnized under whatever law, could be registered under the new law, if the same fulfilled the conditions provided therein. After registration, the marriage stood covered under the provisions of Act of 1954 and not under the personal law wherein it was initially solemnized. The Act of 1954 also prescribed rights of persons concerned with regard to separation, divorce and inheritance etc. including judicial procedures for enforcement of the same and thus came in force a complete code with regard to civil marriages in India. The Act of 1954 was also amended from time to time as per the changing needs of the society. The procedure of publishing a notice and inviting objections from public at large, as was provided under Act of 1872 was, thus, also adopted by the Act of 1954 with minor variations.

10. The golden rule of interpretation of statute is that so far as possible plain reading of the provisions should be accepted. Further, if any penal consequences are provided the provision would be mandatory in nature. In view of aforesaid, more specifically in view of the punitive consequences under Section 46, the publication of notice under Section 6 and inviting objections and decision thereupon under Section 7 was treated as mandatory. Thus the Marriage Officers

have always published a notice of intended marriage and invited objections. Marriages under the Act of 1954 were only solemnized after a period of thirty days of notice or after decision on the objections, in case filed.

11. The question raised before this Court is, whether the social conditions and the law, as has progressed since passing of Act of 1872 and thereafter Act of 1954 till now, would in any manner impact the interpretation of Sections 5, 6 and 7 of the Act of 1954 and whether with change the said sections no more remain mandatory in nature. This argument is based on another principle of interpretation, that, an ongoing statute should be interpreted on the basis of present day's changed conditions and not on old obsolete conditions. The Supreme Court considered the said principle in ***Satyawati Sharma vs. Union of India***3. The Supreme Court, referring to its earlier judgments, held:

"32. It is trite to say that legislation which may be quite reasonable and rationale at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equity and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent. It is trite to say that legislation which may be quite reasonable and rationale at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equity and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent. In State of Madhya Pradesh vs. Bhopal Sugar Industries [AIR 1964 SC 1179], this Court while dealing with a question whether geographical classification due to historical reasons could be sustained for all times and observed: (AIR p.1182, para 6)

"6. ..Differential treatment arising out of the application of the laws so continued in different regions of the same reorganised, State, did not therefore immediately attract the clause of the Constitution prohibiting discrimination. But by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reason may cease to be valid. A purely temporary provision which because of compelling forces justified differential treatment when the Reorganisation Act was enacted cannot obviously be permitted to assume permanency, so as to perpetuate that treatment without a rational basis to support it after the initial expediency and necessity have disappeared."

33. In Narottam Kishore Dev Verma vs. Union of India [AIR 1964 SC 1590] the challenge was to the validity of Section 87-B of the Code of Civil Procedure which granted exemption to the rulers of former Indian States from being sued except with the consent of the Central Government. In the course of judgment, it was observed as under: (AIR p.1593, para 11)

"11. ..If under the Constitution all citizens are equal, it may be desirable to confine the operation of Section 87-B to past transactions and nor to perpetuate the anomaly of the distinction between the rest of the citizens and Rulers of former Indian States. With the passage of time, the

validity of historical considerations on which Section 87-B is founded will wear out and the continuance of the said section in the Code of Civil Procedure may later be open to serious challenge."

34. In H.H. Shri Swamiji Shri Admar Mutt Etc, vs. The Commissioner, Hindu Religious & Charitable Endowments Department [1979 (4) SCC 642] this Court was called upon to consider the validity of the continued application of the provisions of the Madras Hindu Religious Endowment Act, 1951 in the area which had formerly been part of State of Madras and which had latter become part of the new State of Mysore (now Karnataka) as a result of the State Re-organisation Act, 1956. While declining to strike down the legislation on the ground of violation of Article 14 of the Constitution, the Court observed: (SCC p.658, para 29)

"An indefinite extension and application of unequal laws for all time to come will militate against their true character as temporary measures taken in order to serve a temporary purpose. Thereby, the very foundation of their constitutionality shall have been destroyed the foundation being that Section 119 of the State Reorganisation Act serves the significant purpose of giving reasonable time to the new units to consider the special circumstances obtaining in respect of diverse units. The decision to withdraw the application of unequal laws to equals cannot be delayed unreasonably because of the relevance of historical reasons which justify the application of unequal laws is bound to wear out with the passage of time. In Broom's Legal; Maxim (1939 Edition, page 97) can be found a useful principle "Cessante Ratione Legis Cessat Ipsa Lex", that is to say, "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself."

32. In Motor General Traders vs. State of Andhra Pradesh (supra), validity of Section 32(b) of the A.P. Buildings (Lease, Rent and Eviction) Control, Act, 1960 was considered. By that Section it was declared that the provisions of the main Act will not apply to the buildings constructed after 25th August, 1957. The Court noted that exemption had continued for nearly a quarter century and struck down the same despite the fact that validity thereon had been upheld by the High Court in Chintapalli Achaiah vs. P. Gopala Krishna Reddy [AIR 1966 AP 51]. Some of the observations made in the judgment are worth noticing. These are:

"16. What may be unobjectionable as a transitional or temporary measure at an initial stage can still become discriminatory and hence violative of Article 14 of the Constitution if it is persisted in over a long period without any justification."

"24. ... What was justifiable during a short period has turned out to be a case of hostile discrimination by lapse of nearly a quarter of century....We are constrained to pronounce upon the validity of the impugned provision at this late stage because of grab of Constitution which it may have possessed earlier has become worn out and its unconstitutionality is now brought to a successful challenge".

"24. ... As already observed, the landlords of the buildings constructed subsequent to August 26, 1957 are given undue preference over the landlords of buildings constructed prior to that date in that the former are free from the shackles of the Act while the latter are subjected to the restrictions imposed by it. What should have been just an incentive has become a permanent bonanza in favour of those who constructed buildings subsequent to August 26, 1957. There being no justification for

the continuance of the benefit to a class of persons without any rational basis whatsoever, the evil effects flowing from the impugned exemption have caused more harm to the society than one could anticipate. What was justifiable during a short period has turned out to be a case of hostile discrimination by lapse of nearly a quarter of century. The second answer to the above contention is that mere lapse of time does not lend constitutionality to a provision which is otherwise bad. "Time does not run in favour of legislation. If it is ultra vires, it cannot gain legal strength from long failure on the part of lawyers to perceive and set up its invalidity. Albeit, lateness in an attack upon the constitutionality of a statute is but a reason for exercising special caution in examining the arguments by which the attack is supported."

12. ***Following Satyawati Sharma3 in case of Kashmir Singh vs. Union of India4*** the Supreme Court holds:

"55. The superior courts must remember a well-known principle of law that the Court while construing an ongoing statute must take into consideration the changes in the societal condition. It would be a relevant fact. (see Satyawati Sharma[3])

68. For the purpose of giving an effective and meaningful construction of the provisions, the court is bound to take into consideration the situational change...

72. We, therefore, are of the opinion that in view of the situational change, a meaning which could be attributed in the year 1925 cannot be given the same meaning today. For the aforementioned purpose, Sections 40 and 70 of the Act must be read together. Therefore a holistic reading of the entire Act would be necessary."

13. Thus this Court is required to consider the changes in the social and legal aspects, if any, that may impact the interpretation of the provisions of the Act of 1954.

***Reports of the Law Commission of India*:**

14. Touching upon the Act of 1954, the changes occurring in the society over a period of time and need for consequential changes to be brought in law is aptly emphasised and followed by the Law Commission of India (Law Commission) in its following reports.

15. In its 59th report submitted in the year 1974, the Law Commission, while proposing amendments in the Act of 1954 as well as in the Hindu Marriage Act, 1955, states:

"1.11: The object of law, whether personal or public, must be to sustain the stability of the society and help its progress: -

The structure of any society, which wants to be strong, homogeneous and progressive, must, no doubt, be steady but not static; stable but not stationary."

"1.16: It may sound platitudinous but is nevertheless true that revision of laws is a "must' in a dynamic society like ours which is engaged on the adventure of creating a new social order founded on faith in the value-system of socio-economic justice enshrined in our Constitution. With the changing times, notions of fairness and justice assume newer and wider dimensions, and customs and beliefs of the people change. These, in turn, demand changes in the structure of law; every progressive society must make a rational effort to meet these demands. Between the

letter of the law and the prevailing customs and the dictates of the current value-system accepted by the community, there should not be an unduly long gap. Ranade often said that the story of social reform, which involves reform in personal law, is an unending story; it continues from generation to generation. Each generation contributes to the continuance of the effort of social reform; but the effort is never concluded and the end is never reached in the sense that no further attempt to reform is required. It is in that sense that we believe that the revision of personal laws, and indeed, of all laws, has to be undertaken by modern societies. These thoughts have been present in our mind when we embarked upon the present inquiry"

"1.20: In any civilised and progressive society, marriage is an institution of great importance. It is the centre of a family which in turn, is a significant unit of the social structure. Children who are born of marriage, also contribute to the stability of the institution of marriage."

16. Concluding the said report, the Law Commission proposed Marriage Laws (Amendment) Bill of 1974 suggesting amendments in the Act of 1954 as well as in the Hindu Marriage Act, 1955. The Act of 1954 was duly amended in the year 1976.

17. The Law Commission again submitted a report No.212, in the year 2008, titled "Laws of Civil Marriages in India - A Proposal to Resolve Certain Conflicts". After taking into consideration the changes in the social norms as well as in law, the Law Commission made seven recommendations with regard to Act of 1954. Relevant for our purposes are:

"1. The word "Special" be dropped from the title of the Special Marriage Act 1954 and it be simply called "The Marriage Act 1954" or "The Marriage and Divorce Act 1954." The suggested change will create a desirable feeling that this is the general law of India on marriage and divorce and that there is nothing "special" about a marriage solemnized under its provisions. It is in fact marriages solemnized under the community-specific laws which should be regarded as "special."

2. A provision be added to the application clause in the Special Marriage Act 1954 that all inter-religious marriages except those within the Hindu, Buddhist, Sikh and Jain communities, whether solemnized or registered under this Act or not shall be governed by this Act.

3. The definition of "degrees of prohibited relationship" given in Section 2 (b) in the Special Marriage Act 1954 and the First Schedule detailing such degrees appended to the Act be omitted. Instead, it should be provided in Section 4 of the Act that prohibited degrees in marriage in any case of an intended civil marriage shall be regulated by the marriage law (or laws) otherwise applicable to the parties.

4. The requirement of a gazette notification for recognition of custom relating to prohibited degrees in marriage found in the Explanation to Section 4 of the Special Marriage Act 1954 be deleted."

18. Again the Law Commission submitted report No.242, in the year 2012, titled "Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework." It states:

"4.1 The autonomy of every person in matters concerning oneself - a free and willing creator of one's own choices and decisions, is now central to all thinking on

community order and organization. Needless to emphasize that such autonomy with its manifold dimensions is a constitutionally protected value and is central to an open society and civilized order. Duly secured individual autonomy, exercised on informed understanding of the values integral to one's well being is deeply connected to a free social order. Coercion against individual autonomy will then become least necessary.

4.2 In moments and periods of social transition, the tensions between individual freedom and past social practices become focal points of the community's ability to contemplate and provide for least hurting or painful solutions. The wisdom or wrongness of certain community perspectives and practices, their intrinsic impact on liberty, autonomy and self-worth, as well as the parents' concern over impulsive and unreflective choices - all these factors come to the fore-front of consideration."

19. It recommended to simplify the procedure under the Special Marriage Act. It says:

"9: it is desirable that the procedure under the Special Marriage Act is simplified. The time gap between the date of giving notice of marriage and the registration should be removed and the entire process of registration of marriage should be expedited. The domicile restriction should also be removed. We are aware, that already an amendment is proposed to the Special Marriage Act by the Government of India by introducing a Bill in the Parliament. It is, therefore not necessary to make a detailed study and give specific recommendation on this aspect."

20. It summarily recommended:

"11.1 In order to keep a check on the high-handed and unwarranted interference by the caste assemblies or panchayats with sagotra, inter-caste or inter-religious marriages, which are otherwise lawful, this legislation has been proposed so as to prevent the acts endangering the liberty of the couple married or intending to marry and their family members. It is considered necessary that there should be a threshold bar against the congregation or assembly for the purpose of disapproving such marriage / intended marriage and the conduct of the young couple. The members gathering for such purpose, i.e., for condemning the marriage with a view to take necessary consequential action, are to be treated as members of unlawful assembly for which a mandatory minimum punishment has been prescribed.

11.2 So also the acts of endangerment of liberty including social boycott, harassment, etc. of the couple or their family members are treated as offences punishable with mandatory minimum sentence. The acts of criminal intimidation by members of unlawful assembly or others acting at their instance or otherwise are also made punishable with mandatory minimum sentence.

11.3 A presumption that a person participating in an unlawful assembly shall be presumed to have also intended to commit or abet the commission of offences under the proposed Bill is provided for in Section 6.

11.4 Power to prohibit the unlawful assemblies and to take preventive measures are conferred on the Sub-Divisional / District Magistrate. Further, a SDM/DM is enjoined to receive a request or information from any person seeking protection from the assembly of persons or members of any family who are likely to or who have been objecting to the lawful marriage.

11.5 The provisions of this proposed Bill are without prejudice to the provisions

of Indian Penal Code. Care has been taken, as far as possible, to see that there is no overlapping with the provisions of the general penal law. In other words, the criminal acts other than those specifically falling under the proposed Bill are punishable under the general penal law.

11.6 The offence will be tried by a Court of Session in the district and the offences are cognizable, non-bailable and non-compoundable.

11.7 Accordingly, the Prohibition of Interference with the Freedom of Matrimonial Alliances Bill 20___ has been prepared in order to effectively check the existing social malady."

21. It appears that the Bills proposed by the Law Commission in its reports No. 212 (year 2008) and 242 (year 2012) are still pending for consideration.

Development of Law:

22. ***Lata Singh Vs. State of U.P. and another5*** was one of the initial cases which came up before the Supreme Court raising the issue of the right of a person to marry of his own choice. In the said case petitioner solemnized her marriage, with her own free will, with a person of another caste. The said marriage was strongly opposed by her brothers and they also committed violence upon her and her husband. Condemning the same, Supreme Court held:

"17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. ***This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter- religious marriage.*** *We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law." (emphasis supplied)*

23. Again the issue was considered in the cases of ***Arumugam Servai vs. State of Tamil Nadu6and Bhagwan Dass vs. State (NCT of Delhi)****7*. In both the cases, brutality was caused by "khappanchayat" or family members against the persons solemnizing marriage with their own choice. The Supreme Court referring to the case of ***Lata Singh***5strongly condemned

and criticized such atrocious acts and directed the State authorities to take immediate steps in all such cases.

24. In ***Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23-1-2014 in Re8*** the Supreme Court found the right of freedom of choice in marriage to be a fundamental right and an inherent aspect of Article 21 of the Constitution of India. The court declared:

"16. Ultimately, the question which ought to consider and assess by this Court is whether the State police machinery could have possibly prevented the said occurrence. The response is certainly a "yes". ***The State is duty bound to protect the Fundamental Rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage.*** *Such offences are resultant of the State's incapacity or inability to protect the fundamental rights of its citizens." (emphasis supplied)*

25. Another case of honour killing came up before Supreme Court in ***Vikas Yadav vs. State of U.P. and another***9. Again Court held:

"75. One may feel "My honour is my life" but that does not mean sustaining one's honour at the cost of another. ***Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour.*** *That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl.* ***Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise****. It is a vice, condemnable and deplorable perception of "honour", comparable to medieval obsessive assertions." (emphasis supplied)*

26. In ***Asha Ranjan vs. State of Bihar***10, the Supreme Court again declared the right of a person in choosing a partner to be legitimate constitutional right recognized under Article 19 of the Constitution of India. The judgment reads:

"61. ***...choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking".*** *It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion." (emphasis supplied)*

27. Supreme Court considered the matter of the honour killing and right to marry at length in the case of ***Shakti Vahini***1. The relevant paragraphs of the said judgment read as under:

"41. ***What we have stated hereinabove, to explicate, is that the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock. Their consent has to be piously given primacy. If there is offence committed by one because of some penal law, that has to be decided as per law***

which is called determination of criminality*. It does not recognise any space for informal institutions for delivery of justice. It is so since a polity governed by "Rule of Law" only accepts determination of rights and violation thereof by the formal institutions set up for dealing with such situations. It has to be constantly borne in mind that rule of law as a concept is meant to have order in a society. It respects human rights. Therefore, the khap panchayat or any panchayat of any nomenclature cannot create a dent in exercise of the said right.*

43. Honour killing guillotines individual liberty, freedom of choice and one's own perception of choice. ***It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy.***

44. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the constitutional courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. ***Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realisation of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.***

45. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation...

52. Once the fundamental right is inherent in a person, the intolerant groups who subscribe to the view of superiority class complex or higher clan cannot scuttle the right of a person by leaning on any kind of philosophy, moral or social, or self-proclaimed elevation. ***Therefore, for the sustenance of the legitimate rights of young couples or anyone associated with them and keeping in view the role of this Court as the guardian and protector of the constitutional rights of the citizens and***

further to usher in an atmosphere where the fear to get into wedlock because of the threat of the collective is dispelled, it is necessary to issue directives and we do so *on the foundation of the principle stated in Lakshmi Kant Pandey vs. Union of India reported in (1984) 2 SCC 244, Vishaka Vs. State of Rajasthan reported in (1997) 6 SCC 241 and Prakash Singh Vs. Union of India reported in (2006) 8 SCC 1." (emphasis supplied)*

28. Thus the Supreme Court in the case of ***Shakti Vahini***1 again held the right to choose a life partner, to be a fundamental right recognized under Article 19 and 21 of the Constitution. Once the said fundamental right is inherent in a person, the same cannot be scuttled. It found that it is the duty of the Court to remove any interference with the legitimate rights of the young couples or anyone associated with them. The Supreme Court also issued preventive, remedial as well as punitive measures to be followed and implemented by the State authorities.

29. In a Habeas Corpus ***Petition Shafin Jahan vs. Asokan K.M. and Others*****11** again right of an individual to marry without any interference came up before the Supreme Court. In the said case, the High Court failed to take appropriate steps for releasing the detenue, a major lady, to live with her own choice, while trying to make out a case of attempts being made for taking her out of the country after change of religion in a clandestine manner. The relevant portions of the judgment read:

"52. ***It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating there from on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person****. The social values and morals have their space but they are not above the constitutionally guaranteed freedom.* ***The said freedom is both a constitutional and a human right****. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow.* ***It has to be remembered that the realisation of a right is more important than the conferment of the right. Such actualisation indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.***

53. Non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a constitutional court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept.

54. ***In the case at hand, the father in his own stand and perception may feel that there has been enormous transgression of his right to protect the interest of his daughter but his viewpoint***

or position cannot be allowed to curtail the fundamental rights of his daughter who, out of her own volition, married the appellant. *Therefore, the High Court has completely erred by taking upon itself the burden of annulling the marriage between the appellant and Respondent 9 when both stood embedded to their vow of matrimony.*

84. A marriage can be dissolved at the behest of parties to it, by a competent court of law. Marital status is conferred through legislation or, as the case may be, custom. Deprivation of marital status is a matter of serious import and must be strictly in accordance with law. The High Court in the exercise of its jurisdiction under Article 226 ought not to have embarked on the course of annulling the marriage. ***The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme.*** *The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground.* ***Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution****. In deciding whether Shafin Jahan is a fit person forHadiya to marry, the High Court has entered into prohibited terrain.* ***Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognisingthem. Indeed, the Constitution protects personal liberty from disapproving audiences.***

86. ***The right to marry a person of one's choice is integral to Article 21 of the Constitution.*** *The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable.* ***Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.***

87. In Justice K S Puttaswamy vs. Union of India reported in (2017) 10 SCC 1, this Court in a decision of nine judges held that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality: (SCC pp. 498-99, para 298)

"298. ...The autonomy of the individual is the ability to make decisions

on vital matters of concern to life... The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination... The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual."

A Constitution Bench of this Court, in Common Cause (A Regd. Society) vs. Union of India reported in (2018) 5 SCC 1, held: (SCC p.194, para 346)

"346. ...Our autonomy as persons is founded on the ability to decide:

on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives."

The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.

88. The High Court, in the present case, has treaded on an area which must be out of bounds for a constitutional court. The views of the High Court have encroached into a private space reserved for women and men in which neither law nor the judges can intrude. The High Court was of the view that at twenty-four, Hadiya "is weak and vulnerable, capable of being exploited in many ways". ***The High Court has lost sight of the fact that she is a major, capable of taking her own decisions and is entitled to the right recognised by the Constitution to lead her life exactly as she pleases****. The concern of this Court in intervening in this matter is as much about the miscarriage of justice that has resulted in the High Court as much as about the paternalism which underlies the approach to constitutional interpretation reflected in the judgment in appeal. The superior courts, when they exercise their jurisdiction parents patriae do so in the case of persons who are incapable of asserting a free will such as minors or persons of unsound mind.* ***The exercise of that jurisdiction should not transgress into the area of determining the suitability of partners to a marital tie. That decision rests exclusively with the individuals themselves. Neither the state nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state. Courts as upholders of constitutional freedoms must safeguard these freedoms. The cohesion and stability of our society depend on our syncretic culture. The Constitution protects it. Courts are duty-bound not to swerve from the path of upholding our pluralism and diversity as a nation."*** *(emphasis supplied)*

30. A conflict in various decisions was found with regard to the right to privacy of an individual and true nature of such a right. The same was thus referred to a nine-Judge Bench in case of **Justice K.S. Puttaswamy (Retd.) and another vs. Union of India and others**12. The issue before the Supreme Court can be well understood from the following paragraphs of the judgment:

"2. Nine judges of this Court assembled to determine ***whether privacy is a constitutionally protected value****. The issue reaches out to the foundation of a constitutional culture based on the*

protection of human rights and enables this Court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. This case presents challenges for constitutional interpretation. ***If privacy is to be construed as a protected constitutional value, it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection.***

*4. .....****The Attorney General for India urged that the existence of a fundamental right to privacy is in doubt in view of two decisions : the first - M P Sharma vs. Satish Chandra reported in AIR 1954 SC 300 ("M.P. Sharma")was rendered by a Bench of eight Judges and the second, in Kharak Singh vs. State of Uttar Pradesh reported in AIR 1963 SC 1295 ("Kharak Singh") was rendered by a Bench of six Judges. Each of these decisions, in the submission of the Attorney General, contained observations that the Indian Constitution does not specifically protect the right to privacy. On the other hand, the submission of the petitioners was that M P Sharma and Kharak Singh were founded on principles expounded in A. K. Gopalan vs. State of Madras reported in AIR 1950 SC 27 ("Gopalan"). Gopalan, which construed each provision contained in the Chapter on Fundamental Rights as embodying a distinct protection, was held not to be good law by an eleven-Judge Bench Rustom Cavasji Cooper vs. Union of India reported in (1970) 1 SCC 248 ("Cooper"). Hence the petitioners submitted that the basis of the two earlier decisions is not valid. Moreover, it was also urged that in the seven-Judge Bench decision in Maneka Gandhi vs. Union of India reported in (1978) 1 SCC 248 ("Maneka"), the minority judgment of Subba Rao, J. in Kharak Singh was specifically approved of and the decision of the majority was overruled.***

5. While addressing these challenges, the Bench of three Judges of this Court took note of several decisions of this Court in which the right to privacy has been held to be a constitutionally protected fundamental right. Those decisions include : Gobind vs. State of Madhya Pradesh reported in (1975) 2 SCC 148 ("Gobind"), R. Rajagopal vs. State of Tamil Nadu reported in (1994) 6 SCC 632 ("Rajagopal") and People's Union for Civil Liberties vs. Union of India reported in (1997) 1 SCC 301 ("PUCL"). These subsequent decisions which affirmed the existence of a constitutionally protected right of privacy, were rendered by Benches of a strength smaller than those in M P Sharma and Kharak Singh. Faced with this predicament and having due regard to the far-reaching questions of importance involving interpretation of the Constitution, it was felt that institutional integrity and judicial discipline would require a reference to a larger Bench. Hence the Bench of three learned judges observed in its order dated 11-8-2015 in K. S. Puttaswamy vs. Union of India (2015) 8 SCC 735:.....

13. Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of M.P. Sharma (supra) and Kharak Singh (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength." *(emphasis supplied)*

31. Thus Supreme Court found that there was a conflict situation existing with regard to fundamental right to privacy under the Indian Constitution. Supreme

Court in ***Puttaswamy***12 case considered at length and detailed the right to privacy. To fully appreciate the same it is necessary to refer to the said judgment in some detail. The majority view is given by Dr. Justice D. Y. Chandrachud and in addition concurring judgments are also given by other members of the bench. Relevant portions for our purposes are:

"23. Following the decision in Maneka Gandhi vs. Union of India reported in (1978) 1 SCC 248, ***the established constitutional doctrine is that the expression "personal liberty" in Article 21 covers a variety of rights, some of which "have been raised to the status of distinct fundamental rights" and given additional protection under Article 19.*** *Consequently, in Satwant Singh Sawhney vs. D. Ramaratham reported in (1967) 3 SCR 525, the right to travel abroad was held to be subsumed within Article 21 as a consequence of which any deprivation of that right could be only by a "procedure established by law". Prior to the enactment of the Passports Act, 1967, there was no law regulating the right to travel abroad as a result of which the order of the Passport Officer refusing a passport was held to be invalid.* ***The decision in Maneka (supra) carried the constitutional principle of the over-lapping nature of fundamental rights to its logical conclusion. Reasonableness which is the foundation of the guarantee against arbitrary State action under Article 14 infuses Article 21. A law which provides for a deprivation of life or personal liberty under Article 21 must lay down not just any procedure but a procedure which is fair, just and reasonable.***

24. The decisions in M. P. Sharma vs. Satish Chandra reported in AIR 1954 SC 300 and Kharak Singh vs. State of U.P. reported in AIR 1963 SC 1295 adopted a doctrinal position on the relationship between Articles 19 and 21, based on the view of the majority in A.K. Gopalan vs. State of Madras reported in AIR 1950 SC 27. This view stands abrogated particularly by the judgment in Rustom Cavasjee Cooper vs. Union of India reported in (1978) 1 SCC 248 and the subsequent statement of doctrine in Maneka (supra). The decision in Maneka (supra), in fact, expressly recognized that it is the dissenting judgment of Subba Rao, J. in Kharak Singh (supra) which represents the exposition of the correct constitutional principle. ***The jurisprudential foundation which held the field sixty-three years ago in M. P. Sharma (supra) and fifty-five years ago in Kharak Singh (supra) has given way to what is now a settled position in constitutional law. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of State action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that State action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III.***

25. ***The doctrinal invalidation of the basic premise underlying the decisions in M. P. Sharma (supra) and Kharak Singh (supra) still leaves the issue of whether privacy is a right protected by Part III of the Constitution open for consideration. There are observations in both decisions that the Constitution does not contain a***

specific protection of the right to privacy. *Presently, the matter can be looked at from the perspective of what actually was the controversy in the two cases." (emphasis supplied)*

32. The Supreme Court referred to large number of judgments, two out of which relate to the issues in the present case and are thus quoted:

"62. The Court in R. Rajagopal vs. State of Tamil Nadu reported in (1994) 6 SCC 632 held that neither the State nor can its officials impose prior restrictions on the publication of an autobiography of a convict. In the course of its summary of the decision, the Court held: (SCC pp.649-50, para 26)

"(1) 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. None can publish anything concerning the above matters without his consent -- whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

88. In Ram Jethmalani vs. Union of India reported in (2011) 8 SCC 1: (2011) 3 SCC (Cri) 310 ("Ram Jethmalani"), a Bench of two Judges was dealing with a public interest litigation concerned with unaccounted monies and seeking the appointment of a Special Investigating Team to follow and investigate a money trail. This Court held that the revelation of the details of the bank accounts of individuals without the establishment of a prima facie ground of wrongdoing would be a violation of the right to privacy. This Court observed thus: (SCC pp.35-36, paras 83 & 84)

"83. Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner*. We understand and appreciate the fact that the situation with respect to unaccounted for monies is extremely grave. Nevertheless**, **as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well-meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values.***

84. The rights of citizens, to effectively seek the protection of fundamental rights, under clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21.The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order

that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. ***An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others." (emphasis supplied)***

33. The Supreme Court further stated:

"108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. ***The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).***

118. ***Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions - the autonomy of the individual - and not to dictate those decisions.***

"Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.

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.***

260. The impact of the decision in Rustom Cavasjee Cooper vs. Union of India reported in (1970) 1 SCC 248 is to establish a link between the fundamental rights guaranteed by Part III of the Constitution. The immediate consequence of the decision is that a law which restricts the personal liberties contained in Article 19 must meet the test of permissible

restrictions contemplated by Clauses (2) to (6) in relation to the fundamental freedom which is infringed. Moreover, since the fundamental rights are interrelated, Article 21 is no longer to be construed as a residue of rights which are not specifically enumerated in Article 19. Both sets of rights overlap and hence a law which affects one of the personal freedoms under Article 19would, in addition to the requirement of meeting the permissible restrictions contemplated in clauses (2) to (6), have to meet the parameters of a valid "procedure established by law" under Article 21 where it impacts on life or personal liberty. ***The law would be assessed not with reference to its object but on the basis of its effect and impact on the fundamental rights. Coupled with the breakdown of the theory that the fundamental rights are watertight compartments, the post-Maneka (supra) jurisprudence infused the test of fairness and reasonableness in determining whether the "procedure established by law" passes muster under Article 21...***

*262. Technology, as we experience it today is far different from what it was in the lives of the generation which drafted the Constitution. Information technology together with the internet and the social media and all their attendant applications have rapidly altered the course of life in the last decade. Today's technology renders models of application of a few years ago obsolescent. Hence****, it would be an injustice both to the draftsmen of the Constitution as well as to the document which they sanctified to constrict its interpretation to an originalist interpretation. Today's problems have to be adjudged by a vibrant application of constitutional doctrine and cannot be frozen by a vision suited to a radically different society. We describe the Constitution as a living instrument simply for the reason that while it is a document which enunciates eternal values for Indian society, it possesses the resilience necessary to ensure its continued relevance. Its continued relevance lies precisely in its ability to allow succeeding generations to apply the principles on which it has been founded to find innovative solutions to intractable problems of their times. In doing so, we must equally understand that our solutions must continuously undergo a process of re-engineering.***

264. The submission betrays lack of understanding of the reason why rights are protected in the first place as entrenched guarantees in a Bill of Rights or, as in the case of the Indian Constitution, as part of the fundamental rights. ***Elevating a right to the position of a constitutionally protected right places it beyond the pale of legislative majorities. When a constitutional right such as the right to equality or the right to life assumes the character of being a part of the basic structure of the Constitution, it assumes inviolable status: inviolability even in the face of the power of amendment. Ordinary legislation is not beyond the pale of legislative modification. A statutory right can be modified, curtailed or annulled by a simple enactment of the legislature. In other words, statutory rights are subject to the compulsion of legislative majorities. The purpose of infusing a right with a constitutional element is precisely to provide it a sense of immunity from popular opinion and, as its reflection, from legislative annulment. Constitutionally protected rights embody the liberal belief that personal liberties of the individual are so sacrosanct that it is necessary to ensconce them in a protective shell that places them beyond the pale of***

ordinary legislation. To negate a constitutional right on the ground that there is an available statutory protection is to invert constitutional theory. *As a matter of fact, legislative protection is in many cases, an acknowledgment and recognition of a constitutional right which needs to be effectuated and enforced through protective laws. For instance, the provisions of Section 8(1)(j) of the Right to Information Act, 2005 which contain an exemption from the disclosure of information refer to such information which would cause an unwarranted invasion of the privacy of the individual.*

291. Having noticed this, ***the evolution of Article 21, since the decision in Rustom Cavasjee Cooper Vs. Union of India reported in (1970) 1 SCC 248 indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or watertight compartments. In consequence, Article 14 has been held to animate the content of Article 21. Second, the expression "procedure established by law" in Article 21 does not connote a formalistic requirement of a mere presence of procedure in enacted law. That expression has been held to signify the content of the procedure and its quality which must be fair, just and reasonable.The mere fact that the law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself***. *In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable procedure under the law and a law which does so may yet be susceptible to challenge on the ground that its content does not accord with the requirements of a valid law. The law is open to substantive challenge on the ground that it violates the fundamental right.*

297. What, then, does privacy postulate? ***Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality.*** *The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop.* ***Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations***. *In that zone of privacy, an individual is not judged by others. Privacy enables each*

individual to take crucial decisions which find expression in the human personality. ***It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life****. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.*

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. ***Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms****. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity.* ***The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised****. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life*

including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. ***Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination***.

316. The judgment in M. P. Sharma vs. Satish Chandra reported in AIR 1954 SC 300 holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20(3) of the Indian Constitution. The judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. ***The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. M. P. Sharma (supra) is overruled to the extent to which it indicates to the contrary.***

317. Kharak Singh vs. State of U.P. reported in AIR 1963 SC 1295 has correctly held that the content of the expression "life" under Article 21 means not merely the right to a person's "animal existence" and that the expression "personal liberty" is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. Kharak Singh (supra) also correctly laid down that the dignity of the individual must lend content to the meaning of "personal liberty". ***The first part of the decision in Kharak Singh (supra) which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy is not a guaranteed right under our Constitution, is not reflective of the correct position. Similarly, Kharak Singh (supra) reliance upon the decision of the majority in A.K. Gopalan vs. State of Madras reported in AIR 1950 SC 27 is not reflective of the correct position in view of the decisions in Rustom Cavasjee Cooper vs. Union of India reported in (1970) 1 SCC 248 and in Maneka Gandhi vs. Union of India reported in (1978) 1 SCC 248. Kharak Singh (supra) to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled.***

318. Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution; 319. Life and personal liberty are not creations of the Constitution. These rights

are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within

320. ***Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III.***

321. Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament.

322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.

323. ***Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy****. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;" (emphasis supplied)*

34. Concurring with the same, Justice Chelameswar in his separate judgment, in paragraph 375 states:

"All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. ***Fundamental rights are the only constitutional firewall to prevent State's interference with those core freedoms constituting liberty of a human being. The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21."***

(emphasis supplied)

35. Again agreeing, Chief Justice S. A. Bobde (then Justice S.A. Bobde) states in paragraphs 402, 403 and 407:

"402. "Privacy" is "[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions*", Black's Law Dictionary (Bryan Garner Edition) 3783 (2004). The right to be in this condition has been described as "the right to be let alone", Samuel D. Warren and Louis D. Brandeis, "The Right To Privacy", 4 HARV L REV 193 (1890).* ***What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way.*** *These intrusions may be physical or visual, and may take any of several forms including peeping over one's shoulder to eavesdropping directly or through instruments, devices or technological aids.*

403. ***Every individual is entitled to perform his actions in private. In other words, she is entitled to be in a state of repose and to work without being disturbed, or otherwise observed or spied upon. The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place.....****"*

407. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilized societies. But privacy does not stop at being merely a descriptive claim. It also embodies a normative one. The normative case for privacy is intuitively simple. Nature has clothed man, amongst other things, with dignity and liberty so that he may be free to do what he will consistent with the freedom of another and to develop his faculties to the fullest measure necessary to live in happiness and peace. The Constitution, through its Part III, enumerates many of these freedoms and their corresponding rights as fundamental rights. ***Privacy is an essential condition for the exercise of most of these freedoms. Ex facie, every right which is integral to the constitutional rights to dignity, life, personal liberty and freedom, as indeed the right to privacy is, must itself be regarded as a fundamental right.****"*

(emphasis supplied)

36. Justice R. F. Nariman also concurring in his separate judgment states:

"521. ***In the Indian context, a fundamental right to privacy would cover at least the following three aspects****:*

- Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;

- Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

- ***The privacy of choice, which protects an individual's autonomy over fundamental personal choices****.*

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us.

522. We have been referred to the Preamble of the Constitution, which can be said to reflect core constitutional values. ***The core value of the nation being democratic, for example, would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed.****"*

(emphasis supplied)

37. Thus, the nine-Judges Bench concluded:

"644. ***The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.***

645. It was rightly expressed on behalf of the petitioners that the technology has made it possible to enter a citizen's house

without knocking at his/her door and this is equally possible both by the State and non-State actors. ***It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity.***

646. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. ***In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right****. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognize this important, natural, primordial right as a fundamental right." (emphasis supplied)*

38. Again the issue with regard to the personal rights of an individual came up before a Constitution Bench of Supreme Court in the case of ***Navtej Singh Johar and others vs. Union of India13. The vires of Section 377 I.P.C***. came under consideration in the said case. The Court held:

"95. Thus, we are required to keep in view the dynamic concepts inherent in the Constitution that have the potential to enable and urge the constitutional courts to beam with expansionism that really grows to adapt to the ever-changing circumstances without losing the identity of the Constitution. ***The idea of identity of the individual and the constitutional legitimacy behind the same is of immense significance. Therefore, in this context, the duty of the constitutional courts gets accentuated. We emphasize on the role of the constitutional courts in realizing the evolving nature of this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution and not render the document a collection of mere dead letters.*** *The following observations made in Ashok Gupta vs. State of U.P. reported in (1997) 5 SCC 201 further throws light on this role of the courts:- (SCC p.244, para 51)*

"51. Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally."

110. ***The Supreme Court as well as other constitutional courts have time and again realized that in a society undergoing fast social and economic change, static judicial interpretation of the Constitution would stultify the spirit of the Constitution. Accordingly, the constitutional courts, while viewing the Constitution as a transformative document, have ardently fulfilled their obligation to act as the sentinel on qui vive for guarding the rights of all individuals irrespective of their sex, choice and sexual orientation.***

121. An argument is sometimes advanced that what is permissible between two adults engaged in acceptable sexual activity is different in the case of two individuals of the same sex, be it

homosexuals or lesbians, and the ground of difference is supported by social standardization. ***Such an argument ignores the individual orientation, which is naturally natural, and disrobes the individual of his/her identity and the inherent dignity and choice attached to his/her being.***

122. ***The principle of transformative constitutionalism also places upon the judicial arm of the State a duty to ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting and enforcing the Constitution as well as other provisions of law in consonance with the avowed object. The idea is to steer the country and its institutions in a democratic egalitarian direction where there is increased protection of fundamental rights and other freedoms. It is in this way that transformative constitutionalism attains the status of an ideal model imbibing the philosophy and morals of constitutionalism and fostering greater respect for human rights.*** *It ought to be remembered that the Constitution is not a mere parchment; it derives its strength from the ideals and values enshrined in it. However,* ***it is only when we adhere to constitutionalism as the supreme creed and faith and develop a constitutional culture to protect the fundamental rights of an individual that we can preserve and strengthen the values of our compassionate Constitution.***

131. The duty of the constitutional courts is to adjudge the validity of law on well-established principles, namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time, ***it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality.***

167. The above authorities capture the essence of the right to privacy. ***There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional.*** *The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others.*

613. The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. ***In protecting consensual intimacies, the Constitution adopts a simple principle: the State has no business to intrude into these personal matters****. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation." (emphasis supplied)*

39. One of the issues before the court was the considerations to be taken into account by a court when a fundamental right is violated by a law. The Supreme Court held:

"428. When the constitutionality of a law is challenged on the ground that it violates the guarantees in Part III of the

Constitution, what is determinative is its effect on the infringement of fundamental rights. This affords the guaranteed freedoms their true potential against a claim by the state that the infringement of the right was not the object of the provision. ***It is not the object of the law which impairs the rights of the citizens. Nor is the form of the action taken determinative of the protection that can be claimed. It is the effect of the law upon the fundamental right which calls the courts to step in and remedy the violation. The individual is aggrieved because the law hurts. The hurt to the individual is measured by the violation of a protected right. Hence, while assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights****." (emphasis supplied)*

Thus even in the said judgment, the Constitutional Bench again found that the personal liberty goes not merely with regard to matters of marriage but to the union of two persons, even if they belong to same sex.

40. The law as declared by the Supreme Court, since the case of **Lata Singh**5 till the decision in **Navtej Singh Johar**13, has travelled a long distance defining fundamental rights of personal liberty and of privacy. "once a person becomes a major he or she can marry whosoever he/she likes" (**Lata Singh**5); "an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage"(**Indian Woman Says Gang-Raped on Orders of Village Court**8); "choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19" (**Asha Ranjan**10); "the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock.....it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution"(**Shakti Vahini**1); "Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters..... Social approval for intimate personal decisions is not the basis for recognising them."(**Shafin Jahan**11) and finally the nine-judges bench "Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.....privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right."(**Puttuswamy**12) is a long chain of decisions growing stronger with time and firmly establishing personal liberty and privacy to be fundamental rights including within their sphere right to choose partner without interference from State, family or society.

41. In view of the changed social circumstances and progress in laws noted and proposed by the Law Commission as well as law declared by the aforesaid judgments of the Supreme Court, it would be cruel and unethical to force the present generation living with its current needs and expectations to follow the customs and traditions adopted by a generation living nearly 150 years back for its social needs and circumstances, which violates fundamental rights recognized by the courts of the day. In view of law settled in **Satyawati Sharma**3 and **Kashmir**

Singh4as stated above, it is the duty of this court to revisit the interpretation of the procedure under challenge as provided in the Act of 1954.

42. In ***Githa Hariharan vs. Reserve Bank of India***14,Supreme Court restates the principle of interpretation of statute, that, where two constructions of the statute are possible court will uphold the one that is in consonance with the Constitution of India rather one that would go against it.

"9. .....It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction which may be open, the statute remains within the constitutional limits, the court will prefer the latter on the ground that the legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.

40. ...It is now settled law that a narrow pedantic interpretation running counter to the constitutional mandate ought always to be avoided unless, of course, the same makes a violent departure from the legislative intent..."

43. In ***N. Kannadasan vs. Ajoy Khose***15 again Supreme Court in held:

"71. ...Constitutionalism envisages that all laws including the constitutional provisions should be interpreted so as to uphold the basic features of the constitution."

44. In ***Puttuswamy***12 also the guidelines provided by the Supreme Court in paragraph 260 "The law would be assessed not with reference to its object but on the basis of its effect and impact on the fundamental rights.....The mere fact that the law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself" and in paragraph 325 are "A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article. An invasion of life or personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them."

45. The interpretation of Sections 6 and 7 read with Section 46 containing the procedure of publication of notice and inviting objections to the intended marriage in Act of 1954 thus has to be such that would uphold the fundamental rights and not violate the same. In case the same on their simplistic reading are held mandatory, as per the law declared today, they would invade in the fundamental rights of liberty and privacy, including within its sphere freedom to choose for marriage without interference from state and non-state actors, of the persons concerned. Further, note should also be taken of the fact that marriages in India can be performed either under the personal laws or under the Act of

1954. In fact, even today, majority of marriages are performed under the personal laws. These marriages under personal laws are performed by a priest of the religion followed by the parties. Such marriages under any personal law do not require publication of any notice or calling for objections with regard to such a marriage. The individuals intending to marry approach the priest who performs the marriage as per the customs and rituals of the said religion. Their orally saying that they are competent to marry is regarded sufficient for solemnizing marriage under the personal laws. In case any party violates any condition of the said personal law, for example, if one of the parties conceals his/her marital status and commits second marriage; marriage is barred under any law (one of the parties is a minor and conceals age or marriage is within the degrees of the prohibited relationship etc.); the consent of any party is obtained by deceit or under pressure; or any other such circumstances arises, the issues are later decided by a court of law. But, the marriage takes place without any interference from any corner, even if it is later to be declared void. However, under Sections 6 and 7 of Act of 1954 the persons intending to solemnize a marriage are required to give a notice and the Marriage Officer thereafter is made duty bound to publish the notice for a period of 30 days and invite objections with regard to the same. Any person can object to the marriage on the ground that it violates any of the condition of Section 4 of Act of 1954. None of the conditions under Section 4 of Act of 1954 is such, violation of which would impact rights of any person in any manner different than the same would in case of a marriage under any personal law. Even if a marriage takes place in violation of any of the conditions of Section 4, legal consequences would follow and the courts can decide upon the same, including declare such a marriage to be void, as they do under the personal laws. There is no apparent reasonable purpose achieved by making the procedure to be more protective or obstructive under the Act of 1954, under which much less numbers of marriages are taking place, than procedure under the other personal laws, more particularly when this discrimination violates the fundamental rights of the class of persons adopting the Act of 1954 for their marriage.

46. However, in case, such individuals applying to solemnize their marriage under the Act of 1954 themselves by their free choice desire that they would like to have more information about their counterparts, they can definitely opt for publication of notice under Section 6 and further procedure with regard to objections to be followed. Such publication of notice and further procedure would not be violative of their fundamental rights as they adopt the same of their free will. Therefore, the requirement of publication of notice under Section 6 and inviting/entertaining objections under Section 7 can only be read as directory in nature, to be given effect only on request of parties to the intended marriage and not otherwise.

47. Thus, this Court mandates that while giving notice under Section 5 of the Act of 1954 it shall be optional for the parties to the intended marriage to make a request in writing to the Marriage Officer to publish or not to publish a notice under Section 6 and follow the procedure of objections as prescribed under the Act of 1954. In case they do not make such a request for publication of notice in writing, while giving notice under Section 5 of the Act, the Marriage Officer shall not publish

any such notice or entertain objections to the intended marriage and proceed with the solemnization of the marriage. It goes without saying that it shall be open for the Marriage Officer, while solemnizing any marriage under the Act of 1954, to verify the identification, age and valid consent of the parties or otherwise their competence to marry under the said Act. In case he has any doubt, it shall be open for him to ask for appropriate details/proof as per the facts of the case.

48. Since the matter relates to protection of fundamental rights of large number of persons, the Senior Registrar of this Court shall ensure that a copy of this order is communicated to the Chief Secretary of the State of U.P. who shall forthwith communicate the same to all the Marriage Officers of the State and other concerned authorities as expeditiously as possible.

49. With the aforesaid, the present writ petition stands disposed of.

(2021)01ILR A595
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.01.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SAURABH LAVANIA, J.

Misc. Bench No. 12092 of 2016

Shraddha Tripathi ...Petitioner
Versus
The Election Commission of India & Ors. ...Respondents

Counsel for the Petitioner:
Shraddha Tripathi (In Per.)

Counsel for the Respondents:
A.S.G., Arpit Kumar, Asit Kumar Chaturvedi, O.P. Srivastava

(A) Civil Law - Election Symbols (Reservation and Allotment) Orders, 1968 - The Conduct of Election Rules, 1961: Rule 10(4) - Representation of Peoples Act, 1951: Section 38 Election - Reservation and Allotment of Symbols - - The Constitution of India: Article 324, 14- There being a valid classification of political parties between recognized political parties and unrecognized political parties as also independent candidates, based on such valid classification, there exists a valid distinction for reservation and allotment of symbols to such parties. Allotment of reserved or free symbols to candidates is made in relation to an election, however, reservation of symbols for a National party or a State part is not confined to any particular election but is good for all time as long as the said party continues to be recognized as per law. There is nothing in the Act, 1951, Rules, 1961 or the Order, 1968 that symbols can be reserved only after notification of elections, whereas, allotment of symbols takes place at the time of elections and not prior to its notification. (Para 43, 46)

The reservation of symbols is till such period as the political party continues to be recognized. The day it is derecognized or its recognition is withdrawn under Paragraph 16A of the Order, 1968 or any other provision which may be attracted, it will cease to have the benefit of the symbol reserved for it except in so far as is permitted under Paragraph 10A of the Order, 1968. (Para 54)

The Court is of the considered view that the symbol is reserved for a recognized political party because of their special status and for their use considering their importance in the democratic polity of this country. The symbol is reserved for their exclusive use and also for allotment to their candidates in an election but this does not mean that the symbol reserved for them is only for their use at the time of elections. Even prior to the elections they can use it so that the masses may identify

themselves with the symbols based on their agenda and ideology. (Para 56)

Writ Petition Rejected. (E-8)

List of Cases cited :-

1. A.C. Jose Vs Sivan Pillai & ors. AIR 1984 SC 921

2. All Party Hill Leaders' Conference, Shillong Vs Captain W.A. Sangma & ors. AIR 1977 SC 2155

3. Kanhiya Lal Omar Vs R.K. Trivedi & ors. AIR 1986 SC 111

4. Subramanian Swami Vs Election Commission of India thru its Secy. (2008) 14 SCC 318

5. Rama Kant Pandey Vs U.O.I. AIR 1993 SC 1766

6. St. of M.P. Vs Bharat Heavy Electricals (1997) 7 SCC 1

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Saurabh Lavania, J.)

1. Heard Ms. Shraddha Tripathi, petitioner who is a practicing Advocate of this Court, in person, Shri O P Srivastava, learned Senior Counsel appearing for the Election Commission of India i.e. opposite party no. 1 herein. None has appeared for opposite parties no. 2 to 7.

2. This is a petition in public interest. The relief clause of the petition reads as under:-

1.) To issue writ of Mandamus, directing the respondent no. 1, the Election Commission of India to order/directions to all the recognized political parties to immediately stop and restrain from using the Reserved Election Symbols themselves (In the Party name) as their Party Trade-Mark, and for the 'Purpose and Period' beyond the 'Contested Election'.

2.) To issue writ/order or direction in the nature of Mandamus to the respondent no. 1 to strictly allow the use and operation of reserved symbols only the 'contesting candidates' set-up by 'Recognized Political Parties' in the notified elections.

3.) Such other writs, order or direction as this Hon'ble Court may feel just and proper in the interest of justice and instant circumstance to achieve the goal of 'Free and Fair' elections as per law.

3. In nutshell, the argument of the petitioner appearing in person is, firstly, that the Election Commission of India does not have any authority to allot symbols to a recognized political party while not allotting the same to an unrecognized political party. Secondly, the allotment of symbols is only to a contesting candidate as mentioned in Paragraph 4 and 5 of the Election Symbols (Reservation and Allotment) Order, 1968 (herein after referred as Order, 1968) and Rule 10(4) of the The Conduct of Election Rules, 1961 (herein after referred as Rules, 1961), as such, allotment of such symbols, even if in the garb of reserving it, to recognized political parties much prior to the stage is reached under Section 38 of the Representation of Peoples Act, 1951 (hereinafter referred as Act, 1951) when a candidate becomes a contesting candidate, is illegal, without jurisdiction and also discriminatory viz-a-viz the candidates of an unrecognized political party and also independent candidates to whom the symbols allotted to them are informed barely couple of days prior to the date of election, meaning thereby, on account of this arbitrary and illegal action, on one hand, the recognized (National and State) parties steal a march over the unrecognized

political parties and independent candidates as they have benefit of the symbol reserved/allotted for them much earlier, which they continue to use irrespective of the fact whether an election is taking place or not or is to take place or not, whereas the candidates setup by an unrecognized political party and independent candidates do not have this benefit. This according to her, is detrimental to the cause of electoral democracy.

4. Thirdly, she contended that the powers under Article 324 can only be exercised in terms of the Act, 1951, the Rules, 1961 and the Order, 1968, not otherwise. The so called plenary powers available to the Election Commission of India under Article 324 cannot be stretched to act whimsical, arbitrary, in a discriminatory manner or to take decisions not within the domain of the Election Commission of India. In this regard, she placed reliance upon a decision of Supreme Court of India reported in **AIR 1984 SC 921, A.C. Jose Vs. Sivan Pillai and others**. In the said case while in some polling booths, votes were allowed to be cast by the Election Commission of India by use of ballot papers, in other polling booths they were directed to be cast through machines. In this context, the Supreme Court of India opined that if relevant Acts and Rules governing the conduct of elections cover a particular field then it is not open to the Election Commission of India to violate the same. In this very context, powers of the Election Commission of India under Article 324 were considered. The Supreme Court categorically held that the High Court fell into an obvious fallacy by acceptance of deposition that direction of the Commission was intended to operate in an uncovered filed. When the Act and the Rules prescribed a particular method of voting the Commission should not innovate a new method and contend that use of mechanical process was not covered by the existing law and therefore did not come in conflict with the law in the field. In this context, powers of the Election Commission of India under Article 324 were considered and it was held that the same could not be used to devise a new method of voting when the Act and the Rules prescribed the method for the same.

5. Fourthly, she contended that symbol is not allotted to a recognized political party but is reserved for it but the Election Commission of India has veritably proceeded on the premise as if such symbols are allotted to a recognized political party and have allowed them to use the symbol irrespective of the fact as to whether any elections are being held or are to be held in the near future, which according to her is against the provisions and scheme of the Order, 1968. She says that Paragraph 17 of the said Order, 1968 cannot be read in isolation and has to be read in the context of entire Order, 1968 and the other provisions as also the scheme contained therein which according to her lead to only one inference that the symbols are to be allotted to a contesting candidate after the election is set in motion and not prior to it. Therefore, reserving of a symbol for a recognized political party cannot be treated as allotment of symbol nor can the said political party use the symbol reserved for it when there are no elections taking place or when they have not been notified.

6. On being asked as to what prejudice was being caused to the public in this regard as this is a Public Interest Litigation, her contention was that this discriminates against the unrecognized, though registered, political parties and the

independent candidates, as, the use of symbol by recognized political party allows them to score a march in seeking votes of the people at large as they have enough time to advertise their symbols and seek votes etc. as also seek support for themselves, whereas, unrecognized political parties and independent candidates do not have this benefit, as, no symbol is reserved for them nor are they allotted a symbol except barely a few days prior to the day of voting i.e. after they have filed their nomination. This had an adverse bearing on Democratic politics. She laid great emphasis on use of the word 'every candidate' in Rule 10 (6) of the Rules, 1961 to contend that the intent of the Order is that irrespective of the fact as to whether a candidate is of a recognized political party or an unrecognized political party or an independent candidate, he should be assigned a symbol on the same terms without any discrimination. She took us through various provisions of the Order, 1968 as also Section 29 A and 38 of the Act, 1951, Rule 5 and 10 of the Rules, 1961 to contend that the said provisions did not confer any power upon the Election Commission of India to allot a symbol to a recognized political party much prior to the onset of elections, even if in the garb of reserving it for such political parties.

7. Shri O.P. Srivastava, learned Senior Counsel appearing for the Election Commission of India contended that grievance of the petitioner , raised by her through a representation, was decided by the Commission on 08.07.2016 and the said order has been brought on record as Annexure No. - CA-1 to the counter affidavit, inspite of it, she has not challenged the same. He also submitted that none of the provisions of law including the provision contained in Paragraph 17 of the Order, 1968 have been challenged in these proceedings, therefore, he says that the petitioner's contention has no legs to stand especially, in view of the provisions contained in Article 324 of the Constitution of India, as also, the object and purpose which Order, 1968 seeks to achieve. He also invited attention of the Court to the order dated 08.07.2016 by which reasons for such action has been communicated to the petitioner. The said order refers to the Order, 1968. Further, it goes on to say that a party which is allotted a symbol as reserved symbol on fulfillment of the criteria prescribed in the Symbol's Order can use the symbol on regular basis as long as the party retains its recognition. There is no merit in the plea that a recognized party having a reserved symbol cannot use its symbol in the party office and on other occasions, meetings etc. outside the election period. The said order draws the attention of the petitioner to a decision of the Supreme Court of India in the case of **All Party Hill Leaders' Conference, Shillong Vs. Captain W.A. Sangma and others, AIR 1977 SC 2155**; The order goes on to refer to another decision of the Supreme Court of India in **Kanhiya Lal Omar Vs. R.K. Trivedi and others, AIR 1986 SC 111**; wherein observations have been made as to the importance of election symbols and its use by political parties. He has also placed reliance upon a decision of Supreme Court of India reported in **2008 (14) SCC 318, Subramanian Swami Vs. Election Commission of India through its Secretary** in this regard. He has also referred to another decision of the Supreme Court of India rendered in the case of **Rama Kant Pandey Vs. Union of India, AIR 1993 SC 1766**;.

8. In response, the petitioner submitted that none of the case laws cited

by the Counsel for the opposite party apply to the case at hand.

9. India is a constitutional democracy. Its democracy is based on a multi-party system. Political parties compete at the elections to form a democratically chosen Government. Elections are the pillar of any democracy. Part XV of the Constitution of India specifically deals with Elections. Article 324 contained therein refers to superintendence, direction and control of elections to be vested in an Election Commission. It goes on to state that superintendence, direction and control of the preparation of the electoral roles for, and the **conduct of** all elections to Parliament and to the legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission i.e. the Election Commission of India. It is the Constitution which is the source of the power of Election Commission. Article 324 vests the Election Commission of India with the powers of superintendence, direction and control not only of preparation of electoral roles for but also the conduct of elections to Parliament and to the legislature of every State as also elections to the offices of President and Vice-President under the Constitution. Thus, the exercise of power by the Election Commission of India flows from this provision.

10. All wings of the Government as also various other constitutional bodies including the Election Commission of India derive their power from the Constitution of India.

11. Now, the Parliament of India has enacted the Representation of Peoples Act, 1951 to provide for the conduct of elections of the houses of Parliament and to the house or houses of the legislature of each State etc. of the Act, 1951.

12. Part IV-A of the Act, 1951 deals with registration of political parties. Section 29A refers to registration with the Election Commission of associations and bodies as political parties. As per Sub-section 1 thereof, any association or body of individual citizens of India calling itself a political party and intending to avail itself of the provisions of this part shall make an application to the Election Commission for its registration as political party for the purposes of this Act. Thereafter, the provision goes on to lay down the modalities for such registration and that the decision of the Commission in this regard shall be final. Section 2 (1) (f) defines "political parties" to mean an association or a body of individual citizens of India registered with the Election Commission as a political party under Section 29A which has already been referred hereinabove.

13. Part V of the Act, 1951 refers to conduct of elections. Chapter 1 refers to nomination of candidates. Section 33 refers to deliverance of a nomination paper completed in the prescribed form and signed by the candidate and by elector of the constituency as proposer to the returning officer as per the terms mentioned therein. Proviso to Section 33 goes on to state that a candidate not setup by a recognized political party shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by 10 proposers being electors of the constituency, meaning thereby, apart from other things, the Act itself draws a distinction between a candidate setup by a recognized political party and one who is not so setup and

prescribes different conditions regarding them even for the purposes of submission of nomination papers. Section 35 deals with notice of nominations and the time and place for their scrutiny. Section 36 deals with scrutiny of nomination papers. Sub-section 2 of Section 36 empowers the returning officer to reject the nomination papers on the grounds mentioned therein. Sub-section 8 of Section 36 provides that immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix to his notice board. Section 37 speaks of withdrawal of candidates. Section 38 refers to publication of list of contesting candidates. As per Sub-section 1 of Section 38, immediately after the expiry of the period within which candidatures may withdrawn under Sub-section 1 of Section 37, the returning officer shall prepare and publish in such form and manner as may be prescribed, a list of contesting candidates, that is to say, candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidature within the said period. Sub-section 2 of Section 38 is important for our purposes, as, for the purpose of listing the names under the Sub-section 1 the candidates are to be classified as (i) candidates of recognized political parties; (ii) candidates of registered political parties other than those mentioned in Clause (i); (iii) other candidates; and under Sub-section 3 the said 3 categories are to be arranged in the order specified therein. Thus candidates of recognized political parties, registered though not recognized political parties and other candidates are classified separately.

14. Now, we may refer to Rules, 1961 which have been made under Section 169 of the Act, 1951 by the Central Government. The nomination paper referred in the provisions of the Act, 1951 as referred hereinabove are appended to these Rules, 1961 and they are referred in Rule 4 read with Rule 2 (1) (g). Part 1 of the nomination paper (Form 2A) relates to candidates setup by recognized political parties. Part 2 relates to a candidate not setup by recognized political parties. Part 3 which is relevant contains Clause C (i) in which the candidate is required to declare that he is being setup at the election by a party giving its name which is a recognized National political party/State party in the State and that the symbol reserved for the above party be allotted to him, meaning thereby, Rule 4 of the Rules 1961 when read conjointly with Form 2A referred therein speaks of symbol being reserved for a recognized party, be it National or State, therefore, the contents of the form have to be read as Part of Rule 4. Thus, there is a reference to reserving of symbol for a recognized National or State party in the Rules itself which have been made by the Central Government. We may also refer to Clause C (ii) of the same Part 3 of Form 2A which requires a candidate not setup by a recognized political party to make a declaration that he was being setup by a party giving its name which is a registered/unrecognized political party or that he was contesting the election as an independent candidate, striking off whichever was not applicable and that the symbols he had chosen are required to be mentioned in preferential order giving 3 options. Thus, Form 2A itself draws a distinction between recognized and unrecognized political parties as also independent candidates and the symbols which they are required to choose. In the

case of a candidate setup by a recognized political party, the symbol reserved for such political party is required to be mentioned whereas in the case of a candidate setup by an unrecognized political party or an independent candidate, they have to offer 3 options in preferential order for being allotted as symbols. The note to the said form clearly mentions - a "recognized political party" means a political party recognized by the Election Commission under the election symbols (reservation and allotment) Order, 1968 in the State concerned.

15. Now, Rule 5 of the Rules, 1961 refers to "symbols for elections in Parliamentary and Assembly constituencies". Sub-rule 1 thereof says, the Election Commission shall by notification in the Gazette of India and in the official Gazette of each State specify the symbols that may be chosen by the candidates at election in parliamentary or assembly constituencies and the restrictions to which their choice shall be subject. Now, Sub-rule 2 of Rule 5 states that subject to any general or special direction issued by the Election Commission either under Sub-rule (4) or Sub-rule (5) of Rule 10, where at any such election, more nomination papers than 1 are delivered by or on behalf of a candidate, the declaration as to symbols made in the nomination paper first delivered, and no other declaration as to symbol, shall be taken into consideration under Rule 10 even if that nomination paper has been rejected.

16. Now, Rule 10 of the Rules, 1961 refers to "preparation of list of contesting candidates". Sub-rule 1 speaks of the list of contesting candidates referred to in Sub-section (i) of Section 38. Sub-rule 4 says that an election in a parliamentary or assembly constituency where poll becomes necessary, the returning officer shall consider the choice of symbols expressed by the contesting candidates in their nomination papers and shall subject to any general or special direction issued in this behalf by the Election Commission allot the symbols as per Clause (a), (b) contained therein. Sub-rule 5 thereof goes on to state that allotment by the returning officer of any symbol to a candidate shall be final except where it is inconsistent with any direction issued by the Election Commission in this behalf in which case the Election Commission may revise the allotment in such manner as it thinks fit. Sub-rule 6 requires that every candidate or his election agent shall forthwith be informed of the symbol allotted to the candidate and be supplied with specimen thereof by the returning officer.

17. As already stated, Form 2A read conjointly with Rule 4 of the Rules, 1961 speaks of symbol being reserved for a recognized National/State party. It draws a distinction between a candidate setup by a recognized political party who would be allotted the symbol reserved for such party and a candidate of an unrecognized political party or an independent candidate who will have to opt and give 3 preferences for the symbols which they want to choose. Therefore, the provisions of Rule 5 and 10 have to be read, understood and applied conjointly with Rule 4 and Form 2A referred therein. The words choice of symbols expressed by the contesting candidates in their nomination papers referred in Sub-rule 4 of Rule 10 would include the choice of symbols expressed by a candidate setup by a recognized political party in Clause C (i) Part 3 of Form 2A and will have to be the symbol of such political party whereas such choice in the case of a

candidate not setup by a recognized political party or an independent candidate will have to be the choice expressed by such candidate in Clause C (ii) of Part 3 of Form 2A. The allotment by the returning officer of any symbol to a candidate under Sub-rule 5 has to be made accordingly keeping in mind the choice of symbols as expressed in Part 3 of Form 2A as discussed hereinabove.

18. From what we have discussed hereinabove, it is evident that even the Rules, 1961 read with requisite "Form" appended to it speak of reservation of symbols for recognized political parties and also draw distinction between recognized and unrecognized political parties as also independent candidates for all these purposes including for the purposes of allotment of symbols, nomination etc.

19. Now, we may come to the Order, 1968. This Order has been made by the Commission. This Order, 1968 has been made to provide for specification, **reservation, choice and allotment of symbols at elections in Parliamentary and Assembly constituencies, for the recognition of political parties in relation thereto and for matters connected therewith**. It is referred to have been made in exercise of powers conferred by Article 324 of the Constitution read with Section 29A of the Act, 1951 and Rules 5 and 10 of the Rules, 1961 and all other powers enabling it in this behalf. As already stated, the Commission has been vested with veritable plenary powers under Article 324 to do all that is necessary for the conduct of smooth, fair and proper elections and as already stated the exercise of this power is subject only to any constitutional or statutory limitation which itself has to be in consonance with the Constitution. The Election Commission is a constitutional body and the enabling provision from which its power flows is contained in Article 324.

20. Paragraph 2(b) of the Order, 1968 defines political party on the same terms in which Section 2 (1) (f) of the Act, 1951 defines it. Paragraph 4 refers to allotment of symbols. It refers to allotment of symbol to a contesting candidate in accordance with the provisions of the said Order in every contested election. Paragraph 5 of the Order, 1968 read as under:-

"5. ***Classification of symbols*** *- (1) For the purpose of this Order symbols are either reserved or free.*

(2) Save as otherwise provided in this order, a reserved symbol is a symbol which is reserved for a recognized political party for exclusive allotment to contesting candidates set up by that party.

(3) A free symbol is a symbol other than a reserved symbol.

21. Paragraph 5 classifies symbols for the purposes of the said Order as either reserved or free, meaning thereby, there are 2 types of symbols which are available for allotment, one, the reserved symbol which is reserved for a recognized political party and second, that which is not so reserved and which is referred as free symbol, therefore, a distinction has been made by Paragraph 5 between symbols which is in keeping with the provisions of the Act, 1951 and Rules, 1961 which also draw such distinction as already noticed hereinabove.

22. Paragraph 6 of the Order, 1968 is as under:-

[6. ***Classification of political parties*** *- (1) For the purposes of this Order and for*

such other purposes as the Commission may specify as and when necessity therefore arises, political parties are either recognized political parties or unrecognized political parties.

(2) A recognised political party shall either be a National Party or a State Party."]

23. Paragraph 6 classifies political parties as recognized political parties or unrecognized political parties. Sub-paragraph 2 of Paragraph 6 further provides that a recognized political party shall either be a National Party or a State Party. This distinction again is in tune with the provisions of the Act, 1951 and the Rules, 1961 as already noticed, as, therein also distinction has been made at some places as already referred earlier.

24. Paragraph 6A reads as under:-

*"[**6A. Conditions for recognition as a State** Party - A political party shall be eligible for recognition as a State Party in a State, if, and only if, any of the following conditions is fulfilled:*

(i) At the lat general election to the Legislative Assembly of the State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and, in addition, the party has returned at least two members to the Legislative Assembly of that State at such general election; or

(ii) At the last general election to the House of the People from that State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and, in addition, the party has returned at least one member to the House of the People from that State at such general election; or

(iii) At the last general election to the Legislative Assembly of the State, the party has won at least three percent of the total number of seats in the Legislative Assembly, (any fraction exceeding half being counted as one), or at least three seats in the Assembly, whichever is more; or

(iv) At the last general election to the House of People from that State, the party has returned at least one member to the House of the People for every 25 members or any fraction thereof allotted to that State;] or

{(v) At the last general election to the House of the People from the State, or at the last general election to the Legislative Assembly of the State, the candidates set up by the Party have secured not less than eight percent of the total vlaid votes polled in the State.}"

25. Paragraph 6A delineates the conditions for recognition as a State party. We need not go into such conditions at length but suffice it to say that one of the conditions for recognition as a recognized State Party is that the candidates set up by such party should have secured not less than 6% of the total valid votes polled in the State and, in addition, the party must have returned at least 2 members to the Legislative Assembly of that State at such general election to the Legislative Assembly of the State. Now, there is no such condition for an unrecognized albeit registered political parties, meaning thereby, a political party though registered under Section 29A but not recognized under the Order, 1968 is not required to fulfill the aforesaid condition and other conditions mentioned in Paragraph 6A. Various other conditions are mentioned in Paragraph 6A as a mandatory prerequisite for a party to be recognized as a State party which would entitle it to certain benefits of

a recognized political party especially in the matter of symbols.

26. Paragraph 6B reads as under:-

*"**6B. Conditions for recognition as a National party** - A political party shall be eligible to be recognized as National Party, if, and only if, any of the following conditions is fulfilled:*

(i) The candidates set up by the party, in any four or more States, at the last general election to the House of the People, or to the Legislative Assembly of the State concerned, have secured not less than six percent of the total valid votes polled in each of those States at that general election; and, in addition, it has returned at least four members to the House of the People at the aforesaid last general election from any State or States; or

(ii) At the last general election to the House of the People, the party has won at least two percent of the total number of seats in the House of the People, any fraction exceeding half being counted as one; and the party's candidates have been elected to that House from not less than three States; or

(iii) The party is recognized as State Party in at least four States.]"

27. Thus, the conditions mentioned in Paragraph 6B are a necessary prerequisite for any political party to be recognized as a National party, one of which is that the candidates setup by such party in any four or more States at the last general election to the House of the People or to the Legislative Assembly of the State concerned, must have secured not less than 6% of the total valid votes polled in each of those States at that general election; and, in addition, it must have returned at least 4 members to the House of the People at the aforesaid last general election from any State or States etc. and the party should be recognized as State Party in at least 4 States.

28. Now, as a logical corollary of the aforesaid provisions is that any party which does not fulfill the aforesaid conditions cannot be recognized as a National party or a State party, it will at best be a registered party and nothing more. Thus, there is valid distinction/classification based on a rational/intelligible differentia for classifying the parties as aforesaid. It being so, it is quite reasonable that the two separate categories of political parties are treated differently and if it is so done then it cannot be said that there is violation of Article 14 of the Constitution of India, even in the matter of assignment of symbols. Even at the cost of repetition, we need to reiterate that even as per the Act, 1951 and the Rules, 1961, a distinction has been made between recognized political parties and not so recognized political parties. The Order, 1968 merely continues the distinction and lays down the modalities in this regard with regard to reservation and allotment of symbols to such differently categorized political parties. An independent candidate also stands on a footing different from a recognized political party, therefore, he or she is treated differently and if it is so, as is the case even in the matter of allotment of symbols, it cannot be held to be arbitrary or unreasonable, especially for the reasons aforesaid and those which we are going to give hereinafter.

29. Paragraph 6C of the Order, 1968 deals with conditions for continued recognition as a National or a State party. According to it, continuance of party as a recognized National or State party is

dependent upon the fulfillment by it of the conditions specified in Paragraph 6A or 6B, as the case may be, on the results of that general election.

30. Based upon the aforesaid classification which has a rationale, Paragraph 8 of the Symbol Order, 1968 provides that a candidate setup by a National Party or a State Party shall choose and shall be allotted the symbol reserved for that party in that State and no other symbol. Further, reserved symbol shall not be chosen or allotted to any candidate other than a candidate setup by a National Party for whom such symbol has been reserved or a candidate setup by a State Party for whom such symbol has been reserved in the State in which it is a State Party even if no candidate has been setup by such National or State Party in that constituency, obviously, because such symbol being reserved for such parties, the masses would be identifying the parties and its agenda, ideology etc. with the said symbol.

31. Paragraph 9 deals with restriction on the allotment of symbols reserved for State Parties in States where such parties are not recognized. It says that such symbol reserved for a State Party in any State shall not be included in the list of free symbols for any other State or Union Territory and shall not be reserved for any other State Party in any other State, subject to the proviso contained therein, which is also understandable in view of what has been stated hereinabove.

32. Paragraph 10 of the Order, 1968 deals with concession to candidates set up by a State party at elections in other States or Union Territories. It provides that if a political party which is recognized as a State Party in some State or States sets up a candidate at an election in a constituency in any other State or Union territory in which it is not a recognized State Party, then such candidate may, to the exclusion of all other candidates in the constituency, be allotted the symbol reserved for that party in the State or States in which it is recognized State Party, notwithstanding that such symbol is not specified in the list of free symbols for such other State or Union territory, subject to fulfillment of the conditions mentioned therein and subject to the proviso contained therein.

33. Likewise Paragraph 10A deals with concession to candidates setup by an unrecognized party which was earlier recognized as a National Party or State Party. It mentions the conditions in which such candidates may be allotted the symbol reserved earlier for that party when it was a recognized National or State Party notwithstanding that such symbol is not specified in the list of free symbols subject to fulfillment of certain conditions mentioned therein.

34. Paragraph 10B of the Order, 1968 deals with concession to candidates set up by registered (unrecognized) parties and to unrecognized parties which were earlier recognized parties more than 6 years back.

35. Paragraph 11 deals with restrictions on the choice and allotment of symbols allotted under Paragraph 10 or Paragraph 10A.

36. Paragraph 12 deals with choice of symbols by other candidates and allotment thereof.

37. Paragraph 13 deals with the subject as to when candidate shall be deemed to be set up by a political party.

38. Paragraph 16A deals with power of Commission to suspend or withdraw recognition of a recognized political party for its failure to observe Model Code of Conduct or follow lawful directions in instructions of the Commission.

39. We may now refer to Paragraph 17 of the Order, 1968 which reads as under:-

*"**17. Notification containing lists of political parties and symbols**-*

(1) The commission shall by one or more notifications in the Gazette of India publish lists specifying -

(a) the National Parties and the symbols respectively reserved for them;

(b) the State Parties, the State or States in which they are State Parties and the symbols respectively reserved for them in such State or States;

[(c) the un-recognized political parties and the addresses of their headquarters registered with the Commission;] and

[(d) the free symbols for each State and Union Territory.]"

40. Paragraph 17 refers to notification containing lists of political parties and symbols. Clause 1 of Paragraph 17 requires the commission to publish lists by one or more notifications in the Gazette of India specifying- (a) the National parties and the symbols respectively reserved for them; (b) the State Parties, the State or States in which they are State Parties and the symbols respectively reserved for them in such State or States; (c) the un-recognized political parties and the addresses of their headquarters registered with the Commission; and (d) the free symbols for each State and Union Territory. Clause 2 says that every such list shall, as far as possible, be kept up to date.

41. As regards contention of the petitioner that the Election Commission of India does not have any power to allot symbols to a recognized National or State level political party or to reserve a symbol for them, firstly, we are of the view that Article 324 vests ample power on the Election Commission of India for superintendence, direction and control of elections and in this context if such reservation or allotment is made it is in furtherance of the constitutional goal contained in Part XV of the Constitution of India. The only limitation is that this exercise of power cannot violate any constitutional or statutory provision or any rule made there under. We have already noticed that there is no such violation by the Election Commission of India in issuing Order, 1968 for allotment and reservation of symbols. There is no provision in the Act, 1951 or the Rules, 1961 which prohibits the Commission from reserving or allotting symbols as has been done by the Order, 1968. In fact, the said Act, 1951 and the Rules, 1961, hint or suggest such reservation and allotment of symbols, as already noticed. Vires of the Act, 1951 or Rules, 1961 are not under challenge before us. We therefore reject this contention. In fact, the vires of Order, 1968 was put to challenge before the Supreme Court of India in the case of **Kanhiya Lal Omar Vs. R.K. Trivedi and others, 1985 (4) SCC 628**. The Order, 1968 was held to be intra vires the Constitution, the Act, 1951 and the Rules, 1961.

42. The vires of Order, 1968 having already been upheld in Kanhiya Lal Omar's case, now the scope for considering and

granting the relief prayed for in this petition is very narrow.

43. We have perused the Order, 1968 very carefully and we find that it deals with two subjects, one is of reservation of symbols and the other is of allotment of symbols. Paragraph 5 (1) of the Order, 1968 classifies symbols into reserved or free symbols. Clause 2 of Paragraph 5 defines a reserved symbol to mean a symbol which is reserved for a recognized political party for exclusive allotment to contesting candidates set up by that party. Clause 3 of Paragraph 5 defines a free symbol to mean a symbol other than a reserved symbol. Now Paragraph 8, 9, 10 and 10A of the Order, 1968 deal with allotment of symbols to the contesting candidates but these provisions do not deal with reservation of symbols for recognized political parties. Reservation of symbols is dealt with separately in Paragraph 5 (2) and this is in tune with the provisions of the Act, 1951 and the Rules, 1961 already discussed hereinabove. Even Paragraph 17 deals with reserved symbols and free symbols separately. As already stated, there being a valid classification of political parties between recognized political parties and unrecognized political parties as also independent candidates, based on such valid classification, there exists a valid distinction for reservation and allotment of symbols to such parties.

44. In fact there is a distinction between reservation of symbols and their allotment. While recognized political parties, who obviously have a large voter base and have fulfilled the prerequisites for being recognized as National or State political party as mentioned in Paragraph 6A and 6B of the Order, 1968, are entitled to have a symbol reserved for them considering their importance in the democratic polity of this country. Their existence and continuance is on much firmer ground than the unrecognized political parties. A political party is recognized only when it secures a particular percentage of votes and in the case of the recognized National political party when it has won particular number of seats in a minimum number of States as prescribed in the aforesaid provisions contained in Paragraph 6B whereas in the case of unrecognized political parties or independent candidates these conditions are not fulfilled and their existence and continuance is not on equally firm ground. In the case of a candidate setup by a recognized political party it is to be mentioned in Part 3 of the nomination paper Form 2A and as a symbol is already reserved for such recognized political party as a sequitor it is that symbol alone which would be allotted to the candidate under Sub-rule 4 of the Rule 10 of the Rules, 1961 and would be informed to him and his agents under Sub-rule 5 thereof, whereas, in the case of unrecognized political party and an independent candidate, the same would be allotted and informed as per the choice exercised from the list of free symbols and not the list of reserved symbols. Therefore, there is a clear distinction in this regard based on rationale discussed earlier. Paragraph 8 to 10A of the Order, 1968 are to apply accordingly.

45. Much emphasis was laid by the petitioner upon the fact that the word used in Rule 10 (6) of Rules, 1961 is 'every candidate'. Rule 10 (6) is a general provision and the reason the word 'every candidate' has been used is that it includes a candidate of a recognized political party and/or unrecognized political party an independent candidate. Allotment of

symbols is in respect to all such candidates whether belonging to recognized, unrecognized political party or independent candidates hence the words 'every candidate'. This provision has to be read in consonance with the other provisions of the Rules, 1961 and Act, 1951 mentioned hereinabove, especially, Rule 4 of Rule, 1961 and Form 2A and the Order, 1968.

46. Allotment of reserved or free symbols to candidates is made in relation to an election, however, reservation of symbols for a National party or a State party is not confined to any particular election but is good for all times as long as the said party continues to be recognized as per law. There is nothing in the Act, 1951, Rules, 1961 or the Order, 1968 that symbols can be reserved only after notification of elections, whereas, allotment of symbols takes place at the time of elections and not prior to its notification. This is how we understand the scheme of the Act, 1951, the Rules, 1961, especially, the Order, 1968 which is in consonance with the aforesaid and not contrary to it.

47. Further, apart from the fact that the Order, 1968 does not violate any constitutional or statutory provision as already held by the Supreme Court of India in Kanhiya Lal Omar's case, we do not find any inconvenience or hardship to the public at large by such reservation of symbols. There is a purpose behind reservation of such symbols. Apart from the fact that a political party is recognized only after fulfillment of certain conditions prescribed in law therefore it is entitled to be treated differently as it has a much larger base amongst the masses, consequently, its importance in the democratic polity hardly needs to be emphasized rather it needs to be given an impetus, we must not forget that we live in a country where even now in the 21st century in many areas, especially rural and tribal areas the masses are either not literate or not so literate or politically aware as in the western world. Even now, they recognize a political party by its symbol and vote accordingly. Symbol/flag/logo including election symbol, are simple images that are easily identifiable by the general masses. Symbols of a recognized party including the election symbols reserved/allotted under the Order of 1968, help voters to identify the party of their choice while casting vote. Symbols facilitate the public at large including the voters. They may not know the individual candidate, yet, they cast their vote based on the symbol which they recognize, therefore, this is also an aspect which has to be kept in mind. They relate the ideology being pursued by a political party and its agenda based on its symbol i.e. the symbol reserved for it. From the provisions of order of 1968 as also the Act of 1951, it is apparent that the recognized party is having some privileges including allotment of reserved symbols while contesting the elections. This privilege is not available to unrecognized party or any individual candidate. The learned Counsel for the Commission has rightly referred to the decision in the case of **Capt. W.A. Sangma (Supra)**, paragraph 29 of which reads as under:-

" 29. For the purpose of holding elections, allotment of symbol will find a prime place in a country where illiteracy is still very high. It has been found from experience that symbol as a device for casting votes in favour of a candidate of one's choice has proved an invaluable aid. Apart from this, just as people develop a sense of honor, glory and patriotic pride for a flag of one's country, similarly great

fervour and emotions are generated for a symbol representing a political party. This is particularly so in a parliamentary democracy which is conducted on party lines. People after a time identify themselves with the symbol and the flag. These are great unifying insignia which cannot all of a sudden be effaced."

48. We may refer to another decision in the case of **Rama Kant Pandey (Supra)** wherein the Supreme Court of India repelled the argument that candidates set up by political parties should not receive any special treatment. It observed that the fact that candidates set up by political parties, constitute a class separate from other candidates has been recognized by this Court in numerous cases. These observations justify the opinion being expressed by us in this judgment. Paragraph 10 of the judgment in Rama Kant Pandey's case reads as under:-

"10. There is also no merit whatsoever in the contention that candidates set up the political parties should not receive any special treatment. The fact that candidates set up by political parties constitute a class separate from the other candidates has been recognized by this Court in numerous cases. In paragraph 14 of the judgment in the case of Dr. P. N. Thampy Terah Vs. Union of India, (1985) Suppl. SCC 189, the Constitution Bench observed thus:-

"It is the political parties which sponsor candidates, that are in a position to incur large election expenses which often run into astronomical figures. We do not consider that preferring political parties for exclusion from the sweep of monetary limits on election expenses is so unreasonable or arbitrary as to justify the preference being struck down upon that ground".

In D.M.L. Agarwal Vs. Rajiv Gandhi, (1987) Suppl. SCC 93, a Division Bench of this Court took note of and emphasized the vital role of political parties in a parliamentary form of democracy and anxiety was expressed about the growing number of independent candidates."

49. We may also refer to the decision of the Supreme Court in **Subramanian Swamy's** case wherein Paragraph 10 (A) of the Symbols Order, 1968 was challenged as being violative of Article 14. In the said case, the importance of symbol assigned to a political party was considered. Relevant extract of the said judgment is being quoted herein below:-

"12. On this backdrop we have to decide this ticklish question of the right of Janata Party to permanently retain its symbol. There can be no doubt that a symbol particularly in case of an established political party is not only having a political implication but has also an emotional angle attached to it. This is apart from the fact that in India large population of which is rural, uneducated or at time illiterate, the such electorate would naturally have a tendency to identify a party or its candidates by its symbols. It is perhaps for this reason that the political parties zealously guard their symbol.....

.....15. Learned Counsel for the respondent is undoubtedly correct in arguing that concept of recognition is inextricably connected with the concept of symbol of that party. It is but natural that a party must have a following and it is only a political party having substantial following in terms of Clauses 6A, 6B and 6C would have a right for a reserved symbol. Thus, in our opinion, it is perfecly in consonance with the democratic principles. A party which remains only in the records can

never be equated and given the status of a recognized political party in the democratic set up. We have, therefore, no hesitation in rejecting the argument of Dr. Swamy that in providing the symbols and reserving them for the recognized political parties along amounted to an undemocratic act."

50. The above quoted decisions of the Supreme Court support the reasoning given and the opinion expressed by us in this judgment.

51. In the Act of 1951, Rules of 1961 and Order of 1968, there is no provision according to which reserved symbols related to particular recognized party can not be used for publicity of the ideology as also agenda of the party concerned and for campaigning. What has not been provided specifically under the Statute can not be included by judicial pronouncement. The petitioner wants us to read the words "for use only in an election" in Paragraph 5 (2) of the Order, 1968 and other provisions of law dealing with reservation of symbols for recognized parties and to restrict such use during elections. The contention of the petitioner if allowed to stand then it would amount to supplying a causus omissus and reading something in the Act, 1951, Rules, 1961 and Order, 1968 which does not exist therein.

52. We may in this context refer to the case of **State of M.P. vs. Bharat Heavy Electricals, reported in (1997) 7 SCC 1**, wherein the Hon'ble Supreme Court observed as under:-

"16."5. It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements.....

.....10. Two principles of construction ? one relating to casus omissus and the other in regard to reading the statute as a whole, appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature.....

53. We do not see any reason to read words into the relevant Statutes, Rules or Order which do not appear therein and are also contrary to the scheme contained therein.

54. The petitioner also contended that reservation of symbols has to be for a particular period and not for all times to come. The argument is based on a misunderstanding of the legal scheme contained in the Act, 1951, the Rules, 1961 and the Symbols Order, 1968. The reservation of symbols is till such period as the political party continues to be recognized. The day it is derecognized or its recognition is withdrawn under Paragraph 16A of the Order, 1968 or any

other provision which may be attracted, it will cease to have the benefit of the symbol reserved for it except in so far as is permitted under Paragraph 10A of the Order, 1968.

55. It is evident from Paragraph 10A that once the party is unrecognized though it may have been recognized earlier, then it is not entitled to use the symbol reserved for it except in terms of the aforesaid provision i.e. on making of an application to the Commission within 30 days after the publication in the Official Gazette of the notification calling the election, meaning thereby, not prior to it and subject to a declaration under Clause (b) thereof, as also, the opinion being formed by the Commission that there is no reasonable ground for refusing the application for such allotment, meaning thereby, not otherwise. The proviso further qualifies Paragraph 10A making it inapplicable where the same symbol is already reserved for some other National or State party in that State or Union territory. However, as long as the party is recognized and continues to be recognized in terms of Paragraph 6C, there is nothing in law to prevent it from using the symbol reserved for it.

56. It was also her contention that the Symbol Order, 1968 only speaks of "reservation" and not of "allotment" of symbol to recognized political parties. The Court asked her as to for what purpose the symbol is reserved for recognized political party but she could not give any satisfactory answer. We are of the considered view that the symbol is reserved for a recognized political party because of their special status as already noticed hereinabove and for their use considering their importance in the democratic polity of this country. The symbol is reserved for their exclusive use and also for allotment to their candidates exclusively as and when they setup their candidates in an election but this does not mean that the symbol reserved for them is only for their use at the time of elections. Even prior to the elections they can use it so that the masses may identify themselves with the symbols based on their agenda and ideology as has already been discussed hereinabove and as is also evident from the decisions cited and quoted earlier.

57. The petitioner has failed to understand the distinction between "reservation of symbols" and "allotment of symbols". Symbols are not allotted to a recognized political party prior to notification of elections but they are reserved for them. The candidates set up by them are allotted the symbols reserved for such political party after notification of elections as per law already discussed. Reservation of symbols for recognized political parties helps the cause of democracy and does not cause any public injury. There is nothing in the Constitution of India, the Act, 1951, the Rules, 1961 and the Symbols Order, 1968 that symbols cannot be reserved for a recognized political party or that the symbol reserved for them can be used only during elections or after notification of elections. In this regard, as already discussed, a recognized political party stands on a different footing than an unrecognized political party or an independent candidate and therefore has rightly been treated differently in law.

58. As regards contention of the petitioner that symbols should be reserved (misunderstood by the petitioner as allotment in the context of recognized political parties) for unrecognized political parties or independent candidates, the

scheme of the relevant Acts, Rules and Orders referred hereinabove does not support it and in view of the valid distinction between them and the recognized political parties, we do not find it to be acceptable. As per scheme of the Act, 1951, the Rules, 1961 and especially the Symbols Order, 1968, reservation of symbols is only for recognized political parties whereas allotment of symbols is for all political parties, recognized or unrecognized and even for independent candidates.

59. In view of the aforesaid, the unrecognized political parties and independent candidates as they are distinct from recognized political parties and there is a valid rational criteria for such distinction, therefore, the contention of the petitioner that the Election Commission of India is acting in a discriminatory and arbitrary manner is not tenable in law. Moreover, this is Public Interest Litigation but there is nothing to show that the interest of the masses or the public at large is in any manner adversely affected by the questions raised in the petition.

60. For all these reasons, this Writ Petition fails and is **dismissed.**

(2021)01ILR A612
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.01.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Misc. Bench No. 24256 of 2020

Kareem ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Singh

Counsel for the Respondents:
G.A.

(A) Criminal Law - U.P. Control of Goondas Act, 1970: Section 2(b)(i), 3(1)Practice & Procedure - - The petition is directed against a notice and the petitioner will have a reasonable opportunity to defend himself in terms of Section 3(1) and sub-section 2 thereof, there is no reason for the Court to interfere in the matter at this stage. (Para 12)

Writ Petition Disposed of. (E-8)

List of Cases cited :-

1. Suresh Tewari Vs St. of U.P. & ors. Writ Petition No. 12459 (M/B) of 2018

2. Vijay Narain Singh Vs St. of Bihar & ors. (1984) 3 SCC 14

3. Ballabh Chaubey Vs A.D.M. (Finance), Mathura & anr. Criminal Misc. Writ Petition No. 2954 of 1996 ; 1997 A. Cr. R. 387 (1997 ALJ 1630)

4. Additional Secretary to Government of India Vs Smt. Alka Subhash Gadia JT (1991) 1 SC 549

5. Raja Sukhnandan Vs State AIR 1972 ALL 498

6. Kabir Chawla Vs St. of U.P. 1994 SCC (Cri.) 577

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Mrs. Saroj Yadav, J.)

1. Heard Sri Anurag Singh, learned counsel for petitioner and Shri S.P. Singh, learned A.G.A.

2. This writ petition has been filed under Article 226 of the Constitution of India seeking a writ in the nature of certiorari quashing a notice dated

18.03.2020 issued by the District Magistrate, Sitapur under Section 3(1) of the U.P. Control of Goondas Act, 1970. He has also sought a writ of mandamus directing the opposite party no. 3 and 4 not to harass the petitioner in pursuance to the aforesaid notice, which is impugned herein.

3. The contention of learned counsel for petitioner Sri Anurag Singh is that the notice has been issued on the basis of a single criminal case, whereas, Section 2(b)(i) defines 'Goonda' to mean a person who either by himself or as member or leader of a gang, habitually commits or attempts to commit, or abates the commission of an offence punishable under Section 153 or 153-B or Section 294 of the Indian Penal Code or Chapter XV, or Chapter XVI, or Chapter XXII of the said code. The lodging of a single criminal case against the petitioner does not make him, a person, who habitually commits any aforesaid offence. In this regard he relies upon a judgment of this Court dated 23.05.2018 rendered in ***Writ Petition No. 12459 (M/B) of 2018; Suresh Tewari Vs. State of U.P. and Ors***. He also relies upon an interim order passed by this Court on 22.09.2020 in Writ Petition No. 14688 (M/B) of 2020 wherein this Court interfered at the interim stage on the ground that a single criminal case would not make the person a Goonda under Section 2(b)(i) as it would not be proof of the fact that he is habitual of committing an offence referred in the said provision. It is also the contention of learned counsel for petitioner that in the single F.I.R. lodged against the petitioner there were five accused but only the petitioner and one other person, namely, Sahabuddin have been proceeded under the Goondas Act. He informed that petition of Sri Sahabuddin is pending, but, there is no interim protection therein.

4. We have perused the judgment dated 23.05.2018 as also the interim order dated 22.09.2020. We have also perused the record and we find that petition is directed against a notice under Section 3(1) of the U.P. Control of Goondas Act, 1970. Section 3(1) of the said Act pertains to Externment, etc. of Goondas. It requires the District Magistrate, on the satisfaction of the eventualities mentioned in Clause (a), (b) and (c) of Sub-section 1 of Section 3, to inform the person concerned by notice in writing of the general nature of the material allegation against him in respect of Clause (a), (b) and (c) and give him reasonable opportunity of tendering an explanation regarding them.

5. Sub-section 2 of Section 3 goes on to state the rights of the person, against whom an order under the said section is proposed to be passed, to consult and be defended by a counsel and also to have a reasonable opportunity of examining himself or 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. Thereafter, the District Magistrate, on being satisfied that the conditions specified in Clause (a), (b) and (c) of Sub-section 1 exists, may by order in writing take the actions contemplated in Clause (a) and (b) of Section 3(3) of the Act, 1970 for externment etc.

6. Now, in the present case as of now no order has been passed under Section 3 of the Act, 1970. All that has been by the District Magistrate is to issue a notice to petitioner under Section 3(1). In response to which, the petitioner shall have the rights as mentioned in the said sub-section as also

sub-section 2 and only after such opportunity the final order, if at all, would be passed under Sub-section 3 of Section 3 of the Act, 1970.

7. Now, coming to the definition of 'Goonda' the Court finds that Goonda means a person who is covered by (i) of Section 2(b) or Clause (ii) or Clause (iii) or Clause (iv) or Clause (v) of the said Section. All the clauses are disjunctive as is evident from the use of the word 'or'.

8. Clause (iv) of Section 2(b) makes it very clear that a person can be categorized as Goonda if he is generally reputed to be a person who is desperate and dangerous to the community. This provision has not been considered in ***Suresh Tiwari' case (supra),*** though, Section 2(b) has been quoted in the said judgment. As regards the decision in ***Imran alias Abdul Qudus Khan*** the said case also considers meaning of the words 'habitual criminal' and does not delve upon other clauses of Section 2(b). The decision of the Supreme Court rendered in the case of ***Vijay Narain Singh Vs. State of Bihar and Ors. reported in (1984) 3 SCC 14*** as referred in the judgement in ***Suresh Tiwari's case*** (supra) deals with Section 2(b) of Bihar Control of Crimes Act, 1981 and it was not a case of challenge to a notice.

9. Be that as it may, the specific issue as to maintainability of writ petition under Article 226 of the Constitution of India against a notice issued under Section 3(1) of U.P. Control of Goondas Act, 1970 came up for consideration before a Division Bench of this Court in case of ***Ballabh Chaubey Vs. Additional District Magistrate (Finance), Mathura and Anr; Criminal Misc. Writ Petition No. 2954 of 1996*** decided on 22.01.1997 reported in ***1997 A. Cr. R. 387 (1997 ALJ 1630)***. A Division of this Court specifically considered this issue and after referring to various decisions of this Court and that of the Hon'ble Supreme Court opined not to entertain the writ petition at the stage of notice and gave cogent and detailed reasons in support of its conclusion. Relevant extract of the said decision is quoted hereinbelow:-

"8. The detention laws like National Security Act, or Conservation of Foreign Exchange and Prevention of Smuggling Activities Act make serious in-road in the liberty of a person. Under these laws a person is detained without any prior notice and that too on the subjective satisfaction of the detaining authority which satisfaction cannot be challenged on merits. The person detained gets only a right to make representation against his detention but that too after he has been detained and he has been deprived of his liberty. The decision of the representation naturally takes time. The principle that the machinery provided by the Act should not be permitted to be by-passed by taking recourse to proceedings under Article 226 of the Constitution prior to execution of the detention order was reiterated even in such cases. In Additional Secretary to Government of India v. Smt. Alka Subhash Gadia, JT 1991 (1) SC 549, the submission on behalf of the detaining authority is noticed in para 25 of the Report which is as under :

"It was contended by Sri Sibbal, learned Additional Solicitor General, on behalf of the appellants that since the detention law is constitutionally valid, the order passed under it can be challenged only in accordance with the provisions of, and the procedure laid down, by it. In this respect there is no distinction between the

orders passed under the detention laws and those passed under other laws. Hence, the High Court under Article 226 of this Court under Article 32 of the Constitution should not exercise its extraordinary jurisdiction in a manner which will enable a party to by-pass the machinery provided by the law."

The Court after considering the submissions of the parties held as follows in para 30 :

"..... The power under Article 226 and 32 are wide, and are untrammelled by any external restrictions and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraint for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to evoke their discretionary extraordinary and equitable jurisdiction under Articles 226 said 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available ....."

This decision has been subsequently followed in N. K. Bapna v. Union of India, JT 1992 (4) 49; State of Tamil Nadu v. P. K. Shamsuddin, JT 1992 (4) 179 and Subhash Mujimal Gandhi v. L. Miningliana, 1994 (6) SCC 14. The provisions of detention laws are far more stringent than the Control of Goondas Act as here order is passed after notice and trial and the person against whom order is passed does not lose his liberty. He is merely deprived of his right to live in a particular area from where he is externed but is free to reside any where else in the country. There is no reason why the same principle should not apply in the present case as well. The law being well-settled that where a Statute provides a machinery of its own, the aggrieved person should first exhaust the remedies provided under the Statutes before approaching the High Court under Article 226 of the Constitution and the High Court would not normally entertain a petition straightway, the present petition challenging the notice is liable to be rejected on the ground of alternative remedy.

9. In Raja Sukhnandan v. State, AIR 1972 All 498, the writ petition was filed at the stage of notice. The Division Bench examined the contention based upon the constitutional validity of U. P. Control of Goondas Act but refused to consider the submission regarding illegality of the notice on the ground that the same could be agitated before the District Magistrate and if the decision went against the petitioner, in appeal before the Commissioner. In Kabir Chawla v. State of U.P., 1994 SCC (Cri) 577, the validity of the notice under Section 3 of the Act was assailed but the Supreme Court declined to go into this question on the ground that the petitioner could satisfy the District Magistrate who was seized of the matter. It may be mentioned here that in all the cases where validity of notice issued under similar Statute relating to externment of Goondas was assailed before the Supreme Court, the matter had been taken in appeal against

final orders of externment see Gurucharan Singh v. State of Bombay, AIR 1952 SC 221; Hari Khemu Gawli v. Dy. Commissioner of Police, AIR 1956 SC 559; Bhagubhaj v. District Magistrate, AIR 1956 SC 585 and State of Gujarat v. Mehboob Khan, AIR 1968 SC 1468.

10. There is another reason for not entertaining the writ petition at the stage of notice. As the preamble of the Act shows, it has been enacted to make special provisions for the Control and Suppression of Goondas with a view to the maintenance of Public Order. The provisions of the Act are intended to prevent further mischief by a Goonda and not to secure his conviction in a pending case. If a person is permitted to challenge the notice at the initial stage and seek stay of the proceedings, the very purpose for which notice is issued and the law under which it is issued will be frustrated as the externment order remains in operation only for a limited period.

11. Learned counsel has next submitted that in Ramji Pandey v. State of U. P., 1981 Cri LJ 1083, writ petition had been filed challenging the notice under Section 3 of the Act and the writ petition was allowed by a Full Bench of this Court and, therefore, the present petition also deserves to be entertained. The judgment of the Full Bench shows that the question whether a writ petition should be entertained against a notice was not at all considered. The only question which was canvassed and was considered by the Bench was whether the notice was in accordance with the requirement of Section 3 of the Act. No such argument that a writ petition under Article 226 of the Constitution should not be entertained at the stage of notice seems to have been canvassed and therefore no decision has been given on this point. It is well-settled that a decision is an authority for when it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in it. See M/s. Orient Paper and Industries Ltd. v. State of Orissa, AIR 1991 SC 672 para 19. Doctrine of precedent is limited to the decision itself and as to what is necessarily involved in it. Judicial authority belongs not to the exact words used in this or that judgment, nor even to all reasons given, but only to the principle accepted and applied as necessary grounds of decision see Krishna Kumar v. Union of India, AIR 1990 SC 1782 pages 18 and 19. The Full Bench having not considered the question of maintainability of the writ petition at the stage of notice, the decision rendered by it cannot be held to be an authority or binding precedent for holding the writ petition to be maintainable.

12. In view of the reasons discussed above the writ petitions are dismissed on the ground of alternative remedy."

10. The writ petitions were dismissed on the ground of availability of efficacious alternative remedy. As would be evident from a reading of the judgment, the Division Bench relied upon the decision of the Supreme Court reported in ***JT 1991 (1) SC 549; Additional Secretary to Government of India Vs. Smt. Alka Subhash Gadia. It also relied upon AIR 1972 All 498; Raja Sukhnandan Vs. State*** which is a judgment of this very Court. It also relied upon a judgment reported in ***1994 SCC (Cri.) 577; Kabir Chawla Vs. State of U.P.***, wherein the validity of notice under Section (3) of the Goondas Act, 1970 was assailed but the Supreme Court declined to go into this question on the ground that the petitioner could satisfy the District Magistrate who was ceased of the

matter. The Division Bench also noticed that all those cases which were cited before it in support of petitioner's contention, were those where the validity of notice had been seen by the Courts in Appeal against final order of externment. The relevant extract of the judgment in the case of ***Kabir Chawla (supra)*** is quoted hereinbelow:-

"The petitioner has made a grievance in relation to the proceedings that have been initiated against him by the District Magistrate, Nainital, by the show-cause notice dated March 10, 1993 under Section 3(1) of the U.P. Control of Goondas Act, 1970. The petitioner states that he has submitted his reply to the show-cause notice but no final order has been made so far and that he has to appear before the District Magistrate. The petitioner, however, prays that the said proceedings may be quashed. We do not find any ground for quashing the said proceedings at this stage. The matter is under consideration before the District Magistrate. It is open to the petitioner to satisfy the District Magistrate that no ground has been made out for passing the order against him. In the writ petition the petitioner has not made out a case that in issuing the show- cause notice the District Magistrate was actuated by mala fides. There is, therefore, no reason to assume that the District Magistrate would not give a fair consideration to the matter. We are, therefore, unable to accept the submissions of the petitioner in this regard."

11. Thereafter Hon'ble the Supreme Court proceeded to consider the other grievance of the petitioner before it regarding preventive detention on the basis of an order passed by this District Magistrate which was a different issue.

12. In view of the above, considering the fact that the petition is directed against a notice and the petitioner will have reasonable opportunity to defend himself in terms of Section 3(1) and Sub-section 2 thereof, there is no reason for this Court to interfere in the matter at this stage. The only reason we are not delving at length on the object of the Act, 1970 the scheme of the purpose sought to be achieved by it is that it might prejudice the petitioner in his defence before the District Magistrate, therefore, leaving it open for the petitioner to respond to the notice before the District Magistrate and to avail all the rights under Sub-section 1 and 2 of Section 3 before the District Magistrate., we are not inclined to interfere with the impugned notice.

13. We however make it clear that the District Magistrate while considering the response and granting reasonable opportunity to the petitioner shall not pay lip service to the provisions of the Act, 1970, so far as they grant right to the petitioner to defend his case and shall not act with a predetermined and mechanical mind but shall apply his mind duly, properly, objectively and effectively to the facts of the case and the material available before him before deciding as to whether any of the actions as contemplated under Sub-section 3 of Section 3 of the Act, 1970 are required to be taken or not.

14. Subject to aforesaid observations, the writ petition is **disposed of** without prejudice to the rights of the petitioner as aforesaid, without interfering with the impugned notice.

(2021)01ILR A618
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE CHANDRA DHARI SINGH, J.

Misc. Bench No. 24492 of 2020

Waseem Haider ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Muballi Gussalam

Counsel for the Respondents:
G.A.

(A) Criminal Law- Code of Criminal Procedure,1973 - Section 154, 156, 190, 200 -ractice & Procedure - Alternative remedies to FIR - Writ of mandamus to compel the police to perform its statutory duty under Section 154 Cr.P.C. can be denied to the informant/victim for non-availing of alternative remedy under Sections 154(3), 156(3), 190 and 200 Cr.P.C., unless the four exceptions enumerated in the decision of the Apex Court in the case of *Whirlpool Corporation Vs Registrar of Trade Marks (1998) 8 SCC 1*, come to rescue of the informant/victim. .(Para 45)

The verdict of Apex Court in the case of *Lalita Kumari Vs Government of U.P. & Ors. (2014) 2 SCC 1* does not pertain to issue of entitlement to writ of mandamus for compelling the police to perform statutory duty under Section 154 Cr.P.C. without availing alternative remedy under Section 154(3), 156(3), 190 and 200 Cr.P.C. .(Para 45)

The informant/victim after furnishing first information regarding cognizable offence does not become functus officio for seeking writ of mandamus for compelling the police authorities to perform their statutory duty under Section 154 Cr.P.C. in the case the FIR is not lodged. (Para 45)

The proposed accused against whom First information of commission of cognizable offence is made, is not a necessary party to be impleaded in a petition under Article 226 of the Constitution of India seeking issuance of writ of mandamus to compel the police to perform their statutory duty under Section 154 Cr.P.C.(Para 45)

(B) Writs - Constitution of India - The power to issue writ of mandamus has its own well defined self-imposed limitations, one of which is availability of alternative efficacious remedy on the basis of which the Writ Court can deny issuance of the said writ. (Para 17)

Writ Petition Rejected. (E-8)

List of Cases cited :-

1. Lalita Kumari Vs Govt. of U.P. & ors. (2014) 2 SCC 1

2. Whirlpool Corporation Vs Registrar of Trade Marks (1998) 8 SCC 1

3. Abhinandan Jha Vs Dinesh Mishra (1967) 3 SCR 668

4. H.N. Rishbud & Inder Singh Vs St. of Delhi (1955) 1 SCR 1150

5. Sevi Vs St. of T.N. 1981 Supp SCC 43

6. Sakiri Vasu Vs State of U.P. & ors. (2008) 2 SCC 409

7. Aleque Padamsee & ors. Vs U.O.I. & ors. (2007) 6 SCC 171

8. Sudhir Bhaskar Rao Tambe Vs Hemant Yashwant Dhage & ors. (2016) 6 SCC 277

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. This writ petition has been filed by the petitioner Waseem Haider seeking

mandamus commanding the respondents no. 2 & 3 to make direction to respondent no.4 for registration of the First Information Report on the application of the petitioner.

2. Learned counsel for the petitioner has submitted that original owner of land Khasra Nos. 1120Ka, 1097, 2067, 1120Ka, 1121, 1122Ka, 1138, 2151Gha, 2245Ga and 1120 situated at Village Katui Paragana and Tehsil Akbarpur, District Ambedkar Nagar, Old District Faizabad was Shri Ambad Mehndi, who executed Theekanama in favour of his chief executive Quari Sayed Akhtar Husain alongwith some conditions. It is submitted that he did not transfer his title, and only the right to use the aforesaid land was given. It is also submitted that the aforesaid gata numbers are new gata numbers and in the deed of Theekanama, old numbers have been mentioned.

3. Learned counsel has submitted that Late Syed Ahmad Mehdi was Tallukdar of Peerpur Estate and after his death his only daughter Smt. Huma Husain inherited the said property by way of succession. The petitioner is attorney holder of Smt. Huma Husain and managing the affairs of Smt. Huma Husain.

4. It is submitted that when the petitioner came to know about the forged and fraudulent sale deed which was executed by Shri Jagdish Mishra in favour of several persons through six sale deeds on 29.01.2020, the petitioner moved application for registration of First Information Report to opposite party no.4 on 27.06.2020, but opposite party no.4 did not register the said F.I.R.

5. He has submitted that the petitioner approached opposite party no.3 i.e. Superintendent of Police, Ambedkar Nagar and submitted application through registered post dated 10.07.2020 for registration of F.I.R., but nothing has been done by the said authority.

6. Learned counsel has further submitted that when the report of the petitioner was not lodged by opposite party no.4 and no direction was given by opposite party no.3 to opposite party no.4 then the petitioner approached opposite party no.2 i.e. Director General of Police, U.P., Lucknow and moved an application through E-mail on 04.12.2020, but again nothing was done by the police authorities.

7. Learned counsel for the petitioner has relied upon the judgment of Hon'ble the Apex Court in the case of ***Lalita Kumari vs. Government of U.P. and others; (2014) 2 SCC 1*** and submitted that upon receipt of information by a police officer in-charge of a police station disclosing a cognizable offence, it is imperative for him to register a case under Section 154 of the Code.

8. Learned AGA has opposed the prayer as made in the present writ petition and raised a preliminary objection regarding maintainability of the writ petition and states that if the petitioner is aggrieved by the fact that his first information report is not being registered, he has an alternative remedy to approach the Magistrate concerned under section 156(3) Cr.P.C. Learned AGA has also vehemently submitted that proposed accused has not been made a party, which is necessary for proper adjudication of this case. Therefore, the writ petition may be dismissed merely on this ground itself.

9. Heard Mohd. Muballi Gussalam, learned counsel for the petitioner, Sri J. S. Tomar, learned A.G.A. for the State and perused the record.

10. The core issue raised herein is whether a writ of mandamus can be issued under Article 226 of the Constitution of India directing the police to register an offence under Section 154(1) Cr.P.C. in a petition raising grievance that despite informing the police about the commission of cognizable offence, no FIR is lodged.

11. In some cases the writ Court has directed the police authorities to perform their statutory duty under Section 154 Cr.P.C by following the law laid down by the Apex Court in the Constitution Bench decision of Lalita Kumari (supra). The State has taken serious objection and submitted that the Writ Court should have declined issuance of writ of mandamus for the reason of availability of statutory remedy under Section 154(3), 156(3), 190 and 200 Cr.P.C.

12. The core issue mentioned above in fact involves a number of principal and peripheral issues, which are as under :-

Principal Issues :-

(i) Whether in the face of remedies under Sections 154(3), 156(3), 190 & 200 Cr.P.C., writ of mandamus can be issued to police authorities to perform their statutory duty under Sections 154(1) Cr.P.C. in a petition complaining non-registration of FIR despite furnishing first information of commission of cognizable offence?

(ii) Whether the Constitution Bench decision of the Apex Court in Lalita Kumari (supra) is an answer to the above said principal issue No.1?

Peripheral Issues :-

(i) Can relief of writ of mandamus be denied to the informant merely on the ground that the informant is not an aggrieved person or victim and whether such person becomes functus officio after informing the police of commission of cognizable offence?

(ii) Whether the proposed accused is required to be heard before writ of mandamus can be issued in a petition complaining failure of police authorities to register offence despite being informed of commission of cognizable offence?

13. Before embarking upon the process of adjudication it would be appropriate to reproduce the relevant statutory provisions which have bearing on the issued involved herein. Section 154, Section 156, Section 190 and Section 200 of the Cr.P.C. are reproduced in seriatim for convenience and ready reference :-

*"**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.

Section 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.

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

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

(a) if a public servant acting or- purporting to act in the discharge of his official duties or a Court has made the complaint; or

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

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

14. Writ of Mandamus is one of the prerogative writs issued by the superior Courts (High Court or Supreme Court), which is in shape of command to the State, its instrumentality or its functionaries to compel them to perform their constitutional/statutory/public duty. To clarify, the extract of decision of Apex Court explaining the discretionary limitations adopted by the Writ Court while issuing writ of mandamus are as follows:-

(i) ***Thansingh Nathmal Vs. Superintendent of Taxes, AIR 1964 SC 1419*** *:-*

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy which, without being unduly onerous, provides an equally efficacious remedy."

15. The writ remedy is extra-ordinary remedy and equitable remedy. Further, the writ Court need not entertain a writ petition merely because a case is made out of alleged inaction or negligent in acting on an issue by an authority vested with power, in these cases to register crime/to complete investigation into crime, if statutorily engrafted remedy is available to seek redress on such grievance. Even if, a case is made out on alleged illegal action by statutory authority, which require redressal, ordinarily writ Court does not entertain the writ petition if the aggrieved person has not availed other remedies, more so, such remedies are incorporated in a statute.

16. In the case of ***Whirlpool Corporation. v. Registrar of Trade Marks, - (1998) 8 SCC 1***, the Apex Court had held as follows:-

"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."

17. The power to issue writ of mandamus has its own well defined self imposed limitations, one of which is availability of alternative efficacious remedy on the basis of which the Writ Court can deny issuance of the said writ.

18. This Court deems it appropriate to answer principal issue No.2 first. The principal issue No.2 is as follows :-

(ii) Whether the Constitution Bench decision of the Apex Court in the case of Lalita Kumari (supra) is an answer to the above said principal issue No.1 ?

19. The decision of Lalita Kumari (supra) of the Apex Court arose out of a petition under Article 32 of the Constitution of India seeking issuance of writ of habeas corpus or directions of like nature against the respondents therein for the protection of minor daughter who was kidnapped. As per paragraphs 1 & 6 of the said judgment, the Apex Court framed the question raised and decided therein which are reproduced below :-

"Para 1. The important issue which arises for consideration in the referred matter is whether "a police officer is bound to register the first information report (FIR) upon receiving any information relating to commission of cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (in short' the Code') or the police officer has the power to conduct 'preliminary inquiry' in order to test the veracity of such information before registering the same"?

Para 6. Therefore, the only question before this Constitution Bench relates to the interpretation of Section 154 of the Code and incidentally to consider Sections 156 and 157 also".

20. Perusal of the judgment of Lalita Kumari (supra) and the final directions passed in paragraphs 120.1 to 120.8 clearly reveal the laying down of ratio that the police has no option but to register the offence in shape of FIR under Section 154 Cr.P.C. on receipt of first information regarding commission of cognizable offence without verifying the veracity of the first information.

21. Though the Apex Court while formulating the question in paragraph 6 (supra) made reference to Sections 156 & 157 but the entire judgment of Lalita Kumari and final directions issued therein centre around the statutory obligation of the police to register the offence under Section 154 Cr.P.C, with only passing reference of Section 156 & 157 without laying down any law as regards these provisions (Section 156 and 157 Cr.P.C.).

22. Therefore, it can safely be concluded that the Apex Court while interpreting the statutory provision under Section 154 Cr.P.C said nothing further as regards remedy available to the informant whose information of commission of cognizable offence does not invoke any response from the police. Thus, the judgment of Lalita Kumari does not lay down any law in respect of remedies available to the informant under Cr.P.C. to be invoked in case of failure on the part of the police to perform its statutory duty under Section 154(1)/154(3) Cr.P.C. as a sine qua non for seeking writ of mandamus.

23. Consequently, the case of Lalita Kumari of the Apex Court does not answer the principal issue No.1 framed by this Court.

24. Now this Court takes up the principal issue No.1.

25. The self imposed restriction of availability of statutory remedy while considering issuance of writ of mandamus is universally applied with few exceptions as enumerated above.

26. The Code of Criminal Procedure provides various avenues before the informant/victim to initiate criminal prosecution. The first avenue is of lodging of FIR under Section 154(1)/154(3) which can be availed by the victim and as well as a stranger to the offence, provided the first information discloses commission of cognizable offence. The lodging of FIR under Section 154 Cr.P.C. sets the investigative machinery into motion without prior permission of the Magistrate as is otherwise required for non-cognizable offences.

27. The second avenue available to the victim and as well as a stranger to the cognizable offence, is under Section 156(3) by approaching the concerned Magistrate

by informing commission of cognizable offence. The Magistrate can then conduct an enquiry himself or direct the concerned police station to register the offence alleged, thereby triggering the investigation.

28. The third avenue available is under Section 190 Cr.P.C empowering the competent Magistrate to take cognizance of any offence upon receipt of complaint of facts containing allegation constituting the offence, or upon a police report of such facts or upon information received from any person other than a police officer, or upon his own knowledge of commission of cognizable and as well as non-cognizable offence, except offences punishable under Chapter XX of IPC, for which procedure prescribed under Section 198 Cr.P.C. is to be adhered to.

29. The fourth avenue is under Section 200 Cr.P.C where a complaint, oral or in writing if made before the competent Magistrate leads to hearing by the Magistrate on the question of taking cognizance of offence or not and if it is found that complaint discloses commission of any offence punishable in law then the Magistrate issues summons to the proposed accused on appearance of whom statements of rival parties are recorded and the Magistrate decides on the question of framing of charge or discharging the accused. If charges are framed then trial proceeds.

30. The above said discussion makes it clear that there are four different remedies available under Cr.P.C for the informant/victim to initiate prosecution in respect of the cognizable/non-cognizable offence which is alleged in the first information furnished which fails to invoke response from the police. More so, these statutory remedies cannot be branded as non-efficacious or onerous. Accordingly, informant whose first information does not lead to registration of offence under Section 154 Cr.P.C is not remedy-less and therefore, the constraints exercised by the writ Court while issuing writ of mandamus come into play. These constraints as enumerated above are self imposed and lie within the domain of discretion rather than rule but none the less are invariably applied by superior courts while exercising writ jurisdiction. To elaborate, if it is demonstrated that impugned action or inaction is vitiated by violation of principles of natural justice, or being bereft of jurisdiction or violates any statutory provision or causes breach of fundamental rights, then non-availing of alternative remedy cannot restrain the informant or victim to successfully invoke the writ jurisdiction of the superior Court.

31. In the case of ***Abhinandan Jha v. Dinesh Mishra - (1967) 3 SCR 668***, the Supreme Court took great pains in demarking the powers of the police and the judiciary. They explained the duties of the police, in the matter of investigation of offences, as well as their powers. It is necessary to refer to the provisions contained in Chapter XIV of the Code, Sections beginning from Section 154, and ending with Section 176. Section 154 deals with information relating to the commission of a cognizable offence, and the procedure to be adopted in respect of the same. In each of these sections, there is no role of Judiciary. The sections provide guidelines to the police on how to proceed with the Investigation but there is always a discretion to the police officer to conduct a preliminary inquiry in case a complaint does not clearly disclose a Cognizable

offence or has doubts over the veracity of the complaint. The relevant extract (Para - 7) is as follows:-

"7. In order, properly, to appreciate the duties of the police, in the matter of investigation of offences, as well as their powers, it is necessary to refer to the provisions contained in Chapter XIV of the Code. That chapter deals with "Information to the Police and their Powers to investigate"; and it contains the group of sections beginning from Section 154, and ending with Section 176. Section 154 deals with information relating to the commission of a cognizable offence, and the procedure to be adopted in respect of the same. Section 155, similarly, deals with information in respect of non-cognizable offences. Sub-section (2), of this section, prohibits a police officer from investigating a non-cognizable case, without the order of a Magistrate. Section 156 authorises a police officer, in-charge of a police station, to investigate any cognizable case, without the order of a Magistrate. Therefore, it will be seen that large powers are conferred on the police, in the matter of investigation into a cognizable offence. Sub-section (3), of Section 156, provides for any Magistrate, empowered under Section 190, to order an investigation. In cases where a cognizable offence is suspected to have been committed, the officer in-charge of a police station, after sending a report to the Magistrate, is entitled, under Section 157, to investigate the facts and circumstances of the case and also to take steps for the discovery and arrest of the offender. Clause (b), of the proviso to Section 157(1), gives a discretion to the police officer not to investigate the case, if it appears to him that there is no sufficient ground for entering on an investigation. Section 158 deals with the procedure to be adopted in the matter of a report to be sent, under Section 157. Section 159 gives power to a Magistrate, on receiving a report under Section 157, either to direct an investigation or, himself or through another Magistrate subordinate to him, to hold a preliminary enquiry into the matter, or otherwise dispose of the case, in accordance with the Code. Sections 160 to 163 deal with the power of the police to require attendance of witnesses, examine witnesses and record statements. Sections 165 and 166 deal with the power of police officers, in the matter of conducting searches, during an investigation, in the circumstances, mentioned therein. Section 167 provides for the procedure to be adopted by the police, when investigation cannot be completed in 24 hours. Section 168 provides for a report being sent to the officer in charge of a police station, about the result of an investigation, when such investigation has been made by a subordinate police officer, under Chapter XIV. Section 169 authorises a police officer to release a person from custody, on his executing a bond, to appear, if and when so required, before a Magistrate, in cases when, on investigation under Chapter XIV, it appears to the officer in-charge of the police station, or to the police officer making the investigation, that there is no sufficient evidence or reasonable ground of suspicion, to justify the forwarding of the accused to a Magistrate. Section 170 empowers the officer, in charge of a police station, after investigation under Chapter XIV, and if it appears to him that there is sufficient evidence, to forward the accused, under custody, to a competent Magistrate or to take security from the accused for his appearance before the Magistrate, in cases where the offence is bailable. Section 172 makes it obligatory on the police officer making an investigation, to maintain a

diary recording the various particulars therein and in the manner indicated in that section. Section 173 provides for an investigation, under Chapter XIV, to be completed, without unnecessary delay and also makes it obligatory, on the officer in charge of the police station, to send a report to the Magistrate concerned, in the manner provided for therein, containing the necessary particulars."

32. In the case of ***H.N. Rishbud and Inder Singh v. State of Delhi - 1955 (1) SCR 1150***, the Hon'ble Supreme Court held that the Judiciary should not interfere with the police in matters such as Investigation especially of cognizable offence which is the statutory right of the police. The court observed that the police needs no authorisation of the judiciary. The court opined that the functions of the police and judiciary are complimentary and not overlapping keeping in mind individual liberty and law and order situation in the Country. The judiciary role comes into play when a charge is established and not before that. The relevant extracts (Paras - 5 & 8) are as followes:-

"5. To determine the first question it is necessary to consider carefully both the language and scope of the section and the policy underlying it. As has been pointed out by Lord Campbell in Liverpool Borough Bank v. Turner [(1861) 30 LJ Ch 379] , "there is no universal rule to aid in determining whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed". (See Craies on Statute Law, p. 242, Fifth Edn.) The Code of Criminal Procedure provides not merely for judicial enquiry into or trial of alleged offences but also for prior investigation thereof. Section 5 of the Code shows that all offences "shall be investigated, inquired into, tried and otherwise dealt with in accordance with the Code" (except in so far as any special enactment may provide otherwise). For the purposes of investigation offences are divided into two categories "cognizable" and "non-cognizable". When information of the commission of a cognizable offence is received or such commission is suspected, the appropriate police officer has the authority to enter on the investigation of the same (unless it appears to him that there is no sufficient ground). But where the information relates to a non-cognizable offence, he shall not investigate it without the order of a competent Magistrate. Thus it may be seen that according to the scheme of the Code, investigation is a normal preliminary to an accused being put up for trial for a cognizable offence (except when the Magistrate takes cognizance otherwise than on a police report in which case he has the power under Section 202 of the Code to order investigation if he thinks fit). Therefore, it is clear that when the Legislature made the offences in the Act cognizable, prior investigation by the appropriate police officer was contemplated as the normal preliminary to the trial in respect of such offences under the Act. In order to ascertain the scope of and the reason for requiring such investigation to be conducted by an officer of high rank (except when otherwise permitted by a Magistrate), it is useful to consider what "investigation" under the Code comprises. Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and

recorded under Section 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. Thus investigation primarily consists in the ascertainment of the facts and circumstances of the case. By definition, it includes "all the proceedings under the Code for the collection of evidence conducted by a police officer". For the above purposes, the investigating officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has also the authority to examine such person orally either by himself or by a duly authorised deputy. The officer examining any person in the course of investigation may reduce his statement into writing and such writing is available, in the trial that may follow, for use in the manner provided in this behalf in Section 162. Under Section 155 the officer in charge of a police station has the power of making a search in any place for the seizure of anything believed to be necessary for the purpose of the investigation. The search has to be conducted by such officer in person. A subordinate officer may be deputed by him for the purpose only for reasons to be recorded in writing if he is unable to conduct the search in person and there is no other competent officer available. The investigating officer has also the power to arrest the person or persons suspected of the commission of the offence under Section 54 of the Code. A police officer making an investigation is enjoined to enter his proceedings in a diary from day-to-day. Where such investigation cannot be completed within the period of 24 hours and the accused is in custody he is enjoined also to send a copy of the entries in the diary to the Magistrate concerned. It is important to notice that where the investigation is conducted not by the officer in charge of the police station but by a subordinate officer (by virtue of one or other of the provisions enabling him to depute such subordinate officer for any of the steps in the investigation) such subordinate officer is to report the result of the investigation to the officer in charge of the police station. If, upon the completion of the investigation it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefore under Section 170 of the Code. In either case, on the completion of the investigation he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed form furnishing various details. Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material

collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173. The scheme of the Code also shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in Section 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. It is also clear that the final step in the investigation, viz. the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under Section 551.

8. A number of decisions of the various High Courts have been cited before us bearing on the questions under consideration. We have also perused the recent unreported Full Bench judgment of the Punjab High Court [Criminal Appeals Nos. 25-D and 434 of 1953 disposed of on 3rd May, 1954] . These disclose a conflict of opinion. It is sufficient to notice one argument based on Section 156(2) of the Code on which reliance has been placed in some of these decisions in support of the view that Section 5(4) of the Act is directory and not mandatory. Section 156 of the Criminal Procedure Code is in the following terms:

"156.(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 XV relating to the place of inquiry or trial.

(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."

The argument advanced is that Section 5(4) and proviso to Section 3 of the Act are in substance and in effect in the nature of an amendment of or proviso to Section 156(1) of the Code of Criminal Procedure. In this view, it was suggested that Section 156(2) which cures the irregularity of an investigation by a person not empowered is attracted to Section 5(4) and proviso to Section 3 of the 1947 Act and Section 5-A of the 1952 Act. With respect, the learned Judges appear to have overlooked the phrase "under this section" which is to be found in sub-section (2) of Section 156 of the Code of Criminal Procedure. What that sub-section cures is investigation by an officer not empowered under that section i.e. with reference to sub-sections (1) and (3) thereof. Sub-section (1) of Section 156 is a provision empowering an officer in charge of a police station to investigate a cognizable case without the order of a Magistrate and delimiting his power to the investigation of such cases within a certain local jurisdiction. It is the violation of this provision that is cured under sub-section (2). Obviously sub-section (2) of Section 156 cannot cure the violation of any other specific statutory provision prohibiting investigation by an officer of a lower rank than a Deputy Superintendent of Police unless specifically authorised. But apart

from the implication of the language of Section 156(2), it is not permissible to read the emphatic negative language of sub-section (4) of Section 5 of the Act or of the proviso to Section 3 of the Act, as being merely in the nature of an amendment of or a proviso to sub-section (1) of Section 156 of the Code of Criminal Procedure. Some of the learned Judges of the High Courts have called in aid sub-section (2) of Section 561 of the Code of Criminal Procedure by way of analogy. It is difficult to see how this analogy helps unless the said sub-section is also to be assumed as directory and not mandatory which certainly is not obvious on the wording thereof. We are, therefore, clear in our opinion that Section 5(4) and proviso to Section 3 of the Act and the corresponding Section 5-A of Act 59 of 1952 are mandatory and not directory and that the investigation conducted in violation thereof bears the stamp of illegality.

33. In the case of ***Sevi v. State of Tamilnadu*** - 1981 Supp SCC 43, the Hon'ble Supreme Court has held that before registering an FIR under Section 154 of the Code, it is open to the police officer to hold a preliminary inquiry to ascertain whether there is a prima facie case of commission of a cognizable offence or not. The relevant extract (Para - 3) is as follows :-

"3. One of the disturbing features of the case is the strange conduct of PW 15 the Sub-Inspector of Police. According to him he was told by PW 10 on the telephone that there was some rioting at Kottaiyur and that some persons were stabbed. He made an entry in the general diary and proceeded to Kottaiyur taking with him the FIR book, the hospital memo book etc. This was indeed very extraordinary conduct on the part of the Sub-Inspector of Police. If he was not satisfied with the information given by PW 10 that any cognizable offence had been committed he was quite right in making an entry in the general diary and proceeding to the village to verify the information without registering any FIR. But, we have yet not come across any case where an officer in-charge of a police station has carried with him the FIR book. The first information report book is supposed to be at the Police Station House all the time. If the Sub-Inspector is not satisfied on the information received by him that a cognisable offence has been committed and wants to verify the information his duty is to make an entry in the general diary, proceed to the village and take a complaint at the village from someone who is in a position to give a report about the commission of a cognisable offence. Thereafter, the ordinary procedure is to send the report to the police station to be registered at the police station by the officer in-charge of the police station. But, indeed, we have never come across a case where the Station House Officer has taken the first information report book with him to the scene of occurrence. According to the suggestion of defence the original first information report which was registered was something altogether different from what has now been put forward as the first information report and that the present report is one which has been substituted in the place of another which was destroyed. To substantiate their suggestion the defence requested the Sessions Judge to direct the Sub-Inspector to produce the first information report book in the court so that the counterfoils might be examined. The Sub-Inspector was unable to produce the relevant FIR book in court notwithstanding the directions of the court. The FIR book, if produced, would have contained the

necessary counterfoils corresponding to the FIR produced in court. The Sub-Inspector when questioned stated that he searched for the counterfoil book but was unable to find it, an explanation which we find impossible to accept. We cannot imagine how any FIR book can disappear from a police station. Though he claimed that relevant entries had been made in the general diary at the station the Sub-Inspector did not also produce the general diary in court. The production of the general diary would have certainly dispelled suspicion. In the circumstances we think that there is great force in the submission of the learned counsel for the accused that the original FIR has been suppressed and, in its place some other document has been substituted. If that is so, the entire prosecution case becomes suspect. All the eyewitnesses are partisan witnesses and notwithstanding the fact that four of them were injured we are unable to accept their evidence in the peculiar circumstances of the case. Where the entire evidence is of a partisan character impartial investigation can lend assurance to the court to enable it to accept such partisan evidence. But where the investigation itself is found to be tainted the task of the court to sift the evidence becomes very difficult indeed. Another feature of the case which makes us doubt the credibility of the witnesses is the photographic and somewhat dramatic account which they gave of the incident with minute details of the attack on each of the victims. According to the account of the witnesses it was as if each of the victims of the attack came upon the stage one after the other to be attacked by different accused in succession, each victim and his assailant being followed by the next victim and the next assailant. Surely the account of the witnesses is too dramatic and sounds obviously invented to allow each witness to give evidence of the entire attack. But the witnesses themselves admit in cross-examination that they were all attacked simultaneously. If so, it was impossible for each of them to have noticed the attack on everyone else. One other important feature of the case which remains unexplained by the prosecution witnesses is the injuries found on A-4. According to A-4 the prosecution party came to his house and attacked him and the prosecution party were injured in that incident, suggesting thereby that he acted in exercise of his right of private defence. He, however, excludes the presence of the other accused. Whether his version is true or not, the fact remains that he did sustain some injuries which have remained unexplained. Having regard to all these special features of this case we do not think that the High Court was justified in setting aside the acquittal of the appellants and convicting them. The appeals are, therefore, allowed. The appellants, if not on bail, will be released forthwith. If they are on bail their bail bonds will stand cancelled.

34. The Hon'ble Apex Court in the case of ***Sakiri Vasu v. State of U.P. & Ors. - (2008) 2 SCC 409*** has discussed the remedies, procedure available if the police authorities denies to register the FIR. The relevant extract (Para - 26) is as follows :-

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3) CrPC or other police officer referred to in Section 36 CrPC. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section

156(3) CrPC instead of rushing to the High Court by way of a writ petition or a petition under Section 482 CrPC. Moreover, he has a further remedy of filing a criminal complaint under Section 200 CrPC. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?

35. The Hon'ble Apex Court while contemplating the options available to an informant/victim when his first information falls on deaf ears in the case of ***Aleque Padamsee and Ors. v. Union of India and Ors. - (2007) 6 SCC 171*** has laid down thus :-

"7. Whenever any information is received by the police about the alleged commission of offence which is a cognizable one there is a duty to register the FIR. There can be no dispute on that score. The only question is whether a writ can be issued to the police authorities to register the same. The basic question is as to what course is to be adopted if the police does not do it. As was held in All India Institute of Medical Sciences Employees' Union (Regd.) Vs. Union of India, (1996) 11 SCC 582 and re-iterated in Gangadhar's case (supra) the remedy available is as set out above by filing a complaint before the Magistrate. Though it was faintly suggested that there was conflict in the views in All India Institute of Medical Sciences's case (supra), Gangadhar Janardan Mhatre Vs. State of Maharashtra, (2004) 7 SCC 768, Hari Singh Vs. State of U.P. (2006) 5 SCC 733, Minu Kumari Vs. State of Bihar, (2006) 5 SCC 733, and Ramesh Kumar Vs. (NCT of Delhi) (2006) 2 SCC 677, we find that the view expressed in Ramesh Kumari's case (supra) related to the action required to be taken by the police when any cognizable offence is brought to its notice. In Ramesh Kumari's case (supra) the basic issue did not relate to the methodology to be adopted which was expressly dealt with in All India Institute of Medical Sciences's case (supra), Gangadhar's case (supra), Minu Kumari's case (supra) and Hari Singh's case (supra). The view expressed in Ramesh Kumari's case (supra) was reiterated in Lallan Chaudhary and Ors. V. State of Bihar (AIR 2006 SC 3376). The course available, when the police does not carry out the statutory requirements under Section 154 was directly in issue in All India Institute of Medical Sciences's case (supra), Gangadhar's case (supra), Hari Singh's case (supra) and Minu Kumari's case (supra). The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to its notice show that cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Sections 190 read with Section 200 of the Code. It appears that in the present case initially the case was tagged by order dated 24.2.2003 with WP(C) 530/2002 and WP(C) 221/2002. Subsequently, these writ petitions were de-linked from the aforesaid writ petitions.

8. The writ petitions are finally disposed of with the following directions:

(1) If any person is aggrieved by the inaction of the police officials in registering the FIR, the modalities contained in Section 190 read with Section 200 of the Code are to be adopted and observed.

(2) It is open to any person aggrieved by the inaction of the police officials to adopt the remedy in terms of the aforesaid provisions.

(3) So far as non-grant of sanction aspect is concerned, it is for the concerned government to deal with the prayer. The

concerned government would do well to deal with the matter within three months from the date of receipt of this order.

(4) We make it clear that we have not expressed any opinion on the merits of the case."

36. The decision of Aleque padamsee (supra) has though been referred by the Constitution Bench in Lalita Kumari but has neither been distinguished nor over-ruled and therefore, the same continues to hold the field. That the view taken by the Apex Court in case of Aleque Padamsee (supra) and Sakiri Vasu (supra) has been subsequently reiterated and reaffirmed in the case of ***Sudhir Bhaskar Rao Tambe Vs. Hemant Yashwant Dhage and Ors - (2016) 6 SCC 277***, which is as follows :-

"2. This Court has held in Sakiri Vasu Vs. State of U.P. (supra), that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case (supra) because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

3. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under Section 156(3) CrPC and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation."

37. In matters of this nature, there are two competing rights, on the one side right of complainant/victim that perpetrator of crime be punished and justice be rendered to him and on the other side the right of the accused for fair investigation before he is implicated and fair trial before he is convicted. He also has inviolable right to life and liberty. Code of Criminal Procedure incorporates enough safeguards to victims and accused. It lays down detailed procedure in conducting investigation, filing of final report, taking of cognizance, conducting of trial. It provides enough safeguards against illegal action of police. It is a self contained code and comprehensive on all aspects of criminal law. A complainant has statutorily engrafted remedies to ensure that his complaint is taken to its logical end. Thus, he must first exhaust said remedies and cannot invoke extra-ordinary writ remedy as a matter of course, even when crime is not registered and there is no progress in the investigation.

38. Accordingly, the principal issue No.1 is decided by holding that writ of mandamus can be declined due to non-

availing of alternative remedy when the cause shown is non-registration of offence under Section 154 Cr.P.C. despite furnishing information of commission of cognizable offence.

39. Turning to the peripheral issues and taking up the first in that category, which is as under:-

"Can relief of writ of mandamus be denied to the informant merely on the ground that the informant is not an aggrieved person or victim and whether such person becomes functus officio after informing the police of commission of cognizable offence?"

40. A bare perusal of terminology employed by the legislature in Section 154 Cr.P.C discloses that even a stranger to the offence can inform the police about commission of any cognizable offence. Object behind this is that legislature did not want that any cognizable offence committed in the society should go uninvestigated and untried if found to be prima facie committed. By restricting the connotation of the expression "informant" to that of "victim" would defeat this object. Accordingly, once Section 154 enables even a stranger to the cognizable offence to invoke statutory powers of the police of registration of offence (which is now held to be mandatory by the verdict of Apex Court in Lalita Kumari), then the act of failure of police to perform this statutory duty can certainly accrue cause of action to the stranger to seek writ of mandamus under Article 226 of the Constitution of India from the superior Court to compel the police to perform its statutory duty under Section 154 Cr.P.C.

41. Consequently even a stranger to a cognizable offence has locus standi to seek issuance of mandamus against the police to act under Section 154 Cr.P.C. provided such stranger is the first informant.

42. As regards peripheral issue No.2, it is seen that the same relates to question whether proposed accused in the first information is entitled to a hearing before the writ court in a petition seeking mandamus under Article 226 directing the police to register the FIR under Section 154 Cr.P.C.

43. Reverting to the terminology of Section 154 Cr.P.C. one finds that the statute does not contemplate any prior hearing to the proposed accused before registration of cognizable offence. Thus, the natural consequence that follows is that while issuing writ of mandmus directing the police to perform its statutory duty under Section 154 Cr.P.C the accused is not required to be heard.

44. Accordingly, peripheral issue No.2 is decided by holding that proposed accused whose name is mentioned in the FIR is not a necessary party, in a writ seeking issuance of mandamus against police authorities compelling them to perform their statutory duty under Section 154 Cr.P.C.

45. Before parting, the conclusion arrived at based on the above discussion and analysis is delineated below for ready reference and convenience :-

(1) Writ of mandamus to compel the police to perform its statutory duty under Section 154 Cr.P.C can be denied to the informant/victim for non-availing of alternative remedy under Sections 154(3), 156(3), 190 and 200 Cr.P.C., unless the four exceptions enumerated in decision of

Apex Court in the the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 1, come to rescue of the informant / victim.

(2) The verdict of Apex Court in the case of Lalita Kumari Vs. Government of U.P. & Ors. reported in (2014) 2 SCC 1 does not pertain to issue of entitlement to writ of mandamus for compelling the police to perform statutory duty under Section 154 Cr.P.C without availing alternative remedy under Section 154(3), 156(3), 190 and 200 Cr.P.C..

(3) The informant/victim after furnishing first information regarding cognizable offence does not become functus officio for seeking writ of mandamus for compelling the police authorities to perform their statutory duty under Section 154 Cr.P.C in case the FIR is not lodged.

(4) The proposed accused against whom the first information of commission of cognizable offence is made, is not a necessary party to be impleaded in a petition under Article 226 of the Constitution of India seeking issuance of writ of mandamus to compel the police to perform their statutory duty under Section 154 Cr.P.C.

46. From the above discussion of facts and analysis of law including the judicial verdict relied upon, we do not find any force in the argument as advanced by learned counsel for the petitioner. Consequently, the writ petition is ***dismissed.***

However, it will be open for the petitioner to avail appropriate remedy available under law before appropriate forum.

(2021)01ILR A634
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.01.2021

BEFORE

THE HON'BLE ALOK SINGH, J.
THE HON'BLE KARUNESH SINGH PAWAR, J.

Misc. Bench No. 24807 of 2020

Sharda Rani ...Petitioner
Versus
G.M., Lucknow Jal Sansthan, Lucknow & Anr. ...Respondents

Counsel for the Petitioner:
Meena Verma, Ajay Tripathi

Counsel for the Respondents:
Namit Sharma

(A) Fundamental Right - Right to access to drinking water - Constitution of India- Article 21 - It is the duty of the State to provide clean drinking water to its citizens. (Para 9)

The possession of the petitioner in the house in question has been admitted by learned counsel for the intervener and the same is not in dispute, therefore in view of the law laid down by the Supreme Court, the Lucknow Jal Sansthan is under legal obligation to provide water connection to the petitioner. (Para)

Writ Petition Disposed of. (E-8)

List of Cases cited :-

1. A.P. Pollution Control Board II Vs Prof. M.V. Nayudu (Retd.) & ors. (2001) 2 SCC 62

2. Delhi Water Supply & Sewage Disposal Undertaking & anr. Vs St. of Har. & ors. (1996) 2 SCC 572

(Delivered by Hon'ble Alok Singh, J. & Hon'ble Karunesh Singh Pawar, J.)

1. Mr. Neel Kamal Mishra, Advocate made a mention that he has moved an application for impleadment in the Registry on 8.1.2021, however, the same is not on record.

2. Office is directed to trace the application and place it on record today itself.

3. On due appreciation, we permit the applicant Arvind Dharamrajan in C.M. Application No.4352 of 2021, to assist the Court as an intervener under Chapter XXII Rule 5-A of Allahabad High Court Rules. Application is disposed of accordingly.

4. Heard learned counsel for the petitioner and Mr. Ankur Tripathi, holding brief of Mr. Namit Sharma, learned counsel for respondents, as also Mr. Neel Kamal Mishra, Advocate for the applicant Arvind Dharamrajan, as an intervener.

5. Learned counsel for the petitioner submits that the petitioner is a lady whose husband Hariraj died on 2.4.2005. The first wife of Hariraj (petitioner's husband) died in the year 1982 and thereafter the petitioner married with Hariraj who was the owner of House No.9/961, Indira Nagar, Lucknow. After the death of the petitioner's husband, son of the first wife disconnected electricity and water connection of the first floor of the house where the petitioner resides along with her two minor children.

The petitioner's counsel submits that the petitioner is willing to complete all the formalities which are required by Lucknow Jal Sansthan.

6. Learned counsel appearing for Lucknow Jal Sansthan submits that they will provide the water connection provided the petitioner fulfills the formalities as provided under U.P. Nagar Mahapalika Water Supply Rules, 1968.

7. On the other hand, Mr. Neel Kamal Mishra, Advocate appearing for Mr. Arvind Dharamrajan, applicant submits that the mother of the applicant died in the year 1982 and thereafter the petitioner had married late Hariraj Ram. He submits that the applicant is the owner of the said house and has inherited the said house from his late father Hariraj Ram on his death in the year 2005. The applicant had constructed the house in question.

He disputed the fact that mother of the applicant died in the year 1982; rather submits that she died in the year 1988 and thus the marriage of the present petitioner with the late father of the applicant was not a valid marriage.

He next submitted that after the death of the father of the applicant, the petitioner raised claim for compassionate appointment and by presenting false claim, the appointment of the applicant on compassionate ground was challenged by the petitioner while filing Writ Petition No.1752(S/B) of 2008 Sharda Rani versus Director, Samaj Kalyan and others which was decided ex parte in her favour vide judgment and order dated 26.7.2013. Review petition filed by the present applicant was allowed and the writ petition preferred by the petitioner was dismissed. It is thus submitted that the petitioner's marriage with late Hariraj Ram was not proved and she cannot have any claim over the house No.9/61, Indira Nagar, Lucknow.

8. Learned counsel for the applicant disputes the fact that the applicant/intervener stopped water

connection to the first floor. He submits that the petitioner is somehow trying to get a water connection in her favour, only in order to get benefit of the same for the purpose of using it in succession suit which is pending before Civil Judge (Junior Division), Azamgarh.

9. After hearing parties' counsel and after perusal of the record, we are of the view that right to access to drinking water is a fundamental right to life and there is a duty on the State under Art. 21 of the Constitution of India to provide clean drinking water to its citizens. Hon'ble Supreme Court in **A.P. Pollution Control Board II versus Prof.M.V. Nayudu(Retd) and others (2001)2 SCC 62** (paragraphs 3 and 4) has held as under :

"3. Drinking water is of primary importance in any country. In fact, India is a party to the Resolution of the UNO passed during the United Nations Water Conference in 1977 as under:

"All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs."

Thus, the right to access to drinking water is fundamental to life and there is a duty on the State under Article 21 to provide clean drinking water to its citizens.

4. Adverting to the above right declared in the aforesaid Resolution, in Narmada Bachao Andolan Vs. Union of India (2000(7) Scale 34 (at p.124), Kirpal J observed:

"248. Water is the basic need for the survival of human beings and is part of right to life and human rights as enshrined in Article 21 of the Constitution of India....."

In Delhi Water Supply & Sewage Disposal Undertaking and another versus State of Haryana and others (1996)2 SCC 572 (relevant paras 3 and 4), Hon'ble Supreme Court has made the following observations :

"3.....The learned counsel took pains to bring to our notice by referring to some decisions of the American Court, as well as to some writings, that drinking is the most beneficial use of water and this need is so paramount that it cannot be made subservient to any other use of water, like irrigation. So, the right to use of water for domestic purpose would prevail over other needs. It is because of this that it was contended that what has been stated in Article 262 of the Constitution dealing with adjudication of disputes relating to waters of inter-State river or river valleys, read with Inter State Water Disputes Act, 1956, could not exclude the jurisdiction of this Court to entertain the grievance of the petitioner.

4. Shri Venugopal - in support of his contentions relied upon high authorities of State of Connecticut vs. Commonwealth of Massachuhetts; American Jurisprudence, Vol.78, 2d p.293; and C.D. Harris vs. John Brooks. We found plausibility in the contentions and were inclined to unfold new jurisprudential arena, despite strong objection to the same being taken by the State of Haryana....."

10. Since the possession of the petitioner in the house in question has been admitted by learned counsel for the intervener and the same is not in dispute, therefore in view of the law laid down by Hon'ble Supreme Court, referred to above, we are of the view that the respondent Lucknow Jal Sansthan is under legal obligation to provide water connection to the petitioner.

11. In view of the above, with the consent of the parties' counsel, we dispose

of this petition with a direction to Lucknow Jal Sansthan to provide water connection to the petitioner, strictly in accordance with rules, within a period of one week from the date of receipt of an E-copy of this order provided the petitioner completes all the formalities as provided under U.P. Nagar Mahapalika Water Supply Rules, 1968.

12. With this direction the writ petition is disposed of.

It is made clear that this order shall not confer any title or right to any of the parties, to be used in any other proceedings.

(2021)01ILR A637
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.01.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 24919 of 2020

Devsthan, Saidapur ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Aslam

Counsel for the Respondents:
C.S.C., Dilip Kumar Pandey

(A) Land Law - Resumption of land - U.P. Revenue Code, 2006: Section 59(4) c - Revenue Code Rules, 2016- Rues 54, 55 - Failure to publish the notification in the Gazette and the daily newspaper so as to give general notice to the public at large that the resumed and vests in the State Government free from all encumbrances, does not result in vitiating the whole exercise of resumption. It is only an irregularity and not an illegality that goes to the root of the matter. (Para 42)

The Court had observed that there are three categories of persons vis-a-vis locus standi; (1) person aggrieved; (2) a stranger; (3) a busy body or a meddlesome interloper. At the time of the resumption of land, the land in question was recorded in the name of the Gram Sabha and not in the name of Devasthan, therefore, he cannot be said to be an "aggrieved person". (Para 35)

The High Court can under Article 32 or 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed in favour of the petitioner and against the opposite party in violation of the principles of natural justice or is not in accordance with law. (Para 43)

Writ Petition Rejected. (E-8)

List of Cases cited :-

1. Vijai Kumari Vs Consolidation Officer Sawaijpur, Hardoi & 2 ors. 2019 (37) LCD 1701 AIR 1977 Allahabad 360

2. Jasbhai Motibhai Desai Vs. Rosha Kumar, Haji Bashir Ahmad & ors. 1976 (3) SCR 58

3. Nagar Rice & Flour Mills & ors. Vs. N.T. Gowda (1970) 1 SCC 575

4. M.C. Mehta Vs U.O.I. & ors. (1999) 6 SCC 237

5. Gadde Venkateswara Rao Vs. Government of An.P. & ors. AIR 1966 Supreme Court 828

6. Mohd. Swalleh & ors. Vs III A.D.J. (1988) 1 SCC 40

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

1. Heard Sri Mohd. Arif Khan, learned Senior Advocate, assisted by Sri Mohd. Aslam Khan, learned counsel for the petitioner, Sri Upendra Singh, learned Additional Chief Standing Counsel and Sri Dilip Kumar Pandey, learned counsel appearing on behalf of the Gaon Sabha.

2. This petition has been filed by the petitioner through its Mahant/Savarkar Prem Giri Maharaj challenging the order dated 30.09.2019 passed by the Commissioner Lucknow Division Lucknow (hereinafter referred to as "respondent no.2").

3. A preliminary objection has been raised by the counsel for the State Respondents regarding the maintainability of this petition challenging an order resuming land belonging to the Gaon Sabha. It has been submitted by the learned Standing Counsel that the order dated 30.09.2019 has been issued in the exercise of powers given to the State Government under Section 59(4) c of the U.P. Revenue Code 2006 (hereinafter referred to as "the code"). By this order the State Government has exercised its power to resume land that was initially entrusted to the Gaon Sabha from the date of vesting, for a public purpose that is for establishment of a medical college in the district Lakhimpur Kheri. The petitioner is not the recorded tenure holder of the land in question and therefore has no locus to challenge the order dated 30.09.2019. The Gaon Sabha has not come to Court to challenge the order dated 30.09.2019. The learned counsel for the petitioner however has emphasised that if this Court is apprised of the facts leading to the order of resumption being passed, it will be convinced that the action of the State Respondents smacks of arbitrariness and violation of principles of natural justice and has caused grave injustice to the petitioner.

4. Sri Mohd. Arif Khan, learned Senior Advocate, has submitted that the petitioner is "aggrieved person " and his writ petition cannot be thrown out on the ground of *locus standi*. Learned counsel for the petitioner has gone on to argue that the petitioner Devasthan owned several plots of land in village Saidapur bhau, namely, old plot no. 1522, 1523 and 1524 wherein a temple, a well, several Samadhis, Yagya Shala, Gaushala and Ashram have been in existence for a long time. Plot no.1523 (new plot no. 755) and plot no.1524 (new plot no.756) are recorded in the name of Mandir Shri Thakurji Devsthan Kuti Saidapur bhau, Savarkar Mathura Das alias Taapsee Babaji, and there is no dispute regarding the same. However, there is an adjoining plot, Plot no. 1522 in which a dispute has arisen as the State Government through the respondent no. 2 has resumed the property in question without following the principles of natural justice and without following the procedure prescribed under the law.

5. Village Saidapur Bhau was notified for consolidation operations on 11.09.1965. The predecessor in interest of the current Sarvarakar Prem Giri Maharaj, had filed objections before the Assistant Consolidation Officer in Case No.808 alleging that the plot no. 1522, ad-measuring 27.27 acres, had been wrongly recorded in the revenue records as Jungal Jharee. The Assistant Consolidation Officer allowed the objection of Mathura Das alias Taapsee Baba and directed the plot in question to be recorded in the name of the petitioner through an order dated 15.12.1967. It was given effect to in C.H. Form 11, and thereafter, the entry was also made in C.H. Form 41 and 45. The Consolidation operations came to an end and a notification under Section 52 was issued on 25.07.1970. The Khatauni prepared during consolidation operations showed the said plot of land as a new plot no.754 Min. ad-measuring 26.91 acres in the name of Devsthan and the remaining

land of the plot ad-measuring 0.36 decimal, was recorded as Banjar that is belonging to the Gram Sabha.

6. All of a sudden the petitioner came to know from the Pradhan of the village concerned that the land of plot no.754 Min. is being proposed to be used for construction of a medical college. On enquiry the petitioner found out that an appeal had been filed by the Gram Sabha against the order dated 15.12.1967 passed by the Assistant Consolidation Officer with the huge delay of 51 years before the Settlement Officer Consolidation Sitapur. Such Appeal was filed only on 24.09.2019 along with an application for condonation of delay supported by an affidavit. Notice was issued to the petitioner but it was never served upon the petitioner. It was shown by the process server to have been affixed on the wall of the primary school of the village concerned in the presence of two witnesses. The petitioner could not file his reply/objections to the maintainability of the said Appeal. A report was summoned from the Consolidation Officer and file was summoned from the Revenue Record Room on 26.09.2019. The file was never sent. However, the order was passed by the Settlement Officer Consolidation allowing the appeal on 28.09.2019.

7. Within two days of passing of the said order, the same was sent to the revenue officials of the village to get the land demarcated and taken possession of, and at the same time getting its Amaldaramad /endorsement of the order in the revenue records i.e the Khatauni. The land was recorded in the name of the Gaon Sabha within no time. On 30.09.2019 itself the State Government through the respondent no.2 exercised its power of resumption under section 59(4)c of the Code and resumed an area of 3 ha, i.e. 7.50 acres out of 26.19 acres of plot no.754 Min. for establishing a medical College, vesting the land in the State Government through Secretary, Medical Education.

8. It has been submitted by the learned counsel for the petitioner that long-standing entry in the revenue records was set aside and the land first recorded in the name of the Gram Sabha and thereafter resumed by the Government arbitrarily. Not only was the petitioner not given any notice, the procedure prescribed under section 59(4)c and Rules 54 and 55 of the Revenue Code Rules 2016 (hereinafter referred to as "the rules of 2016")was not followed.

9. It has been submitted on the basis of paragraph-18 of the writ petition that notice is required to be published in the Gazette and two daily newspapers, one of which should be in Hindi, circulating in the area in which the land is situated as information to the general public that land is being sought to be resumed by the State Government. No such publication was done.

10. It has been further submitted that in similar circumstances, land was resumed of a graveyard by the Collector Raebareli. This Court passed an interim order staying the operation the order of resumption in Writ Petition No. 12320 (M/S) of 2020: *Mohammed Siddiq vs. State of U.P. and others,* by its order dated 06.08.2020.

11. The learned Standing Counsel appearing on behalf of the State Respondents has submitted that initially plot nos. 1523, 1524 along with plot no. 1522 was recorded as *Jangal Jharee and Banjar* in the basic Khatauni. In the basic

year Khatauni, the entry was in favour of Gaon Sabha as plot no. 1524 along with other plot nos. was recorded in Banjar Khata of the Gram Sabha. The Assistant Consolidation Officer's order appeared to be a fraudulent entry in Form C.H. 11 as the Assistant Consolidation Officer can exercise power of correction of entry only on the basis of compromise between the parties recorded under section 9A1. Section 9A1 proceedings are held before consolidation Scheme is published under Section 10. The publication under Section 10 alone is done Form C.H. 11. The Assistant Consolidation Officer in his order dated 15.12.1967 did not mention under which provision of the Act the objections had been filed and decided by the Assistant Consolidation Officer. The order dated 15.12.1967 was also not found in the Record of the consolidation operations that was submitted in the Revenue Record Room. In the report submitted by the officials on 26.09.2019, it has come out that the alleged order dated 15.12.1967 converting to 27.27 acres of land of old plot no. 1522 giving it new no. 754 Min. from Jungal Jharee to Devasthan is only found on one copy of Form C.H. 11. The records relating to consolidation operations in a village are always prepared in duplicate. One of the copies is kept in the Revenue Record Room and the second copy is kept in the concerned Tehsil office. The other copy of Form C.H.11 preserved in the Revenue Record Room does not have any such entry. Moreover, a close examination of Form C.H. 41 showed that old plot no.1522 was initially ad-measuring 27.27 Acres however in the comments adjacent to such entry, 26.91 acre has been recorded in the name of Devasthan and 0.36 decimal has been shown to be recorded as "Anya Banjar". The circumstances for such comments being added in Form C.H. 41 by scoring out earlier entry of Banjar/Jungle Jharee remained a mystery as, had the Assistant Consolidation Officer passed an order in exercise of power under section 9A1, and entry would have been made in C.H. Form 4 and not in C.H. Form 11 only, thereafter, the order would have been incorporated in C.H. Form 41. The order dated 15.12.1967, having been passed earlier, there would be no requirement of scoring out the Original entry in Form C.H. 41, as Form C.H. 41 is always prepared after Form C.H. 11. On the basis of instructions received, signed by the Consolidation Officer, the Additional District Magistrate (Finance & Revenue) and the District Magistrate, (which instructions have been kept on record by this Court), it has also been submitted by the learned Standing Counsel that no entries were found in Form C.H. 2A or in Form C.H. 4 in the basic year Khatauni, in the name of Devasthan on old plot no. 1522.

12. It has been submitted by Sri Upendra Singh that the Assistant Consolidation Officer neither under Rule 24 A2, nor under Rule 25K, had any jurisdiction to pass any order recording land vested in the Gramsabha as Banjar or Jungle Jharee, in the name of any private person as Savarkar of a Devasthan.

13. It has also been submitted by the learned Standing Counsel that the petitioners reliance on the order dated 15.12.1967 passed allegedly by the Assistant Consolidation Officer is also misplaced because the Assistant Consolidation Officer had no power to change the nature/Navvaiyyat of any land recorded in the basic year as Jungle Jharee or Banjar belonging to the Gram Sabha. The learned counsel for the State

Respondents has placed reliance upon the Coordinate Bench decision in Writ Petition No. 6946 (Consolidation) of 2019, ***Vijai Kumari vs Consolidation Officer Sawaijpur, Hardoi and two others*** reported in ***2019(37) LCD 1701***, to substantiate his argument.

14. This Court had decided a bunch of writ Petitions where orders passed by the Consolidation Officer were questioned in which the land in dispute was ordered to be recorded as per revenue records in the same *Khata* as pertaining to 1379 Fasli in the basic year Khatauni, after expunging the name of the writ petitioners. This Court noticed that before 31.10.1980 the land which was the subject matter of the writ petition was recorded in Category VI, in terms of paragraph A-124 of the U.P. Land Records Manual. Category VI relates to barren land that is an uncultivated land or *Akrishak Bhumi* which is further sub-divided as land covered under water, camping sites, roads, railways, buildings and other lands put to non-agricultural uses and land with which is otherwise barren. Category V as per Land Record Manual denotes cultivable land with different sub-categories such as Naveen Parti, Parti Jadeed or Krishi Yogya Banjar, or cultivable waste. On a resolution being passed by the Land Management Committee of the Gram Sabha for changing the nature of land from Category VI to Category V, a report was submitted by the Lekhpal and the Sub-Divisional Officer changed the category of land in question and land earlier recorded in Category VI like *Naala, Charagah, Khalihan and Devasthan* etc, were recorded in Category V as *Krishi Yogya Bhumi. Pattas* were granted thereafter to the writ petitioners and their names were recorded in the relevant *Khata*. On consolidation operations being undertaken in the village in 2004, the petitioners were given valuation of these plots in their possession, and the *Chaks* were allotted thereafter. The orders of the consolidation authorities were given effect to in the *Khatauni* in 2013.

15. Later an application under section 198 (4) for cancellation of *pattas* was filed by the Gram Sabha before the Collector which was referred to the Assistant Consolidation Officer. The Consolidater submitted a report that the land in question was earlier recorded in 1379 Fasli as public utility land referable to land described under Section 132 of the U.P.Z.A. & L.R. Act. No pattas of permanent nature in respect of such land were permissible. Only temporary *Asaami pattas* could have been given. To obviate this difficulty the category of land was changed from Category VI to Category V. The Consolidation Officer being convinced that category had been wrongly changed by the Sub-Divisional Officer passed an order in 2019, directed the land to be recorded in the name of Gaon Sabha as public utility land.

16. The writ petitioners had challenged the order on the ground that such action was barred by the provisions of Section 11 A of the U.P. Consolidation of Holdings Act. The learned counsel for the writ petitioners has relied upon a Full Bench decision of this Court reported in **AIR 1977 Allahabad 360**, that the Consolidation Officer is not vested with any power to adjudicate upon the validity of the Patta, except in exceptional circumstances and therefore the Consolidation Officer's finding on the validity of the pattas which were executed in 1992 was bad in law. The Sub-Divisional Officer having changed the

category of land from Category VI to Category V, and thereafter allotting the said land to the writ petitioners was in terms of the provisions of paragraph, Ka-155 Ka of the U.P. Land Records Manual.

17. This Court considered the arguments raised by the counsel for the writ petitioners but found that since the Sub-Divisional Officer could not have changed the category of land from Category VI to Category V, thus giving away public utility land to the writ petitioners, such action was *void ab initio* and not voidable, requiring appropriate proceedings to be drawn for its cancellation. The Court also determined the question as to whether the District Collector could have entertained the delayed application under Section 198(4) of the U.P.Z.A. & L.R. Act. It also considered the issue of the power of the Sub-Divisional Officer under paragraph Ka- 155 Ka of the Land Records Manual. The Court referred to Section 195 of the U.P.Z.A.& L.R. Act and also Section 132. Only that land could be given in pattas/leases as was not covered under Section 132 which related to public utility land. No permanent leases or Pattas could be granted, no Bhumidhari the rights could accrue on land covered under section 132.

18. Having considered the provisions of the U.P. Land Records Manual and also of the U.P.Z.A.& L.R. Act and the Land Revenue Act, (later replaced by the U.P. Revenue Code), and the provisions of U.P. Consolidation of Holdings Act, this Court came to the conclusion that there was no substantive provision in the principal legislation which vested any authority or jurisdiction in an officer to change the category of land, the U.P. Land Records Manual being subordinate legislation, could not be used for doing an act which was not contemplated under the principal legislation. The Pattas or the leases executed in 1992 in favour of the petitioners were void ab initio, and therefore, even if the names of the writ petitioners were recorded in the Khatauni on the basis of pattas executed in their favour, and in the basic year Khatauni, and during consolidation operations their rights had matured, the basic year entries being void ab initio, the writ petitioners could not be permitted to take benefit of a mistake committed by the officials. The Court held that the full bench decision in **AIR 1977 Allahabad 360** holding that the Consolidation Officer had no jurisdiction to cancel the Pattas was distinguishable and could not save the writ petitioners as their pattas were held to be void ab initio.

19. The Court also referred to Section 11 C of the Act and observed that the consolidation authorities up to the level of Deputy Director of Consolidation have a duty to protect land which is vested in the State, even though no objection or Appeal or Revision has been preferred by the State or the Gaon Sabha or the local authority concerned.

20. The learned Standing Counsel on the basis of instructions, has also submitted that even if the petitioners contention is accepted that the file of case no.808: Baba Mathuradas versus Gram Sabha; decided on 15.12.1967 had been weeded out on 02.02.1981, and that such a case was genuinely filed as a its entry has been found on the Register maintained in the record room at serial no.1737, the fact still remains that the Assistant Consolidation Officer had no power or jurisdiction to pass an order changing the nature of land from

Banjar and *Jungle Jharee to Devsthan*. Such order being without jurisdiction would be *void ab initio*.

21. It has further been submitted by Sri Upendra Singh that after resuming the land by the order dated 30.09.2019, a copy of the same was sent to the office of the District Magistrate who sent it to the office of Tehsildar Lakhimpur Kheri with a direction that the land in question be measured, demarcated and handed over and its endorsement/Amaldaramad on the revenue records be done expeditiously. A further direction was issued that a copy of the order of the Commissioner dated 30.09.2019 be pasted on the noticeboard at a conspicuous location in the village concerned, and copy of the report of such affixation be also sent to the office of the District Magistrate. Moreover, a letter was sent to the office of the Nazir Sadar to get the order pasted on the noticeboard of the Collector's Office for notice to all concerned. After such order was pasted on the noticeboard in the District Collector's office, and affixed on public place in the village concerned, and Amaldaramad of the same was made in the Khatauni, land stood vested in the State Government. Sufficient compliance has been made of the Rules to bring to the notice of all concerned that the land in question has vested in the State. It was only due to inadvertence that publication of such order dated 30.09.2019 resuming land in village Saidapur Bhau, was not published in the Gazette and two new newspapers and proceedings are now being initiated to get the order so published.

22. It has also been submitted on the basis of instructions that notice with regard to the filing of the Appeal by the Gramsabha was sent to the village concerned but since the entry of Devsthan in C.H. Form 11 and C.H. Form 41, did not show the name of the Savarkar, the notice was affixed on the Primary School, a public building in the village for notice to all concerned.

23. It has been pointed out again that the order dated 30.09.2019 resuming land of plot no. 152 min. had been passed at a time when the land in question was recorded in the name of the Gaon Sabha and not in the name of Devasthan, therefore the petitioner had no locus to challenge the same and pray for a writ in the nature of Certiorari. The petitioner being mainly aggrieved by the order passed by the Settlement Officer Consolidation had statutory remedy of filing a Revision against the order of the Appellate Authority under the Consolidation of Holdings Act.

24. In rejoinder to the argument made by the learned counsel for the State Respondents, the learned counsel for the petitioner submitted that the petitioner on having come to know of the order dated 28.09.2019 belatedly, has filed a Revision before the Deputy Director of Consolidation in August, 2020 which has also been dismissed on 15.01.2021. It has been submitted that the Deputy Director of Consolidation being a District Level Officer could not go against the orders passed by the State Government or the Commissioner of the Division resuming the land and thus unravelling the plan of the State Government. It was argued that this Court alone in writ jurisdiction can interfere in such arbitrary action of the State Respondents. The learned counsel for the petitioner has argued that he would file a writ petition challenging the order passed by the Settlement Officer challenging and the Deputy Director Consolidation before

this Court very soon however, the notification dated 30.09.2019 resuming the land in question would not be set aside in such a writ petition.

25. On the question of the locus of the petitioner to challenge the notification dated 30.09.2019 which had resumed the land of the Gaon Sabha in favour of the State Government, the counsel for the petitioner has failed to answer the specific query of the Court as to how the petitioner can be said to be a "person aggrieved" and how a writ in the nature of Certiorari can be issued on the asking of a person who is not "a person aggrieved." The learned counsel for the petitioner has repeatedly emphasized that this Court should interfere on grounds of equity, taking into account the fact that the order passed by the Settlement Officer Consolidation, condoning the delay of 51 years is arbitrary and has been passed with unholy haste. It has been submitted that the Settlement Officer Consolidation took only four days to decide the Appeal and such decision was taken in the absence of the original record of Case No. 808: Baba Mathuradas versus Gaon Sabha, being before him.

26. It has also been submitted by the learned counsel for the petitioner that after the impugned order dated 30.09.2019 was issued, a proposal was made by the Sikh community of village Tahirpur in the same District, of donating land for the purpose of the medical College. The proposal was approved by the Secretary Medical Education and recommendation made to the State Government to accept the same on 23.10.2020. The State Government in its intransigence refused to accept the said proposal and has passed an order on 23.11.2020 reiterating its plan to construct Medical College on the land of the petitioner.

27. It has been submitted that while issuing the notification dated 30.09.2019 and by reiterating its decision on 23.11.2020, the State Government has omitted to consider the guidelines framed by the Government in its order dated 03.06.2016 wherein it has been proposed in paragraph 5(7) that in case of graveyards, cremation grounds and other religious sites, care should be taken that the same are not resumed if they are likely to inflame religious sentiments. In the case of the petitioner, a temple already existed on the property in question and a suitable land in the alternative in a different village has also been offered by the Sikh community, yet the impugned notification has been issued.

28. Lastly, it has been submitted that since on similar facts Writ Petition No.12320 (M/S) of 2020 has been entertained by this Court and an interim order passed on 06.08.2020, this instant writ petition be connected with Writ Petition No.12320 (MS) of 2020 and similar interim order be passed and both the writ petition be heard together.

29. The counsel for the Gaon Sabha Sri Dilip Kumar Pandey has also argued that he has instructions to submit that the Gaon Sabha has no intention of challenging the order dated 30.09.2019 as it has been issued for an avowed public purpose of establishing a Medical College and a referral Hospital in the District which is an object of greater public good than having a Devasthan. He also submits that a temple already exists in the village. A fraudulent entry of an alleged order passed on

15.12.1967 in C.H. Form 11 had been made recording 26.91 acres of plot no.1522 as land belonging to Devasthan. The basic year entry of Banjar, Jungle Jhari and Naveen Parti has been restored which amounted to restoration of the right of the Gram Sabha when the Settlement Officer Consolidation allowed the appeal of the Gram Sabha.

30. Having heard the learned counsel for the petitioner and for the State Respondents and the Gaon Sabha, this Court has carefully perused the order impugned which is an order of resumption of land entrusted to the management of the Gram Sabha by the State Government in exercise of its plenary powers. The Supreme Court in several decisions has laid down the law as to when a writ in the nature of Certiorari can be issued by the High Court.

31. In ***Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmad and others, 1976 (3) SCR 58***, a four Judges Bench of the Supreme Court while relying upon ***Nagar Rice and Flour Mills and others vs. N. T. Gowda 1970 (1) SCC 575***, had laid down the law with regard to "standing" and the requirement of a "person aggrieved" while issuing a writ in the nature of Certiorari under Article 226 of the Constitution of India. It was observed that Article 226 has been couched in a comprehensive phraseology to enable the High Court to reach injustice wherever it is found. In a sense, the scope and nature of the power conferred by the Article is wider than that exercised by the Court in England. However, the adoption of the nomenclature of English writs, with the prefix, "nature of " being super added, indicates that the general principles grown over the years in the English Courts, can, shorn of technical and procedural restrictions, and adapted to special conditions of this vast country in so far as they do not conflict with the provisions of the Constitution, or the law declared by the Supreme Court, be usefully considered in directing the exercise of this discretionary jurisdiction in accordance with well recognised rules of practice. The jurisdiction under Article 226 in general, and Certiorari in particular, is discretionary. In a country like India wherein petitions are instituted in the High Courts by the thousands, many of them frivolous, ascertainment at the outset, of the "standing" of the petitioner to invoke this extraordinary jurisdiction must be insisted upon. According to most English decisions, in order to have the locus standi to invoke Certiorari jurisdiction the petitioner should be an "aggrieved person" and, only in case of defect of jurisdiction, such a petitioner would be entitled to a writ of certiorari as a matter of course, but if he does not fulfil that character, and is a stranger, the Court will, in its discretion deny him this extraordinary remedy, save in very special circumstances. The Court had pointed pointed out three categories of persons vis-a-vis locus standi; (1) person aggrieved; (2) a stranger; (3) a busy body or a meddlesome interloper. The Honble judges in decision of Jasbhai Motibhai Desai (supra) pointed out that anyone belonging to the third category is easily distinguishable as such person interferes in things which do not concern him as he masquerades to be a crusader of justice. The judgement had cautioned that the High Court should do well to

reject the petitions of such busybodies at the threshold itself.

32. Their lordships observed the following:-

"the distinction between the first and the second categories of applicants though real is not always well demarcated. The first category has as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outer most nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of person aggrieved. In the grey outer circle the bounds which separate the first category from the second, intermix, inter-fuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be person aggrieved."

33. The Supreme Court went on to observe that in India, in order to have the locus standi to invoke the extraordinary writ jurisdiction under Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject matter of the application, though in case of some of the writs, like habeaus corpus or quo warranto, this rule is relaxed or modified. So as a general rule, infringement of some legal right or prejudice to some legal interest inherent in the petitioner is necessary to give a locus standi in the matter. The Supreme Court observed that the appellant in the said case being a rival businessman had not been deprived of a legal right. He had not sustained injury to any legally protected interest. In fact, the impugned order did not operate as a decision against him, much less did it wrongfully affect his title to something. He had not been subjected to a legal wrong. He had suffered no legal injury. He had no legal peg for a justiciable claim to hang on. Therefore, he was not a person aggrieved and has no locus standi to challenge the grant of no objection certificate to a rival to establish a cinema hall in the same locality.

34. The Supreme Court further observed that Certiorari is a discretionary writ which is granted with a lot of circumspection. Even assuming that the appellant is a stranger and not a busybody, then also there are no exceptional circumstances in the case which would justify the issue of such a right at his instance. On the contrary, the result of exercise of these discretionary powers, in his favour, would, on balance, be against public policy.

35. It is evident from the documents on record that the Gaon Sabha was the recorded tenure holder of the property in question in the basic year khatauni. On the basis of some alleged order passed on alleged objection being filed by the predecessor in interest of the petitioner, Baba Mathuradas alias Taapsee Baba, the Assistant Consolidation Officer had without jurisdiction passed an order changing the nature of land and recording the same in the name of Devasthan. After the order dated 28.09.2019 passed by the Settlement Officer Consolidation the Gaon Sabha became the recorded tenure holder of the property again. At the time of resumption, the land in question was recorded in the name of the Gram Sabha and not in the name of Devasthan. Therefore, it cannot be said that the petitioner is an "aggrieved person".

36. The learned counsel for the petitioner has emphasized paragraph-18 of

the writ petition. The paragraph-18 of the writ petition is being quoted hereinbelow:-

"18. That section 59 (4) of the U.P. Revenue Code as well as relevant rules 54 and 55 are reproduced hereunder:

Section 59 (4)

(4) The State Government may, by a subsequent order to be published in the manner prescribed-

(a) add to, amend, vary or rescind any earlier order issued under sub section (1);

(b) transfer to any other Gram Sabha or other local authority, any land or other thing entrusted or deemed to be entrusted under sub-section (1) or sub-section (3) for superintendence, preservation, management and control;

(c) resume any land or other thing so entrusted, or deemed to be entrusted or transferred to any Gram Sabha or local authority on such terms and conditions as prescribed;

(d) impose conditions and restrictions subject to which the powers of superintendence, preservation, management and control under this section shall be exercised.

Rule 54 - mode of publication or order [under section 59 (1) and section 59 (4)]- The General or specific order referred in section 59 (1) and section 59 (4) shall be published in the gazette and in two daily newspapers, circulating in the locality of such area of which one shall be in Hindi Language.

Rule 55 - Resumption of private property by the State Government (section 59)

(emphasis supplied)

(1) - Where any land or other thing is entrusted or deemed to be entrusted to any Gram Panchayat or any local authority, and such land or other thing is sought to be resumed by the State Government under section 59 (4)(c) then it shall issue a notification specifying the particulars of such property, and the publication of the notification in the gazette shall be conclusive evidence that such property stands vested in the State Government.

(2) A copy of every such notification shall be sent to the Collector as well as the Gram Panchayat or the local authority concerned.

(3) Where the property referred to in sub rule (1) has already been allotted to any person under section 64 or section 125 of this Code or under the provisions of the Acts, repealed by this Code, and such allottee has made any improvement on such land before the date of notification, then the allottee shall be entitled to such compensation for improvement as the Collector may determine."

37. This Court has also perused Section 59 of the Code of 2006 as also Rule 54 and 55, which have been cited by learned counsel for the petitioner. Section 59 of the Code of 2006 as published in the Bare Act summoned from the Library, is being quoted hereinbelow in its entirety:-

"59. Entrustment of land etc. to [Gram Panchayats] and other local authorities.-- (1) The State Government may, by general or special order to be published in the manner prescribed, entrust all or any of the things specified in sub-section (2), which vest in the State Government, to a [Gram Panchayat] or other local authority for the purposes of superintendence, preservation, management and control in accordance with the provisions of this Code.

(2) The following things may be entrusted to a Gram Panchayat]. or other local authority under sub-section (1), namely,

(i) lands, whether cultivable or otherwise, except land for the time being comprised in any holding or grove;

(ii) grove standing on the [Gram Panchayat] land, pasture land, graveyard, cremation ground, manure pits, Khaliyans, Chakroads, link roads, sector roads, land in river bed, road, Sadak Khanti, Sullage farm;

(iii) forests; and fisheries;

(iv) trees, other than trees in a holding or on the boundary of a holding or in a grove or abadi, or any trees on unoccupied land;

(v) hats, bazaars, melas, tanks, ponds, water-channels, private ferries, pathways and abadi sites;

(vi) subject to the provisions of the Treasure Trove Act, 1878, any properties specified in Section 55 and belonging to the State Government.

(3) Every land or other thing-

(a) vested in a [Gram Panchayat] or any other local authority under the provisions of the Uttar Pradesh Consolidation of Holdings Act, 1953 or the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960;

(b) placed under the charge of a (Gram Panchayat) or any other local authority under any of the enactments repealed by this Code;

(c) otherwise coming into possession of a [Gram Panchayat] or other local authority, either before or after the commencement of this Code;

shall be deemed to be entrusted to such [Gram Panchayat] or other local authority, as the case may be, with effect from the date of commencement of this Code or from the date of such coming into its possession, for the purpose of superintendence, preservation, management and control, in accordance with the provisions of this Code.

(4) The State Government may, by a subsequent order to be published in the manner prescribed, -

(a) add to, amend, vary or rescind any earlier order issued under sub-section (1);

(b) transfer to any other [Gram Panchayat] or other local authority, any land or other thing entrusted or deemed to be entrusted under sub-section (1) or sub-section (3) for superintendence, preservation, management and control;

(c) resume any land or other thing so entrusted, or deemed to be entrusted or transferred to any [Gram Panchayat) or local authority on such terms and conditions as prescribed;

(d) impose conditions and restrictions subject to which the powers of superintendence, preservation, management and control under this section shall be exercised.

(5) Where any of the things specified in sub-section (2) has been entrusted or deemed to have entrusted to a [Gram Panchayat], and the village or any part thereof in which such things are situated lies outside the circle of the [Gram Panchayat], such [Gram Panchayat] or its Bhumi Prabandhak Samiti shall, subject to any general or special order issued by the State Government in this behalf, perform, discharge and exercise the functions, duties and powers assigned, imposed or conferred by or under this Code or the U.P. Panchayat Raj Act, 1947 on a [Gram Panchayat] or a Bhumi Prabandhak Samiti as if that village or part also lay within that circle.

(6) Where any of the things specified under sub-section (2) has been entrusted or deemed to be entrusted to a local authority other than the [Gram Panchayat], the provision of this chapter shall mutatis mutandis apply to such local authority."

38. The perusal of the same would show that under Section59 (4)(c), the State Government may resume any land or other thing so entrusted, or deemed to be entrusted or transferred to any [Gram Panchayat] or local authority on such terms and conditions as prescribed and under Rule 54 and 55 of the Rules of 2016, the procedure has been prescribed, which says that an order passed under Section 59(1) and Section 59(4) shall be published in the Gazette and in two daily news-papers circulated in the locality of such area of which one shall be in Hindi language. Rule 55 further says that on resumption of property by the State Government under Section 59, a notification specifying the particulars of such property shall be issued in the Gazette which shall be conclusive evidence that such property stands vested in the State Government. A copy of such notification shall be sent to the Collector as well as the Gram Panchayat or the local authority concerned and in case the property referred to in sub-rule (1) has already been allotted to any person under Section 64 or Section 125 of the Code or under the provisions of the Acts repealed by the Code, and such allottee has made any improvement on such land before the date of notification, then the allottee shall be entitled to such compensation for improvement as the Collector may determine.

39. Rule 54 and 55 cited by the learned counsel for the petitioner are also being quoted hereinbelow:-

*"**54. Mode of publication of the order [Section 59(1) and Section 59(4)].**-The general or special order referred to in Section 59(1) and Section 59(4) shall be published in the Gazette and in two daily news-papers circulating in the locality of such area of which one shall be in Hindi language.*

*55. **Resumption of property by State Government (Section 59).--**(1) Where any land or other thing is entrusted or deemed to be entrusted to any Gram Panchayat or any local authority, and such land or other thing is sought to be resumed by the State Government under Section 59(4)(c), then it shall issue a notification specifying the particulars of such property, and the publication of the notification in the Gazette shall be conclusive evidence that such property stands vested in the State Government.*

(2) A copy of every such notification shall be sent to the Collector as well as the Gram Panchayat or the local authority concerned.

(3) Where the property referred to in sub-rule (1) has already been allotted to any person under Section 64 or Section 125 of this Code or under the provisions of the Acts repealed by this Code, and such allottee has made any improvement on such land before the date of notification, then the allottee shall be entitled to such compensation for improvement as the Collector may determine."

40. It is apparent from a bare perusal of paragraph-18 of the petition, the provisions of Section 59 and Rule 54 & 55 quoted hereinabove, that the petitioner has wrongly quoted the language of Rule 55 of the Rules of 2016.

41. The learned counsel for the petitioner has argued on the basis of paragraph 18 of the writ petition that had there been a public notification/publication in the newspapers before resumption proceedings were undertaken by the state government, the petitioner being an interested person would have filed his

objections. The learned Senior Counsel has referred to the procedure prescribed under the Land Acquisition Act to say that proceedings for resumption are similar to such proceedings of acquisition and therefore, in the absence of any publication in the newspapers opportunity of being heard was denied to the petitioner and the order has been passed in violation of principles of natural justice.

42. This Court finds from a perusal of Section 59 of the Revenue Code and Rule 54 and 55 of the Rules of 2016, that they do not apply to private property. A wrong quoting of the Section 59 and Rule 54 and 55 of the Rules of 2016 in paragraph 18 of the writ petition would not entitle the petitioner to allege that because no notification was published in the newspapers before the acquisition of land of plot no. 1522 such resumption notification is bad. A perusal of the Rule 54 and 55 shows that there is only a requirement of publication in the Gazette and the daily newspapers circulated in the locality for the purpose of general notice to the public at large that the resumed land vests in the State Government free from all encumbrances, such publication of notification in the Gazette shall be conclusive evidence that the property stands vested in the State Government; there is no requirement under the Rules for issuing a notification in the Gazette or in the newspapers before the resumption exercise is carried out. It is only after resumption has been done by an order passed under Section 59(4) that such order will be published in the Gazette and two daily newspapers of the area in which the property is situated. Failure to publish the notification does not result in vitiating the whole exercise of resumption. It is only an irregularity and not an illegality that goes to the root of the matter.

43. The Supreme Court in the case of ***M.C. Mehta vs. Union of India and others, 1999 (6) SCC 237*** has observed that writ jurisdiction is a discretionary jurisdiction and the Court need not issue a writ merely because there has been a violation of the principles of natural justice if greater good is to be achieved by refusing to interfere. In ***Gadde Venkateswara Rao versus Government of Andhra Pradesh and others; AIR 1966*** Supreme Court 828, the Supreme Court had refused to interfere even when it was found that the order issued by the Government was without prior notice to the villagers while changing the location of the health centre from one village to another, and when it was established that the Government had no power to review in respect of orders passed earlier to establish it in particular village, the Supreme Court observed that there were other factors which disentitled the appellant to the quashing of the order passed by the State Government even though it was passed in breach of principles of natural justice. The Court observed that setting aside of the later order would restore the earlier order of the Government which was passed without notice to the affected party namely the Panchayat Samiti. It would also result in the setting aside of a valid resolution passed by the Panchayat Samiti, the Supreme Court refused the relief and agreed with the High Court in not interfering under Article 226 even if there was a violation of principles of natural justice. The above case is a clear authority for the proposition that it is not always necessary for the Court to strike down the order under challenge merely because the order has been passed against the petitioner in breach of natural justice.

The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed in favour of the petitioner and against the opposite party in violation of the principles of natural justice or is not in accordance with law.

44. The Supreme Court in M.C. Mehta (supra) also referred to another case where there was a breach of principles of natural justice. The Supreme Court found that interference was not necessary if the result of interference would be the restoration of another order which was not legal. In ***Mohd. Swalleh and others Vs Third Additional District Judge; 1988 (1) SCC 40,*** the Supreme Court was considering an Appeal arising out of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972. The Prescribed Authority dismissed an application filed by the landlord and this was held clearly to be contrary to the very purpose of Section 43(2) RR of the Act. The District Court entertained the Appeal filed by the landlord and allowed it without noticing that such appeal was not maintainable. The High Court refused to interfere. The Supreme Court on Appeal filed by the tenant accepted that though no Appeal lay to the District Court observed nevertheless that the refusal of the High Court to set aside the order of the District Judge was correct, as that would have restored the order of the Prescribed Authority which was apparently illegal.

45. This Court having considered the arguments of the counsel for the petitioner is convinced that the petitioner is a stranger to the cause pleaded in this petition. Even if it be assumed that the order of the Settlement Officer Consolidation and the Deputy Director Consolidation would be set aside by this Court in writ petition proposed to be filed by the petitioner but the order of the Commissioner would stand in its way preventing it to enjoy the fruits of the litigation, still the Court believes that showing interference in the order of Resumption would be against greater public good as a Medical College and Referral Hospital is proposed to be established on the land in dispute under a time bound centrally sponsored scheme.

46. The writ Petition stands ***dismissed***.

47. The interim order stands discharged.

(2021)01ILR A651
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.01.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Misc. Bench No. 25382 of 2020
Connected with Misc. Bench Nos. 25759 of 2020, 25756 of 2020, 25639 of 2020, 25508 of 2020 & 25453 of 2020

Rajeev Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Purnendu Chakravarty, Annuj Taandon

Counsel for the Respondents:
Govt. Advocate, Shishir Jain

(A) Civil Law - Prevention of Corruption Act, 1988 - Section 19 - The petitioner has assailed the grant of sanction to prosecute him before institution of the prosecution in a

competent Court. The Court observed that where it is not a case of absence of sanction, but a case of validity of sanction, the High Court under Article 226 of the Constitution of India would not take cognizance of the matter before pre-cognizance stage. The appropriate remedy would lie under Section 482 Cr.P.C. at the appropriate stage. (Para 18)

Writ Petition Rejected. (E-8)

List of Cases cited :-

1. Ajai Kumar & ors. Vs.St. of U.P. & ors. Writ Petition No. 792 (MB) of 2020

2. Chhatra Pal Singh (C.P. Singh Vs St. of U.P. & ors.16340 (MB) of 2020

3. Rajeev Garg Vs St. of U.P. & ors. 19087 (MB) of 2020

4. St. of U.P. Vs Anil Kumar Sharma (2015) 6 SCC 716

5. Satya Pal Singh & ors. Vs St. of U.P. & ors. Writ Petition No. 7806 (MB) of 2009

6. Dinesh Kumar Vs Airport Authority of India (2012) 1 SCC 532

7. St. of M.P. Vs Dr. Krishna Chandra Saksena (1996) 11 SCC 439

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Mrs. Saroj Yadav, J.)

1. This is a bunch of writ petitions filed under Article 226 of the Constitution of India challenging the sanction order dated 16.12.2019 and consequential orders of communication issued thereafter in respect to F.I.R. registered at Crime No. 1 of 2014 dated 1.1.2014 under sections 409, 120-B I.P.C. and section 13(1)(d) read with section 13(2) of the Prevention of Corruption Act 1988. All these writ petitions involve same issue, therefore, they were heard together and are being decided by a common judgment. For convenience Writ Petition No. 25382 (MB) of 2020, Rajeev Kumar Singh v. State of U.P. & ors., has been treated as the leading writ petition.

Petitioners of the aforesaid petitions pray as under :

"this Hon'ble Court may be pleased to issue -

(a) a writ, order or direction in the nature of certiorari for quashing of the Prosecution Sanction Order dated 16.12.2019 signed on 14.12.2019 by the Managing Director UPRNN and the Communication Letter dated 16.12.2019 actually signed on 13.12.2019 against the petitioner contained as Annexure No. 2 to this Writ Petition arising out of FIR registered at Crime No. 1/2014 dated 01.01.2014, under sections: 409, 120-B IPC and section 13(1)(d) read with 13(2) of Prevention of Corruption Act 1988 after summoning the records from the authority competent.

(b) a writ order or direction so as to decide this petition as per the order and direction passed by Coordinate Bench of this Hon'ble Court in Writ Petition No. 792/(MB) of 2020 (Ajay Kumar and another v. State of UP and others) in the facts and circumstances of this petition and the same benefit may kindly be extended to the petitioner also."

2. At the very outset learned counsel for the petitioner submitted that **Writ Petition No. 792 (MB) of 2020, Ajai Kumar & ors. V. State of U.P. & ors**., involving similar issue and pertaining to the same crime number, albeit, in respect to other accused, has been decided by this Court vide judgment dated 18.6.2020 wherein, without entering into validity of the sanction order certain directions have been issued to complete the investigation

with a further direction to the Court below to consider objections to the validity of sanction and till such decision is taken by the Court below regarding validity of sanction for prosecution against the said petitioners, no coercive measures were to be taken against them. He prays for similar relief.

3. However, learned A.G.A. submits that in the said petition the sanction order dated 16.12.2019 was not under challenge, instead an order communicating the same had been challenged. Moreover, he says that a writ petition under Article 226 of the Constitution of India is not maintainable against such a sanction order as its validity can be seen during trial as has been held by Hon'ble the Supreme Court in a catena of decisions and by a Division Bench of this Court in Satya Pal Singh & ors.

4. In response, learned counsel for the petitioner invited attention of the Court to interim orders passed in similar cases pertaining to same crime number relating to co-accused on 8.12.2020 in **Writ Petition Nos. 16340 (MB) of 2020, Chhatra Pal Singh(C.P. Singh) v. State of U.P. & ors., and 19087 (MB) of 2020, Rajeev Garg v. State of U.P. & ors.,** wherein, referring to the decision in Ajay Kumar's case, protection has been given in terms thereof.

5. Learned counsel for the petitioner fairly admitted to the fact that in all those cases which are referred hereinabove investigation had already been completed, yet under some misconception directions were issued for completion of investigation. The sanction order in fact had been issued after completion of investigation.

6. Learned counsel for the petitioner was further confronted as to the maintainability of this writ petition in view of various pronouncements of the Supreme Court wherein a distinction has been made between absence of sanction which can be raised at a pre-cognizance stage before the appropriate court and question of validity of sanction for prosecution which can be raised during trial, meaning thereby, a writ petition in this regard would not be maintainable. Learned counsel submitted that in the facts of the present case petitioner had not been arrested during investigation since the lodging of the F.I.R. in 2014 and even now merely because sanction has been granted, even if the investigating agency is proceeding to submit a chargesheet, as is the case, there is no mandatory necessity that the petitioner is required to be arrested and produced before the Court while submitting the chargesheet, whereas in fact this is exactly what they are proceeding to do. In this regard he relied upon a decision of Hon'ble the Supreme Court reported in **2015 (6) SCC 716, State of U.P. v. Anil Kumar Sharma**, wherein a judgment of this very court making it mandatory for the Police/Investigating Agency to produce the accused while submitting chargesheet in the court was set aside, inter alia, with the observations that there is no requirement under section 173 for the investigating officer to produce the accused alongwith the chargesheet. However, on being asked as to whether section 173 or the decision of the Supreme Court in the case of Anil Kumar Sharma (supra) prohibits the Police on its own from arresting the accused and producing before the Trial Court so as to expedite the proceedings, learned counsel for the petitioner fairly submitted that it did not.

7. Learned counsel for the petitioner was asked as to whether there is a difference in the High Court passing a dictum mandatorily requiring the accused to be arrested and produced before the court at the time of submission of a chargesheet and the Police on its own considering the relevant facts arresting and producing him, the learned counsel admitted to the distinction in this regard, however, he submitted that there is no justification for the arrest of the petitioner accused at this stage when he has not been arrested in the past six years, especially as, when the court below issues the summons or warrants, as the case may be, he will either appear on his own or be produced by the Police. On being asked as to the remedy under section 438 Cr.P.C. being available in this regard, learned counsel referred to practical difficulties in this regard and the possibility of arrest before the remedy could be availed.

8. He also submitted that the challenge to the sanction order was on the ground of non-application of mind to relevant factors and materials.

9. As the petitioner is also being prosecuted under the Prevention of Corruption Act 1988, it is relevant to refer to section 19 thereof which reads as under :

"19. ***Previous sanction necessary for prosecution.--(1)*** *No court shall take cognizance of an offence punishable under sections 7, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, save as otherwise provided in the Lokpal and Lokayuktas Act, 2013--*

(a) in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section, unless--

(i) such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and

(ii) the court has not dismissed the complaint under section 203 of the Code of Criminal Procedure, 1973 (2 of 1974) and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding:

Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant:

Provided also that the appropriate Government or any competent authority

shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt:

Provided also that in case where, for the purpose of grant of sanction for prosecution, legal consultation is required, such period may, for the reasons to be recorded in writing, be extended by a further period of one month:

Provided also that the Central Government may, for the purpose of sanction for prosecution of a public servant, prescribe such guidelines as it considers necessary.

Explanation.--For the purposes of sub-section (1), the expression "public servant" includes such person--

(a) who has ceased to hold the office during which the offence is alleged to have been committed; or

(b) who has ceased to hold the office during which the offence is alleged to have been committed and is holding an office other than the office during which the offence is alleged to have been committed.]

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

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

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

10. We have gone through the decision of a Coordinate Bench of this Court in the case of co-accused in **Writ Petition No. 792 (MB) of 2020, Ajai Kumar & Another v. State of U.P. & ors**., decided on 18.6.2020. In the said case a consequential order dated 31.8.2019 was

under challenge, whereas the sanction had been granted by the order dated 16.12.2019 which was not challenged. In the present case order dated 16.12.2019 has been challenged.

11. As stated by the learned A.G.A. and as is also mentioned in the interim orders passed in other writ petitions referred hereinabove, the order dated 31.8.2019 which was challenged in the case of Ajai Kumar (supra) was merely a communication of the sanction granted on 16.12.2019/14.12.2019.

12. Be that as it may, the sanction order dated 16.12.2019 is under challenge in this writ petition. Furthermore, on a perusal of the judgment dated 18.6.2020 referred hererinabove we find that though the Coordinate Bench of this Court has extensively dealt with the purpose and object of sanction as also the stage at which its validity can be challenged during trial, no finding or opinion has been expressed as to whether a writ petition under Article 226 of the Constitution of India would be maintainable in view of various decisions referred in the said judgment itself and even otherwise rendered by Hon'ble the Supreme Court and this Court wherein it has been held that such a challenge to validity of sanction can be raised before the Trial Court, although, the Court was obviously not inclined to entertain the writ petition on the question of validity of sanction as it directed the Trial Court to consider it, however, while not entering into the question of validity of sanction and disposing off the writ petition gave protection to the petitioner to the effect that "*till the decision is taken by the competent court/Court of Magistrate in regard to the sanction of prosecution against the petitioner that whether the same is valid or not, no coercive measures shall be taken against him."* Now the question before this Court is that once the writ petition challenging the validity of sanction is not maintainable under Article 226 of the Constitution of India in view of decisions of Hon'ble the Supreme Court and this Court wherein it has been held that such a challenge can be raised and should be raised before the Trial Court, is it within the domain of this Court to grant some relief while not entertaining the writ petition ? It is the limited protection granted as aforesaid which has created a piquant situation before this Bench where, on the one hand, we are bound to follow the decision of Hon'ble the Supreme Court and, on the other hand, petitioner claims similar benefit on the ground of parity as they are accused in the same crime number as the petitioners in Ajay Kumar's case and in the subsequent two writ petitions referred hereinabove who have also been granted such relief.

13. Before proceeding further we would like to make a mention that the only question which arises before us is validity of sanction. Now, can it be seen by us at this stage or it is to be seen by the Trial Court at the appropriate stage, is the moot point. A coordinate Bench of this Court in the case of **Satya Pal Singh & ors. v. State of U.P. & ors. (Writ Petition No. 7806 (MB) of 2009)** and connected matters had the occasion to consider the question as to whether a proposed accused under Article 226 of the Constitution of India can challenge the grant of sanction to prosecute him before institution of the prosecution in a competent Court. Considering the relevant provisions of law and various provisions of this Court and the Supreme Court of India the Division Bench concluded as under :

"38. In view of above discussion, this Court is of the firm view that

(1) grant of sanction order to prosecute the accused under the statute is not an administrative action of the competent authority. It would be a statutory function of the competent authority and subject to challenge in the proceedings launched against the accused in accordance with the procedure established under law.

(2) An accused cannot be allowed to challenge the order granting sanction to prosecute at pre-cognizance stage. As the same has no locus as held in Smt. Nagawwa vs Veeranna Shivallngappa Konjalgi and others; MANU/SC/0173/1976; (1976) 3 SCC 736 and Raghu Raj Singh Rousha Vs. Shivam Sundaram Promoters Private Limited and another; MANU/SC/8476/2008 : (2009) 2 SCC 363.

39. In view of above, this bunch of writ petition is not maintainable and the same are liable to be dismissed. The interim orders passed in the writ petitions are also liable to be vacated, therefore, the interim orders passed in the writ petitions stand vacated.

40. Accordingly, all the writ petitions are dismissed."

14. It categorically held that such accused cannot be allowed to challenge the order granting sanction to prosecute at pre-cognizance stage.

15. When the above quoted decision was rendered, there was no provision for grant of anticipatory bail in the State of U.P., however, now there is such a provision.

16. We may also refer to a decision of the Supreme Court of India reported in **(2012) 1 SCC 532, Dinesh Kumar v. Airport Authority of India** wherein it has held as under :

"8. The provisions contained in Sections 19(1), (2), (3) and (4) of the P.C. Act came up for consideration before this Court in Parkash Singh Badal (2007) 1 SCC 1. In paras 47 and 48 of the judgment, the Court held as follows (SCC p. 37) :

"47: The sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard.

48: The sanction in the instant case related to the offences relatable to the Act. There is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial."

9. While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Parkash Singh Badal (supra) expressed in no uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in Parkash Singh Badal (supra), this Court referred to invalidity of sanction on account of non- application of mind.

10. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-application of mind - a category carved out by this Court in Parkash Singh Badal (supra), the challenge to which can always be raised in the course of trial."

17. We may also refer to another decision of the Supreme Court in the case of **State of M.P. v. Dr. Krishna Chandra Saksena, (1996) 11 SCC 439** :-

"8..... sanctioning authority was satisfied after complete and conscious scrutiny of the records produced in respect of the allegation against the accused. Now the question whether all the relevant evidence which would have tilted the balance in favour of the accused if it was considered by the sanctioning authority before granting sanction and which was actually left out of consideration could be examined only at the stage of trial when the sanctioning authority comes forward as a prosecution witness to support the sanction order if challenged during the trial. As that stage was not reached the prosecution could not have been quashed at the very inception on the supposition that all relevant documents were not considered by the sanctioning authority while granting the impugned sanction."

18. In view of the above decisions, we have absolutely no doubt that this petition challenging the order dated 16.12.2019 sanctioning prosecution against the petitioner is not maintainable and is not liable to be entertained, however, as stated earlier now the other aspect of the matter is that in similar cases relating to same crime number Coordinate Benches have granted some protection as already referred hereinabove to the co-accused till validity of sanction is decided by the trial court. If the petition itself is not liable to be entertained then whether while dismissing the same, irrespective of the fact that as to whether we mention it as a disposal or dismissal of the petition, any relief, if so, to what extent, can be granted to the petitioner herein, especially as, since June 2018 the provision for grant of anticipatory bail under section 438 Cr.P.C. has come into force in the State of U.P. which can be applied and considered at any stage, certainly at a stage where no chargesheet has been filed as yet as in this case and appropriate relief can be sought. Question is whether this Court should grant a protection to the effect that no coercive measures should be taken against the petitioner till the trial court decides the validity of sanction, at this stage ? Now the fact is that the chargsheet has not been filed as yet. We are at the pre-cognizance stage. The law is very clear that where it is not a case of absence of sanction, but a case of validity of sanction, the High Court under Article 226 of the Constitution of India would not take cognizance of the matter before the pre-cognizance stage. In fact, even thereafter the remedy may not lie under under Article 226 of the Constitution of India, but may be under section 482 Cr.P.C. at the appropriate stage, therefore, ordinarily while dismissing the petitions we would not grant such relief, nevertheless, considering the piquant situation which has already been noticed by us, as, in the same

crime number this Court has granted protection, as an exceptionally compelling measure which is not to be treated as a precedent, we provide that for 3 weeks from the pronouncement of the judgment petitioner(s) shall not be arrested in Case Crime No. 1 of 2014 referred hereinabove, during which, it shall be open for them to apply for anticipatory bail under section 438 which may be considered by the Court concerned as per law, but, this protection shall cease immediately on expiry of 3 weeks as aforesaid. Thereafter, the law shall take its own course. Subject to these observations and leaving it open for the petitioner to raise the question of validity of sanction in the event a chargesheet is filed before a Court of criminal jurisdiction, at the appropriate stage, we **dismiss** these writ petitions, but only for the aforesaid reason without entering into the merits of the sanction order impugned herein.

(2021)01ILR A659
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE MANISH MATHUR, J.

P.I.L. Civil No. 2084 of 2021

Hindu Personal Law Board ...Petitioner
Versus
Union of Bharat ...Respondent

Counsel for the Petitioner:
Asok Pande

Counsel for the Respondents:
A.S.G.

(A) Civil Law - Public Interest Litigation - doctrine of constitutional trust - maxim - *Salus populi suprema lex esto* - the good of the people shall be supreme law - it cannot be believed that a constitutional authority or functionary would not act in accordance with and within the scope of its powers as indicated in the Constitution of India - Courts have very limited role with regard to judicial legislation - neither the Courts can legislate nor they have any competence to issue directions to legislature to enact a law in a particular manner - legislature is supreme in its own sphere under the Constitution - subject to the limitations provided for in the Constitution itself - legislature to decide nature of operation of the statutes - as to when and in what respect and of what subject-matter the laws are to be made.(Para - 5,6,)

Petitioner in person is only seeking a direction for the concerned respondent to consider for legislating a law regulating religious conversion and no specific direction is being sought to Parliament or any State Legislature to enact any legislation.(Para -3)

HELD:- In view of aforesaid dictum, it is clear that no direction can be issued for enacting any legislation in any particular manner by High Courts under Article 226 of the Constitution of India.(Para - 8)

Writ Petition dismissed. (E-6)

List of Cases cited :-

1. Manoj Narula Vs U.O.I. , (2014) 9 SCC 1 (Constitution Bench)

2. Municipal Committee, Patiala Vs Model Town Residents Assn., (2007) 8 SCC 669

3. St. of H.P. Vs Parent of a student of Medical College, (1985) 3 SCC 169
4. V.K. Naswa Vs U.O.I., (2012) 2 SCC 542 : (2012) 1 SCC (Cri) 914

5. Gainda Ram Vs MCD, (2010) 10 SCC 715

(Delivered by Hon'ble Ritu Raj Awasthi, J. & Hon'ble Manish Mathur, J.)

1. Heard Mr. Ashok Pande petitioner in person and Mr. S.B. Pandey, Assistant Solicitor General of India, assisted by Mr. Ambrish Rai, learned Central Government Counsel for respondents.

2. The petition has been filed in the nature of Public Interest Litigation seeking the following relief:-

(i) issue a writ of mandamus directing the concerned respondent to consider for legislating a law regulating the religious conversion on the pattern of the law legislated on the subject by the State of U.P. and other States.

(ii) to issue any such other order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

(iii) Allow the writ petition with cost.

3. Petitioner in person has submitted that the Court would very well be within its jurisdiction to issue a direction as prayed for in the petition to ameliorate the condition with regard to a particular sect or religion. It has been further submitted that the petitioner in person is only seeking a direction for the concerned respondent to consider for legislating a law regulating religious conversion and no specific direction is being sought to Parliament or any State Legislature to enact any legislation. It is submitted that in view of this distinction, this petition in nature of public interest litigation would be maintainable since it only seeks consideration of petitioner's grievance particularly since all the laws giving criminality to any act or omission have been legislated by the Union and therefore the law regulating religious conversion should also be made by Union of India.

4. With regard to aforesaid prayer, a Constitution Bench of Hon'ble the Supreme Court in the case of **Manoj Narula v. Union of India** reported in (2014) 9 SCC 1 had declared a similar relief not maintainable in context of the doctrine of constitutional trust.

5. The subject of doctrine of constitutional trust has been explained in the aforesaid judgment in context of debates held in the Constituent Assembly and particularly with regard to separation of jurisdiction and powers of various constitutional functionaries and authorities. It was held that the doctrine of constitutional trust clearly is with regard to the maxim *Salus populi suprema lex esto*. It was held that it cannot be believed that a constitutional authority or functionary would not act in accordance with and within the scope of its powers as indicated in the Constitution of India.

6. Hon'ble the Supreme Court referred to various judgments of the Supreme Court itself in which it has been clearly held that Courts have very limited role with regard to judicial legislation since neither the Courts can legislate nor they have any competence to issue directions to legislature to enact a law in a particular manner.

7. Relevant portion of the judgment is as follows:-

"124.In Municipal Committee,Patiala [Municipal Committee, Patialav. Model Town Residents Assn., (2007) 8 SCC 669] this Court referred to Parent of a student of

Medical College[State of H.P.v.Parent of a student of Medical College, (1985) 3 SCC 169. This was a judgment delivered by a Bench of three learned Judges.] and held that legislation is in the domain of the legislature. It was said:

"It is so well settled and needs no restatement at our hands that the legislature is supreme in its own sphere under the Constitution subject to the limitations provided for in the Constitution itself. It is for the legislature to decide as to when and in what respect and of what subject-matter the laws are to be made. It is for the legislature to decide as to the nature of operation of the statutes.""

"125. More recently, V.K. Naswa [V.K. Naswa v.Union of India, (2012) 2 SCC 542 : (2012) 1 SCC (Cri) 914] referred to a large number of decisions of this Court and held that the Court cannot legislate or direct the legislature to enact a law. It was said: (SCC p. 547, para 18)

"18. Thus, it is crystal clear that the court has a very limited role and in exercise of that, it is not open to have judicial legislation. Neither the court can legislate, nor has it any competence to issue directions to the legislature to enact the law in a particular manner.""

"126. However, a discordant note was struck inGainda Ram [Gainda Ram v. MCD, (2010) 10 SCC 715. This was a judgment delivered by a Bench of two learned Judges.] wherein this Court issued a direction to the legislature to enact legislation before a particular date. It was so directed in paras 70 and 78 of the Report in the following words: (SCC pp. 739 & 743)"

"70. This Court, therefore, disposes of this writ petition and all the IAs filed with a direction that the problem of hawking and street vending may be regulated by the present schemes framed by NDMC and MCD up to 30-6-2011. Within that time, the appropriate Government is to legislate and bring out the law to regulate hawking and hawkers' fundamental right. Till such time the grievances of the hawkers/vendors may be redressed by the internal dispute redressal mechanisms provided in the schemes.

***

78. However, before 30-6-2011, the appropriate Government is to enact a law on the basis of the Bill mentioned above or on the basis of any amendment thereof so that the hawkers may precisely know the contours of their rights. This Court is giving this direction in exercise of its jurisdiction to protect the fundamental rights of the citizens."

"127.The law having been laid down by a larger Bench than in Gainda Ram [Gainda Ram v. MCD, (2010) 10 SCC 715. This was a judgment delivered by a Bench of two learned Judges.] it is quite clear that the decision, whether or not Section 8 of the Representation of the People Act, 1951 is to be amended, rests solely with Parliament."

8. In view of aforesaid dictum, it is clear that no direction can be issued for enacting any legislation in any particular manner by High Courts under Article 226 of the Constitution of India.

9. So far as submission of petitioner in person is concerned that only a direction for consideration of petitioner's grievance has been made in the petition, aforesaid doctrine of constitutional trust also bars any grant of relief prayed for in the manner as envisaged in the petition.

10. Considering the aforesaid factors and enunciation by Hon'ble the Supreme

Court, the writ petition being devoid of merit is **dismissed** at the admission stage itself.

(2021)01ILR A662
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 827 of 2016

Amar Deo Ojha & Anr. ...Appellants
Versus
Shri Krishna Ojha ...Respondent

Counsel for the Apellants:
Sri Chandrakesh Rai

Counsel for the Respondents:
Sri Ishwar Kumar Upadhyay, Sri Satya Priya Upadhyay, Sri Vineet Kumar Singh, Sri H.N. Singh

Civil Law - Specific Relief Act (47 of 1963)- Section 38 - Permanent injunction - *Cause of action* - defendants denied ownership of plaintiffs over land in question & plaintiffs were apprehending that the defendants might encroach upon the land, as such a cause of action was available to the plaintiff & Court rightly entertained suit - *finding regarding ownership* - To arrive at a finding regarding ownership of land as claimed by plaintiff - Courts below should have independently applied their minds & should have arrived at an independent finding irrespective of the finding arrived in another suit & paper filed in that suit in which the defendants were not party - *Amin's Report* - there was a door of the defendant no. 2 which opened on the southern side of his house, same was shown as a door in the Amin's report but the existence of that door not dealt with by the courts below - finding ought to have been arrived at as to what would be effect of the door opening in the southern side of the house of the defendant no. 2 - Both courts committed error in holding plaintiff to be owner of land - Decree liable to be set aside and matter remanded to Trial Court. (Para 10, 11, 12)

Partly allowed. (E-4)

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

1. This second appeal has been filed against the judgement and decree dated 13.5.2016 passed by the District Judge, Ballia, in Civil Appeal No. 31 of 2016 which had affirmed the judgement and decree dated 14.3.2016 passed by the Civil Judge (J.D.) Ballia in Original Suit No. 424 of 2007.

2. The plaintiff had filed a suit for the relief of permanent injunction stating that the defendant (appellant here) may be injuncted from interfering with the possession of the plaintiff over the land marked by nos. 1-4-5-6-7-1 and by nos. 6-8-9-10 in the plaint map. The case of the plaintiff had been that the area marked by numbers 1-4-5-6-7-1 had formed a part of plot no. 48 which was the plaintiff's sehan land and he had inherited the same from his grand-father, namely, Jamuna Ojha.

3. To bolster his case, the plaintiff had taken support of the papers which were filed in another suit being Suit no. 274 of 1993 which was filed by Vimlesh Chaubey, a person who was not a party to the suit of the plaintiff. Suit No. 274 of 1993 was

dismissed by a judgement and decree dated 21.1.1995. The plaintiff of the suit from which the instant appeal has arisen had alleged that on 30.9.2007 the defendants in the instant case had threatened that they would take over possession over the land numbered as 1-4-5-6-7-1 in the plaint map and would also stop the water from flowing from the nali which was running on the land numbered as 6-8-9-10 in the plaint map. The defendants, the appellant here, filed their written statement denying the rights and title of the plaintiff over the land in question and stated that since their houses opened southwards into the land numbered as 6-8-9-10 and since they had a Chabutara over it the plaintiffs could not have any right over the land in question. Upon filing of the suit, an Amin of the Civil Court went on the spot and submitted his report alongwith a map on 28.11.2007. The report was numbered as 19(ga)(2) and the map was numbered as 20(ga) (2). For deciding the suit the Trial Court had framed as many as nine issues.

4. Issue no. 1 was to the effect as to whether the land which was claimed by the plaintiff to be his own land was his or not. Upon giving a finding in favour of the plaintiff in the affirmative the suit was decreed. The defendant filed a first appeal being First Appeal No. 31 of 2016 in which only one point of determination was drawn and that was also to the effect as to whether the plaintiff was the owner in possession over the land in question. The First Appeal was, however, dismissed on 13.5.2016. The instant second appeal when was filed was admitted on 22.12.2016 on the questions of law as had been framed in the memo of appeal. There were 10 questions of law which were framed and the same are being reproduced here as under:-

1. Whether the suit for permanent injunction filed by the plaintiff-respondent without there being any cause of action, is maintainable?

2. Whether both the courts below committed manifest error of law in decreeing the suit and passing impugned orders by treating the land the land in dispute to be part of land of Shikmi No. 48 without ascertaining correct location and area of Shikmi No. 48?

3. Whether the plaintiff-respondent who stand on his own leg, his suit cannot be decreed on the weakness of defendants-appellants?

4. Whether the paper filed in the suit No. 274 of 1993 in which the defendants-appellants were not party, can be relied in decreeing the suit?

5. Whether the courts-below are justified in decreeing the suit of the plaintiff-respondent without ascertaining the location of Khasra No. 48 where area is given in the Khasra?

6. Whether the courts-below were justified in law in decreeing the suit of the plaintiff without establishing his case by any cogent documents/evidence regarding recording the name of Bahuriya Piyari Kunwari even in Khasra on record?

7. Whether both the courts below have committed manifest error of law in not deciding the objections filed by the defendants-appellants against the Amin-report and whether without deciding said objection, both the courts below were justified in law in passing impugned orders?

8. Whether the impugned orders passed by the courts-below are against the actual spot position, if yest then on what basis the impugned orders have been passed by the courts below?

9. Whether the findings recorded by the courts below that the disputed land is

part of land of Shikmi No. 48, is based on any cogent evidence and document, if not, then on what basis the impugned orders have been passed by the courts below?

10. Whether the impugned orders passed by the courts below are sustainable in the eyes of law?

5. When the case was heard finally and the judgement was reserved the counsel appearing for the Appellants and the Respondent had submitted their written submissions. The Appellant while arguing the appeal mainly argued on the substantial questions of law numbered as 1, 4 and 7. He submitted that when there was only an apprehension in the mind of the plaintiffs that the disputed land would be encroached upon by the defendants and that thereafter the plaintiffs would be deprived from using the same then there was no cause of action yet. With regard to the records of the Original Suit No. 274 upon which the plaintiff had depended and which had been dealt with by the two courts below the learned counsel appearing for the Appellant submitted that the suit was filed by a person who was not a party in the instant suit against the plaintiff of the instant suit. The defendant/Appellant had tried to get himself impleaded in the Suit No. 272 of 1993 but his impleadment application was rejected. Therefore any reliance on the pleadings of Suit No. 272 of 1993 which the Court has done while deciding the instant suit from which the instant second appeal arose was an illegality committed by the court's below and which required to be undone.

6. Learned counsel for the Appellant submitted that to arrive at a finding regarding ownership of the land claimed by the plaintiff, the Trial Court as also the Appellate Court should have independently applied their minds and should have arrived at an independent finding irrespective of the finding arrived in the Original Suit No. 274 of 1993. Learned counsel for the Appellant submitted that any finding in the Suit No. 272 of 1993 could not have been used by the Trial Court while deciding the suit from which the instant second appeal arose as the defendants were never a party in that suit. Learned counsel for the Appellant further submitted that if the commission report dated 28.11.2007 is seen then it appears that the report had given an opinion of the Amin with regard to the Chabutara constructed on the plot in dispute and no effort was made by the Court to come to an independent finding as to when the Chabutara was exactly built. Learned counsel for the Appellant submitted that the defendant had raised an objection with regard to the findings in the Amin report but they were never considered. Learned counsel further submitted that if the map attached to the report was seen it would become evident that Dinanath, the defendant no. 2 (the appellant no. 2) in the instant second appeal had only one ingress and egress on the southern side which opened in the plot in question. Learned counsel submitted that with regard to the Chabutara which was shown in Map 20(ga)(2) of the Amin report, no finding whatsoever was arrived at by the Courts below. Learned counsel for the appellant further submitted that in the Amin report there was a clear finding that the Nali, to begin with, was an open Nali and was also a pakka one and it went westward. It also said that even though to begin with it was open but as it reached its destination it had gone underground. He submitted that with regard to this opinion of the commissioner no finding was arrived at.

7. In reply, the learned counsel for the respondents plaintiff, however, submitted that in the written statement the defendant had denied the owner ship of the plaintiffs over the land in question then a cause of action was evident. Learned counsel appearing for the Respondent submitted that when the pleadings between the parties are exchanged and it is evident to the Court that there is a cause of action available then it had not to be proved by the plaintiff that the apprehension was wrong.

8. In the instant case when the defendant had denied the title of the plaintiff over the land in question and the plaintiffs were apprehending that the defendants might encroach upon the land then there was definitely a cause of action. Learned counsel further submitted that when the judgement passed in the Suit No. 274 of 1993 had given its seal of approval to the written statement filed by the plaintiff in that suit then the written statement could always have been used in the instant suit. Still further learned counsel for the plaintiff respondents submitted that the finding given in the Amin report that the Chabutara was made after the filing of the suit gets credence from the fact that in the map attached with the written statement there was no Chabutara made.

9 Learned counsel for the Plaintiffs/Respondents further submitted that the instant Second Appeal was filed against judgments which had concurrently being passed in favour of the plaintiffs and, therefore, no interference be made in the instant second appeal. He submitted that no substantial question of law at all arose and the instant second appeal, therefore, be dismissed.

10. Having heard the learned counsel for the appellant and the learned counsel for the respondents, I am of the view that when the defendants had denied the title over the land in question in their written statement then definitely a cause of action was available to the plaintiff and the Court rightly entertained his suit. So far as the question of reliance over the documents filed in Suit No. 274 of 1993 is concerned, I find that the Defendants/Appellants was not a party to that suit. He had not admitted that the documents filed by the respondents in the instant second appeal were correctly filed in the Suit No. 274 of 1993. The impleadment application which the Defendants had filed in Original Suit No. 274 of 1993 had been rejected. If the court wanted to give a finding with regard to the land over which the Plaintiff was claiming title and possession then the courts below should have given a finding independent of any finding arrived at in Suit No. 274 of 1993.

11. So far as the question with regard to the reliance on the Amin report and map is concerned, I find that since there was no Chabutara made in the map attached in the written statement, it can be safely concluded that the Chabutara was built during the pendency of the suit. However, since there was a door of the defendant no. 2 which opened on the southern side of the house of the defendant no. 2 and which has been shown as a door in the map and the Amin's report and since the existence of that door has not been dealt with by the courts below, I feel that the court' below fell in error while dealing with the Commission Report. A finding ought to have been arrived at as to what would be effect of the door opening in the southern side of the house of the defendant no. 2. There is also no finding in both the judgement as to what would be the result of the fact that the Nali in front of the house of the defendant initially was an open one and then had gone

underground as had been given in the Amin's report. Since there was a wrong reliance on the papers filed in the Suit No. 274 of 1993 and since the Amin's report and map had not been considered in their right perspective, I find that the courts below fell in error in coming to a conclusion that the land in question belonged to the plaintiff. Ends of justice would be served if the Judgement and Decree of the Courts below dated 14.3.2016 and 13.5.2016 of the Trial Court and the First Appellate Court respectively are set aside and the matter is remanded back to the Trial Court for a decision afresh with regard to the ownership after considering the Amin's report in its right perspective and after giving a finding independent of the papers/pleadings which related to the Suit No. 274 of 1993. The matter is,therefore, remanded back to the Trial Court.

12. The substantial questions no. 1, 4 and 7 which were argued by the Appellants counsel are accordingly answered. The other question need not be answered.

13. The second appeal is partly allowed.

(2021)01ILR A666
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2020

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Special Appeal (D) No. 1008 of 2020

Om Prakash ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prakash Chandra Srivastava, Sri Vishnu Prakash

Counsel for the Respondents:
C.S.C., Sri Shishir Prakash

A. Service law – Compassionate Appointment – Long delay in seeking appointment – Effect – Held, Compassionate appointment cannot be treated as a bounty and is to be given to the needy if the said person is facing hardship – There cannot be inherent right to compassionate appointment but rather, it is a right to provide a succor to a needy family – Appellant has already survived for more than nine years after the death of his mother and as such, he had no financial constraint. (Para 12 and 19)

Special Appeal dismissed. (E-1)

Cases relied on :-

1. Umesh Kumar Nagpal Vs St. of Har. , (1994) 4 SCC 138

2. U.O.I. Vs Bhagwan , (1995) 6 SCC 436

3. Haryana State Electricity Board Vs Naresh Tanwar, (1996) 8 SCC 23

4. St. of U.P. & ors.. Vs Paras Nath, AIR 1998 SC 2612

5. Director of Education (Secondary) & anr. Vs Pushpendra Kumar & ors., AIR 1998 SC 2230

6. S. Mohan Vs Government of Tamil Nadu & anr., 1999 (I) LLJ 539

7. SBI Vs Anju Jain, (2008) 8 SCC 475

8. P.N.B. & ors.Vs Ashwini Kumar Taneja (2004) 7 SCC 265

9. General Manager (D&PB) & ors. Vs Kunti Tiwari & anr. (2004) 7 SCC 271

(Delivered by Hon'ble Pritinker Diwaker, J.)

(04.11.2020)

Order on Civil Misc. Delay Condonation Application

1. Heard learned counsel for the appellant on the application seeking condonation of delay in filing the appeal.

2. For the reasons mentioned in the application, the same is allowed.

3. Delay in filing the appeal is condoned.

4. Office to allot regular number to the appeal.

Order on Appeal

5. Sri Prakash Chandra Srivastava, for the appellant, Sri Shad Khan, for the respondent nos. 2 & 3 and Sri Ankit Gaur, learned State counsel for respondent no. 1.

6. Challenge in this appeal is to the order dated 09.09.2020 passed by learned Single Judge dismissing the writ petition filed by the appellant seeking compassionate appointment.

7. Facts of the case in brief are that one Chameli Devi, who was working as Peon in the Department of Vidyut Janpad Anurakshan Khand-First, Kasimpur, Aligarh died during service on 03.11.2011. The appellant claiming himself to be adopted son of Chameli Devi, filed an application seeking compassionate appointment. As the relation between the appellant and the deceased was doubted by the department, the appellant approached the civil court for obtaining succession certificate. It has been informed that second appeal between the parties in this relation is still pending before this Court.

8. When the compassionate appointment was denied to the petitioner, he filed the writ petition before this Court seeking compassionate appointment. By the impugned judgement, writ Court has dismissed the writ petition on the ground that as on date, the appellant is overage and, therefore, he is not entitled for compassionate appointment.

9. Learned counsel for the appellant submits that there is no upper age limit prescribed for appointing a person on compassionate ground and, therefore, the writ Court has erred in law in dismissing the writ petition. He submits that immediately after the death of his mother, the appellant had applied for compassionate appointment and he cannot be blamed for any delay, if occurred, on the part of department. He admits that as on date, the appellant is aged about 46 years and has already received about Rs. 13 Lakhs towards the retiral dues of the deceased.

10. We have heard the parties.

11. In our opinion, the only issue which has to be examined is whether the applicant, who has already received the retiral dues and praying for compassionate appointment, after a delay of long period, aged about 46 years at present is entitled to compassionate appointment or not.

12. It is trite to say that law in respect of compassionate appointment is very clear and the same cannot be treated as a bounty and is to be given to the needy if the said person is facing hardship. There cannot be inherent right to compassionate appointment but rather, it is a right to provide a succor to a needy family.

13. In the case of **Umesh Kumar Nagpal v. State of Haryana [(1994) 4 SCC 138],** the Apex Court held that:

"For these very reasons, the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

14. An appointment on compassionate basis claimed after a long time has seriously been deprecated in **Union of India Vs. Bhagwan 1995 (6) SCC 436 and Haryana State Electricity Board Vs. Naresh Tanwar, (1996) 8 SCC 23**. The Court has said:

"compassionate appointment cannot be granted after a long lapse of reasonable period and the very purpose of compassionate appointment, as an exception to the general rule of open recruitment, is intended to meet the immediate financial problem being suffered by the members of the family of the deceased employee..... the very object of appointment of dependent of deceased-employee who died in harness is to relieve immediate hardship and distress caused to the family by sudden demise of the earning member of the family and such consideration cannot be kept binding for years."

15. In **State of U.P. & Ors. Vs. Paras Nath AIR 1998 SC 2612**, the Court said:

"The purpose of providing employment to a dependent of a government servant dying in harness in preference to anybody else, is to mitigate the hardship caused to the family of the employee on account of his unexpected death while still in service. To alleviate the distress of the family, such appointments are permissible on compassionate grounds provided there are Rules providing for such appointment. The purpose is to provide immediate financial assistance to the family of a deceased government servant. None of these considerations can operate when the application is made after a long period of time such as seventeen years in the present case."

16. In **Director of Education (Secondary) & Anr. Vs. Pushpendra Kumar & Ors. AIR 1998 SC 2230,** Court said:

"The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood."

17. In **S. Mohan Vs. Government of Tamil Nadu and Anr. 1999 (I) LLJ 539**, Court said:

"The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

18. In **SBI v. Anju Jain, (2008) 8 SCC 475,** Court said:

"Appointment on compassionate ground is never considered a right of a

person. In fact, such appointment is violative of rule of equality enshrined and guaranteed under Article 14 of the Constitution. As per settled law, when any appointment is to be made in Government or semi-government or in public office, cases of all eligible candidates must be considered alike. That is the mandate of Article 14. Normally, therefore, the State or its instrumentality making any appointment to public office, cannot ignore such mandate. At the same time, however, in certain circumstances, appointment on compassionate ground of dependants of the deceased employee is considered inevitable so that the family of the deceased employee may not starve. The primary object of such scheme is to save the bereaved family from sudden financial crisis occurring due to death of the sole bread earner. It is thus an exception to the general rule of equality and not another independent and parallel source of employment."

19. In the present case, the appellant has already survived for more than nine years after the death of his mother and as such, he had no financial constraint. Moreover, he has already received Rs. 13 Lakhs towards the retiral dues of his mother and thus, has sufficient amount for his survival. Law in this respect is also clear. In the case of **Punjab National Bank & Ors V. Ashwini Kumar Taneja (2004) 7 SCC 265**, and in **General Manager (D&PB) & Ors V Kunti Tiwari & Anr (2004) 7 SCC 271**, the Apex Court has held that:

"compassionate appointment has to be made in accordance with the Rules, Regulations or administrative instructions taking into consideration the financial condition of the family of the deceased. Whereas the scheme provides that in case the family of the deceased gets the retrial/terminal benefits exceeding a particular ceiling, the dependant of such deceased employee, would not be eligible for compassionate appointment."

20. Considering the cumulative effect of the entire facts, we are of the view that the appellant is not entitled for compassionate appointment. Learned single Judge was justified in dismissing the writ petition. The appeal has no substance, the same is accordingly **dismissed.**

(2021)01ILR A669
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Special Appeal (D) No. 1063 of 2020

Hemant Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Praveen Kumar, Damodar Singh, Sri Devendra Vikram Singh, Sri Pradeep Kumar

Counsel for the Respondents:
C.S.C.

A. Practice and Procedure – Special Appeal – Maintainability – Writ order passed on consent – Though availability of alternative remedy is not a bar in entertaining writ petition under Article 226 of the Constitution, but writ petition was dismissed on the admitted fact of availability of alternative remedy – Held, Special Appeal is not maintainable as it has been filed against an order passed with consent – Appellant-petitioner is at liberty to seek his appropriate remedy

before the learned Single Judge. (Para 9, 11 and 13)

Special Appeal dismissed. (E-1)

Cases referred :-

1. The Medhodist Church in India Vs The Bareilly Development Authority, AIR 1988 ALL 151,

2. Suresh Chandra Tewari Vs District Supply Officer & anr., AIR 1992 ALL 331,

3. Narendra Kumar Pandey Vs S.B.I. through its Chief G.M. , Service Bench No. 757 of 1999,

4. St. of U.P. & anr. Vs U.P. Rajya Khanij Vikas Nigam S.S. & ors., Appeal (Civil) No. 3202 of 2008 [S.C.],

5. Genpact India Private Limited Vs Deputy Commissioner of Income Tax & anr.,Special Leave Petition (Civil) No. 20728 of 2019

6. St. of Orissa & ors. Vs Gokulananda Jena,(2003) 6 SCC 465,

7. S.A. Khan Vs St. of Har. ,(1993) 2 SCC 327,

8. Mohan Lal Vs St. of U.P. & ors. ,(2013) 100 ALR 38,

9. Surendra Rao Vs Regional Transport Authority, Gorakhpur Region & ors.,1992 AIR All 211,

10. Daljit Kaur & anr. Vs Muktar Steels Pvt. Ltd & anr.,(2013) 16 SCC 607 and,

11. Kuber Singh Vs St. of U.P. & 3 ors., Special Appeal No. 1124 of 2019.

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

1. Heard Sri Praveen Kumar, learned counsel for the appellant-petitioner through **Video Conferencing** and Sri Rajiv Singh, learned Standing Counsel appearing for the respondents, who is physically present in the Court.

2. The present Special Appeal has been filed against the impugned judgement and order dated 12.10.2020 passed by the learned Single Judge in Writ-A No. 3553 of 2019 (Hemant Kumar Singh Vs. State of U.P. and 2 others) whereby the writ petition has been dismissed on the ground of existence of alternative remedy by leaving it open to the appellant-petitioner to avail such remedy if so advised.

3. The issue before this Court is limited only to the extent as to whether a learned Single Judge once at the time of raising a preliminary objection regarding maintainability of the writ petition on the ground of an alternative remedy has proceeded to entertain the writ petition and call for a counter affidavit in the matter on merits and later on another learned Single Judge dismissed the said writ petition on the ground of existence of alternative remedy with the consent of learned counsel for the parties and as such will it be open for the other learned Single Judge to do so. The facts of the present case are not being attended to by this Court as the question is in a narrow compass as stated above.

4. Learned counsel for the appellant-petitioner argued that once the learned Single Judge before whom a preliminary objection regarding maintainability of the writ petition on the availability of alternate remedy was taken and the Court comes to a finding that it is unable to sustain the said objection, it will not be open for another learned Single Judge to dismiss the writ petition on the ground of existence of alternative remedy. Thus the said order is impugned herein. Learned counsel for the appellant-petitioner has placed reliance upon the following judgements to buttress his submissions:-

"(i) The Medhodist Church in India Vs. The Bareilly Development Authority: AIR 1988 ALL 151;

(ii) Suresh Chandra Tewari Vs. District Supply Officer and another: AIR 1992 ALL 331;

(iii) Narendra Kumar Pandey Vs. State Bank of India through its Chief G.M.: Service Bench No. 757 of 1999;

(iv) State of U.P. and another Vs. U.P. Rajya Khanij Vikas Nigam S.S. & others: Appeal(Civil) No. 3202 of 2008 [S.C.];

(v) Genpact India Private Limited V. Deputy Commissioner of Income Tax &Another: Special Leave Petition (Civil) No. 20728 of 2019."

5. Per contra, learned Standing Counsel while opposing the present Special Appeal argued that the learned Single Judge had initially when the matter was taken up before him and a preliminary objection regarding the maintainability of the writ petition on the ground of availability of alternate remedy was raised, considered the same but proceeded to examine the matter on merits in view of the nature of dispute. It was argued next that the order impugned dated 12.10.2020 is an order with consent and as such challenge to the same is not permissible in law. Learned Standing Counsel has placed reliance upon the following judgements to buttress his submissions that no appeal is maintainable against a consent order, which are as follows:

"(i) State of Orissa and others Vs. Gokulananda Jena: 2003(6) SCC 465;

(ii) S.A. Khan Vs. State of Haryana: 1993(2)SCC 327;

(iii) Mohan Lal Vs. State of U.P. and others: 2013(100)ALR 38;

(iv) Surendra Rao Vs. Regional Transport Authority, Gorakhpur Region and others: 1992 AIR(All) 211;

(v) Daljit Kaur and another Vs. Muktar Steels Pvt. Ltd and another: 2013(16) SCC 607 and;

(vi) Kuber Singh Vs. State of U.P. and 3 others: Special Appeal No. 1124 of 2019."

6. We have heard learned counsel for the parties and have perused the record.

7. The Writ-A No. 3553 of 2019 (Hemant Kumar Singh Vs. State of U.P. and 2 others) was initially taken up on 07.3.2019 and the learned Single Judge passed the following orders:

"Although, Sri J.S. Bundela, the learned Standing Counsel has raised a preliminary objection to the maintainability of the writ petition on the ground that the petitioner has an alternative remedy of preferring a statutory appeal, this Court finds itself unable to sustain this objection since it is asserted that although the enquiry report was submitted on 23 August 2013, the Disciplinary Authority has chosen to pass final orders six years thereafter in terms of the order impugned.

Additionally, it is asserted that no oral enquiry was conducted before imposition of a major penalty.

Learned Standing Counsel prays for and is granted six weeks' time to file a Counter Affidavit in this petition. The petitioner shall have two weeks thereafter to file his Rejoinder Affidavit.

List thereafter. "

8. Subsequently, the said writ petition came to be dismissed on the ground of existence of alternate remedy leaving it open to the petitioner-appellant to avail such remedy if so advised and the order passed on 12.10.2020 which reads as under:

"Shri Pradeep Kumar, learned Senior Counsel for the petitioner fairly admits that

there is a provision for taking the order of dismissal in appeal before the competent authority.

The writ petition is dismissed on the ground of existence of alternative remedy. It is open to the petitioner to avail such remedy if so advised."

9. Argument of learned counsel for the appellant-petitioner that the learned Single Judge could not have dismissed the writ petition on the ground of alternate remedy is fallacious from the bare perusal of the order dated 12.10.2020 which is impugned in the present special appeal, it is apparent that the same is an order passed by a consent of learned counsel for the parties appearing in the matter that there is a provision for taking the order impugned therein in appeal before the competent authority. In so far as the judgements relied upon by learned counsel for the appellant-petitioner is concerned, the same are not of any help in the dispute in the present matter as the same are addressing the question as to maintainability of a writ petition during the existence of an alternate remedy to a person who has approached the Court. The position of law as settled till date that availability of alternative remedy is not a bar in entertaining writ petition under Article 226 of the Constitution of India is not in dispute. The argument of learned counsel for the appellant-petitioner is at an error in the matter as the writ petition was dismissed by the order impugned on the admitted fact of availability of alternative remedy.

10. In so far as it relates to the argument of learned Standing Counsel, the same does impress us and is also supported by the said view through the judgements relied by him that no appeal lies against a consent order.

11. The present Special Appeal thus is not maintainable as it has been filed against an order passed with consent.

12. The present Special Appeal is thus dismissed as not maintainable.

13. Needless to say, the appellant-petitioner is at liberty to seek his appropriate remedy before the learned Single Judge, if so advised.

14. The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person (s) (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked, before the concerned Court/Authority/Official.

15. The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)01ILR A672
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2020

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Special Appeal (D) No. 1189 of 2020

Km. Sunita ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Udai Narain Khare, Sri Basdeo Nishad

Counsel for the Respondents:
C.S.C., Sri Arun Kumar

A. Constitution of India – Article 14 – Reasonableness – Doctrine of legitimate expectation – Principle of 'reasonableness' is one attribute to equality or non-arbitrariness protected by Article 14 of the Constitution – Doctrine of legitimate expectation too has been included as an important limb of reasonableness. (Para 13 and 15)

B. Service law – Selection – Counselling for post of Assistant Teacher – Liability to convey the respondents about willingness to attend counselling within the time prescribed – Failure – Effect – Appellant-petitioner is a woman working as Constable – Immediately after calling off the lockdown, she requested the competent authority to allow her to face the counselling – Counselling is nothing but verification of documents – Counselling is still going on – Held, the respondents, who are under obligation to have best hands on basis of merit examined, looking to the existing circumstances, especially involvement of the appellant-petitioner in COVID-19 duties and further as the counselling was in currency, should have called her to face the counselling. (Para 16 and 17)

Special Appeal allowed. (E-1)

Cases relied on :-

1. Menka Gandhi Vs U.O.I. & anr., AIR 1978 SC 56

2. Ramana Dayaram Shetty Vs The International Airport Authority & ors., AIR 1979 SC 1628

(Delivered by Hon'ble Govind Mathur, C.J. & Hon'ble Piyush Agrawal, J.)

1. To examine correctness of the order dated 21st October, 2020 passed by learned single Bench, this appeal is before us.

2. The order aforesaid reads as under:-

"Heard learned counsel for the petitioner and the learned Standing Counsel.

The instant petition has been preferred seeking the following relief:-

"Issue a writ order or direction in the nature of mandamus directing and commanding the respondents to allow the petitioner to join the counselling which is still in process.

Issue a writ order in the nature of mandamus directing and commanding the respondent permit the petitioner to join the counselling and issued to appointment letter to the petitioner and to and permit him join the services as the petitioner during pendency of the writ petition."

Admittedly although the petitioner participated in the Assistant Teacher Recruitment Examination, she was not included in the counselling sessions which were held thereafter since she did not submit the requisite online form. According to the petitioner since she was on duty at the relevant time, she could not complete the formalities as a consequence of which she has been denied the right to participate in the counselling process.

Sri Arun Kumar learned counsel appearing for the department apprises the Court that a candidate who had cleared the written examination was only required to submit an online form to participate in the counselling process and that all other details were to be gathered by the Department from the application form that had already been submitted.

The Court notes that it is not the case of the petitioner that she did not have the requisite facility to either access the internet or to submit the application online. The submission of choices for the purposes

of participating in the counselling did not require any physical steps to be taken.

In view of the aforesaid, the Court finds no ground to issue the writs as prayed. The writ petition consequently stands dismissed."

3. Factual matrix of the case is that on 16th May, 2019 the respondents notified 69000 vacancies relating to the post of Assistant Teacher. The vacancies so notified were to be filled in by way of direct recruitment and for the purpose, a competitive examination i.e. "Assistant Teacher Recruitment Test 2019" was to be conducted. As per the scheme of the process of selection, in the first phase aspirants were to compete the test of 2019 and then to go for counselling. Suffice to state that the counselling is nothing but verification of documents and allotment of district for appointment as per choice and merit of the selected incumbent. To face the test, the aspirants were supposed to submit an application in the prescribed proforma and on qualifying the test they were also supposed to submit a requisition to be called to attend the counselling.

4. The appellant-petitioner a female member of the Other Backward Caste class presently holding the post of Constable in the Uttar Pradesh Police submitted an application in pursuant to the notification dated 16th May, 2019 and participated in written test. On 24th March, 2020 nation wide lockdown was declared to combat virus COVID-19. During lockdown, result of the written test was declared on 12th May, 2020. The appellant-petitioner secured multiplication of merit marks 67.8% gross. She was to attend counselling on 28th May, 2020 subject to submitting online requisition for the purpose. The appellant-petitioner at the relevant time was deputed with COVID-19 duties at Gorakhpur. Her original documents were lying at her native place and during the period of lockdown she had no means to borrow the same from her home.

5. Be that as it may, the appellant-petitioner being on COVID-19 duties failed to submit requisition to attend counselling. However, on the day next to calling of the lockdown she submitted a representation to the authority competent to allow her to attend the counselling. In the representation in quite unambiguous terms she narrated all the circumstances preventing her from submitting requisition/application showing her desire to attend counselling.

6. On being failed to have any positive response from the respondents, she approached single Bench of this Court to have a writ in the nature of mandamus but that came to be dismissed under the order impugned dated 21st October, 2020.

7. In appeal, the argument advanced on behalf of the appellant-petitioner is that she failed to submit online application showing her desire to attend counselling due to unavoidable reasons, therefore, the equity demands that an opportunity be given to her to face counselling. It is the position admitted that the counselling is still going on and that would be concluding on 30th December, 2020.

8. While opposing and defending the judgment passed by learned single Bench, it is submitted by learned Standing Counsel that the entire process of selection was online and the appellant-petitioner admittedly, failed to submitted application to face counselling.

9. In absence of application form, it was not at all possible for the agency

conducting the process of selection to call her to face the process and further that in the scheme of the process of selection there is no provision to allow any person by manual submission of requisition to attend counselling that too subsequent to the date of counselling given to the candidate concerned.

10. It is submitted that even during the lockdown the appellant-petitioner could have submitted application online as done by several other candidates.

11. Heard learned counsels appearing on behalf of rival parties.

12. The preposition for adjudication on basis of the argument advanced on behalf of the appellant-petitioner is that "whether in given set of facts the principle of reasonableness demands for issuing a writ in the nature of mandamus to the respondents to allow the appellant-petitioner to face the counselling for consideration of her candidature for the purpose of appointment as Assistant Teacher?

13. At the threshold, it would be appropriate to State that the principle of "reasonableness" is one attribute to equality or non-arbitrariness protected by Article 14 of the Constitution of India.

14. ***In Menka Gandhi Vs. Union of India and another reported in AIR 1978 SC 56*** the Supreme Court held that the members of reasonability legally as well as philosophically is an essential element of equality or non-arbitrariness every action of the State may that be administrative must right, just, fair and without any arbitrariness. No action should be fanciful or oppressive.

15. In ***Ramana Dayaram Shetty Vs. The International Airport Authority and others reported in AIR 1979 SC 1628*** the Apex Court while giving more larger meaning to non-arbitrariness held that action of the government in different eventualities including the award of jobs must be rational, relevant and non-discriminating. Any injury to these standards would liable to struck down action concerned. The law laid down by the Supreme Court in ***Menka Gandhi Vs. Union of India and another (supra) as well as Ramana Dayaram Shetty Vs. The International Airport Authority and others*** has further been enriched in last four decades and the doctrine of legitimate expectation too has been included as an important limb of "reasonableness". The constitutional courts are required to examine every action brought before it for scrutiny in light of the principle of reasonability inter alia.

16. In the case in hand, the appellant-petitioner is a young girl from rural part of Uttar Pradesh belonging to Other Backward Caste. Presently she is holding the post of Constable in Uttar Pradesh Police. As a part of her duty, she was posted in an operation to combat COVID-19 pandemic duties at Gorakhpur. While working as Constable she had an aspiration to become a Teacher and for that she faced a process of selection. She qualified written test with quite higher marks. Admittedly, she was entitled to face counselling, which is nothing but verification of documents and other testimonials. Unfortunately, being engrossed with COVID-19 duties, she failed to convey the respondents about willingness to attend counselling within the time prescribed but immediately after calling off the lockdown, she requested the

competent authority to allow her to face the counselling.

17. Worthwhile, to note here that the counselling was in process at that time and that is still going on. The respondents, who are under obligation to have best hands on basis of merit examined, looking to the existing circumstances, especially involvement of the appellant-petitioner in COVID-19 duties and further as the counselling was in currency, should have called her to face the counselling. Instead of it, they chose to keep silence on the request made by the appellant-petitioner and compelled her to approach the writ Court.

18. Learned single Bench dismissed the writ petition arriving at the conclusion that the involvement of the appellant-petitioner in COVID-19 duties would not have any hindrance in submitting an online request/application to disclose her willingness to join the counselling.

19. True it is, the online process was available to the appellant-petitioner but Court should have examined that whether a person working as Constable had any opportunity to leave her duties and to avail a device to satisfy online process. The appellant-petitioner may also not have a smart phone with her or even the internet connectivity to avail online facility. In such circumstance, she had to go to some other place may that be e-mitra or otherwise but merely a failure to avail that, does not mean that she was not interested in facing the counselling.

20. More important fact deserves to be noticed is that immediately after calling off the lockdown she represented to the respondents to have counselling. Being a person discharging duties to combat COVID-19, she must be having an expectation to have support from the system in all adversaries for her further development. The denial to consider her request to face couselling reflects arbitrariness and also an approach unfair and unjust. The circumstances would have a different, if the counselling would have been completed or the process of selection would have not in currency but that is not so. Admittedly, the counselling is still going on and will continue till 30th December, 2020.

21. Looking to this factual background, the appropriate course was to allow her to face the counselling for the purpose of appointment as Assistant Teacher. Learned single Bench, in our considered opinion, did not consider the aspect of reasonability while dismissing the petition for writ.

22. In view of whatever stated above, this appeal deserves acceptance. Accordingly, the same is allowed. The judgment impugned dated 21st October, 2020 passed by learned single Bench in Writ-A No.5011 of 2020 is set aside. The petition for writ preferred by the appellant-petitioner is accepted. The respondents are directed to call the appellant-petitioner to face counselling for the purpose of appointment as Assistant Teacher and further to consider her candidature for appointment as Assistant Teacher in pursuance to the notification dated 16th May, 2019 in accordance with law. No order to cost.

(2021)01ILR A677
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2020

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Commercial Tax Revision No. 94 of 2020

M/S B.S. Enterprises, Agra ...Applicant
Versus
The Commissioner of Commercial Tax, U.P. Lucknow ...Opp. Party

Counsel for the Applicant:
Sri Vishwjit

Counsel for the Opp. Party:
C.S.C.

(A) Tax - Best Judgment Assessment - The Assessing Authority, solely on the basis of one fake tax invoice amounting to Rs. 11,970, assessed evaded sales at Rs. 26,15,000/- which is 100% of the disclosed sales. Apart from only one bill the Assessing Authority had nothing more to form an opinion that the sales equal to the declared sales should be determined as evaded sales. Therefore, this Court found it justifiable to hold evaded sales to be 10% of the total disclosed sales for the purpose of determining the tax liability. (Para 19, 20)

Revision Partly Allowed. (E-8)

List of Cases cited :-

1. M/s Kapil Kumar & Brothers, Gautam Budh Nagar Vs Commissioner of Trade Tax Vol. 34 NTN 2007, Page 171 *(followed)*

2. Ayyub Traders Vs Commissioner, Commercial Tax U.P., Lucknow 2019 U.P.T.C. (Vol. 102) – 1363

3. M/s Vivek Agency thru' Prop. Gyan Prakash Kesarwani Vs The Commissioner of Tarde Tax, U.P. Lucknow Sales/Trade Tax Revision No. 317 of 2007

4. M/s Raj Pan Products Pvt. Ltd. Vs Commissioner of Commercial Tax, U.P. Lucknow

5. St. of Kerala Vs C. Velukutty (1966) 60 ITR 239

6. The Commissioner of Income Tax, Calcutta Vs Padamchand Ramgopal (1970) 3 SCC 866

7. Ms Joharmal Murlidhar & Co. Vs Agricultural Income Tax Officer, Assam & ors. (1970) 3 SCC 331

8. Shri S.M. Hasan, S.T.O. Jhansi & anr Vs M/s New Gramophone House, Jhansi (1976) 4 SCC 854

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Vishwjit, learned counsel for the revisionist and Sri Rishu Kumar, Standing Counsel appearing on behalf of State-opposite party.

2. In view of the statement made by the Standing Counsel that he does not want to file any objections, I proceed to hear and decide the matter finally.

3. The present assessment proceedings arise from the Assessment Year 2013-14 wherein the revisionist has disclosed the turn over of purchases and sales as under:

(1) Total purchases from the registered dealers:	16,65,367.00
(2) Sales within U.P. (a) Taxable	Rs. 65,400.00
(b) Non-taxable	Rs. 20,000.00
Total sales within U.P.	85,400.00
(3) Central Sales	Rs. 25,29,563.00
Gross Turn over of sales:	Rs. 26,14,963-00

4. It is stated that the revisionist has also filed his detailed Statements of Accounts. It is stated that while the assessment proceedings were going on two tax invoices collected by Mobile Squad were considered by the Assessing Authority and with regard to one of the said two tax invoices, the Assessing Authority came to the conclusion that the same was issued by the revisionist, the said findings were recorded on the basis of personal inspection of the invoices (comparing them with the actual invoices by the revisionist) and also the fact that the revisionist did not lodge any FIR when it came to his knowledge that any parallel invoice is being issued. On the basis of the said invoice, the Assessment Authority rejected the Books of Accounts and proceeded to assess taking recourse to Section 28(2)(ii) of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as the 'Act') for 'best judgement assessment'. The said 'best judgement assessment' was done on 31.3.2017 by an ex-parte order, the revisionist filed an application under section 32 of the Act for recall of the ex-parte order. The Assessment Authority proceeded to decide the matter on merits and passed an order dated 04.12.2017 determining evaded purchase of 65,00,000.00 and evaded sales of Rs. 80,00,000/- (Rs. 60,00,000 Provincial & Rs. 20 lacs Central Sales) and thus the tax payable by the assessee was assessed at Rs. 17,50,000/- in Provincial case and Rs. 2,80,000/- in Central Sales.

5. The order dated 04.12.2017 was rectified in respect of the Central Sales vide order dated 18.12.2017.

6. Aggrieved against the order dated 04.12.2017, the revisionist preferred an appeal before the Appellate Authority and submitted that the manner of best judgement assessment was wholly arbitrary and illegal inasmuch as only one bill recovered or produced by the Mobile Squad was found to be non-genuine and it was argued before the Appellate Authority that the assessment taking into account the entire sales, the State as well as the Central was an arbitrary exercise of power.

7. The Appellate Authority, vide order dated 18.2.2018, was of the opinion that the determination of the turn over on the basis of 'best judgement assessment' was based upon maintenance of parallel bill book hence the evaded sales was assessed as equal to the disclosed sales of the assessee i.e. 26,15,000/-. As regards, the Central Sales, the Appellate Authority was of the opinion that as no evidence was on record with regard to evasion of Central Sales hence the demand for evaded Central Sales was set aside.

8. Aggrieved against the said order, an appeal was preferred before the Tribunal. The Tribunal after considering the arguments raised by appellant upheld the order of the First Appellate Authority placing reliance upon the judgement of this Court in **M/S Kapil Kumar & Brothers, Gautam Budh Nagar vs. Commissioner of Trade Tax (Vol. 34 NTN 2007, Page 171).**

9. Aggrieved against the said judgement dated 11.2.2020 the present revision has been filed on the following substantial questions of law:

"1. Whether on the facts and circumstances of the present case, it was legally justified to enhance the taxable turnover of sale by Rs. 26,15,000.00 under the U.P. VAT Act merely on the basis of single invoice of Rs. 11970-00?"

2. Whether Tribunal was legally justified to confirm the enhancement of taxable turnover arbitrarily against the principle of law laid down by this Hon'ble court that determination of turn over should be commensurate to the material and evidence available on the record?

3. Whether, Tribunal was legally justified in confirming the enhancement of taxable furn over of sale in U.P. by Rs. 26,15,000-00 equal to gross sale of Rs. 26,14,963/- disclosed by the applicant for the entire assessment year which includes the Inter State Sales (Central Sales) of Rs. 25,19,563.00 accepted by the appellate authorities?

4. Whether in view of provision of the Act and settled law of this Hon'ble Court, it was legally justified to impose the tax both on determined taxable turnover of purchase and sales without giving the benefit of input tax credit to the applicant?"

10. The counsel for the revisionist argued that while taking recourse to the powers conferred upon the authority under section 28(2)(ii) of the Act, the Assessing Authority does not get absolute powers for making the assessment. The said power has to be exercised with caution and any exercise of power which is prima facie arbitrary has to be held contrary to the powers conferred under section 28(2)(ii) of the Act.

11. The counsel for the revisionist has placed reliance upon the judgement of this Court in the case of **Ayyub Traders vs. Commissioner, Commercial Tax U.P. Lucknow, [2019 U.P.T.C. (Vol. 102)-1363]** wherein this Court recorded as under:

"Insofar as estimation of turnover is concerned, normally, this Court does not interfere if such an estimation is found arising from material and evidence on record, however, in the present case, other than the two undisclosed bills recording transactions worth Rs. 5,520/- (in all), there is absolutely no material considered by the assessing officer or the appellate authority for the purposes of making an estimation. It is a settled position in law that the estimation made must arise from and be proportionate to the evidence of undisclosed turnover. In the instant case, as against the undisclosed turnover Rs. 5,520/- discovered, that too, on one date, i.e. 01.01.2006, the estimation as has been sustained, bears no proportion being Rs. 5,25,000/-. The same cannot be sustained.

Normally, this Court would have remanded the matter to the fact finding authority to record a proper finding of its own, however, the Court cannot lose sight of the fact that the assessment year in question is 2005-06 and almost 14 years have passed since then. If the matter were to be remitted today, largely, it would be a waste of time, inasmuch as the assessment had arisen under the U.P. Trade Tax Act, 1948 that came to be repealed by the U.P.V.A.T. Act which, in turn, has come to be repealed by the G.S.T. Act, 2017.

Thus, to bring a closure to an old dispute wherein the assessee appears to have a genuine grievance and not to set a rule as to the estimation to be made, the estimation of undisclosed turnover be pegged at Rs. 50,000/-. The assessment may stand concluded accordingly. Question of law no. (ii) is answered accordingly."

12. He further placed reliance upon the judgement of this Court dated

04.12.2017 in Sales/Trade Tax Revision No. 317 of 2007 **(M/s Vivek Agency Thru' Prop. Gyan Prakash Kesarwani vs. The Commissioner of Trade Tax, U.P. Lucknow**) wherein this Court has recorded as under:

"Both the Assessing Authority as well as the Tribunal have proceeded in the matter without being educated by the principles which must necessarily govern a best judgment assessment. While it is true that in the course of estimation of turnover a certain degree of guess work must necessarily be recognized as vesting and inhering in the hands of the Assessing Authority, the same cannot possibly be construed as conferring a power to estimate turnover in a wholly whimsical manner as has been done in the facts of the present case. The estimation of turnover of Rs.10,00,000/- is based solely on surmises and conjectures. The mere fact that the bill in question bore the number 114, cannot automatically lead one to conclude or hold that it was preceded by 113 prior transactions and that too of identical value. Such a process of determination and assessment in the case of a taxing statute cannot be accorded approval by this Court."

13. He has further placed reliance on the judgement of this Court passed in Sales/Trade Tax Revision No. 499 of 2015 (**M/S Raj Pan Products Private Limited vs. Commissioner of Commercial Tax U.P. Lucknow**) dated 20.1.2017 wherein this Court has held as under:

"The authorities have not recorded any finding as to how assessment has been enhanced by almost 28 times. There has to be some reasonable basis or nexus between the escaped transaction noticed and the consequential enhancement made by the authorities. This Court had earlier indicated that unless there exists other material to come to a different conclusion, the authorities could enhance the assessment by twice the amount i.e. Rs.1,40,000/-. The observations made by this Court in the order dated 22.7.2015 does not appear to have been taken note of in correct perspective and without any independent material or finding, it has reiterated the view taken earlier by it. There is no finding that assessee had persistently committed such default or that it was done with deliberate intent.

In the facts and circumstances of the present case, enhancement ought not to have been made more than twice the escaped transaction. The question of law raised in this revision is accordingly answered by holding that tribunal was not justified in enhancing the turnover above twice the escaped transaction in the facts and circumstances of the present case, and the enhancement to the tune of 28 times is not justified."

14. In view of the judgements referred above, counsel for the revisionist argues that the assessment made against the assessee, the appellate orders herein are wholly arbitrary and illegal and deserves to be set aside.

15. The Standing Counsel, on the other hand, argues that there was no error committed by Assessing Authority in rejecting the Books of Accounts on the basis of one bill, which on examination was found to be issued by the assessee himself. In support of the said contention, he has placed reliance on the judgement of this Court in case of **M/S Kapil Kumar & Brothers, Gautam Budh Nagar vs. The Commissioner of Trade Tax (Vol. 34**

NTN 2007, Page 171) wherein this Court had accepted the application of stay in respect of fake bills. Surprisingly, in the said judgement itself, while deciding the issue on the quantum of assessment, this Court recorded as under:

"The inference of the Tribunal that every month suppressed sales had been made against 100 bills is also not without any basis. Taking the value of the each bill at Rs. 1.29,000/-, total suppressed sale for the entire year comes to Rs. 15.48 crores. Tribunal has taken a very lenient view and has estimated the suppressed sales only at Rs. 1,54,46,975/-, which cannot be said to be arbitrary or excessive."

16. Thus, in sum and substance, this Court with regard to quantum accepted 10% of the escape sales not to be arbitrary and excessive.

17. The jurisdiction of the Assessing Authority while taking recourse to the 'best judgement assessment' is well settled. The Supreme Court in the case of **State of Kerala vs. C. Velukutty, (1966) 60 ITR 239, The Commissioner of Income Tax, Calcutta vs. Padamchand Ramgopal, 1970 (3) SCC 866, M/s Joharmal Murlidhar and Co. vs. Agricultural Income Tax Officer, Assam and others, 1970 (3) SCC 331 and Shri S.M. Hasan, S.T.O. Jhansi and another vs. M/s New Gramophone House, Jhansi, (1976) 4 SCC 854** has categorically held that while assessing, on the basis of 'best judgement', the Assessing Authority has to make the assessment honestly and on the basis of an intelligent well-grounded estimate rather than upon pure surmises. The assessment so made while taking recourse to the 'best judgement assessment' should not be speculative or fanciful but on reasonable guess based upon the material available before the Assessing Authority.

18. In the present case, admittedly, the one tax invoice, which was found to be fake, was of Rs. 11,970/- and solely on the basis of the said invoice, the evaded sales has been assessed at Rs. 26,15,000/- i.e. 100% of the disclosed sales.

19. Considering the judgements placed by both the counsels, it is clear that the Assessing Authority is bound to act in a rational manner while resorting to best judgement assessment in view of the facts on record it is clear that only one bill of Rs. 11,570/- was available as material to assess the evaded sales. There was nothing more before the Assessing Authority to form an opinion that sales equal to the declared sales should be determined as evaded sales.

20. In view of the facts and circumstances and following the judgements cited by Standing Counsel in case of **M/S Kapil Kumar & Brothers (supra),** I hold that the evaded sales should be quantified as Rs. 2,61,500/- that is the 10% of the total disclosed sales for the purposes of determining in the tax liability.

21. The liability of payment of tax shall be calculated for the year 2014-15 treating evaded sales at Rs. 2,61,500/-.

22. Question of law no. 1, 2 and 3 are answered accordingly.

23. The revision is partly allowed.

(2021)01ILR A682
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ Tax No. 400 of 2020

M/s Samtel Avionics Ltd. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anurag Khanna, Sri Shubham Agrawal, Sanyukta Singh, Sri Shivam Shukla, Sri Syed Fahim Ahmed

Counsel for the Respondents:
A.S.G.I., Sri B.K. Singh Raghuvanshi, Sri Narendra Singh, Sri Krishna Agarwal, C.S.C.

(A) Civil Law - Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019: Section 124, 121, 123 - The words "amount payable" has been defined in Section 121(e) which is the arrears of Tax dues under Section 123 less the tax relief under Section 124. (Para 12) - Tax - Calculation of amount payable.

The balance amount determined by the designated authority and payable by the petitioner under Section 127, is in accordance with the provisions of Section 124(1)(c) read with Section 121(c)/(d) and (e) of the Act which does not suffer from any error of law. (para 13)

Writ Petition Rejected. (E-8)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Anurag Khanna, learned Senior Counsel assisted by Sri Shivam Shukla, learned counsel for the petitioner, Sri Shashi Prakash Singh, learned Assistant Solicitor General of India assisted by Sri Krishna Agarwal, learned counsel for Respondent No1 and Sri B.K. Singh Raghuwanshi, learned counsel for Respondent Nos.2 and 3.

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

"(a) "certiorari" quashing and setting aside the circular dated 25.09.2019 (Annexure No.8) passed by the Designated Committee.

(b) "certiorari" quashing and setting aside the SVLDRS-3 dated 1.2.2020 (Annexure No.6) passed by the Designated Committee.

(c) mandamus directing the Designated Committee to accept the SVLDRS-1 Declaration (Annexure No.3) filed by the petitioner.

(d) Declaration that no amount of tax or duty or impost is payable by the petitioner.

(e) Mandamus directing the Respondents to grant the relief of remission on Rs.8,23,50,252/- in accordance with Section 124(1)(c) and grant deduction of pre-deposit thereafter.

(f) Issue any other Writ, order or direction in favour of the petitioner which this Hon'ble Court deems fit in the facts and circumstances of the case.

(g) Award cost of the petition to the petitioner."

3. Learned counsel for the petitioner submits as under:

(i) Paragraph 2(iv) of the impugned circular dated 25.09.2019 is violative of the provisions of sub-section (2) of Section 124 of The Finance (No.2) Act, 2019, inasmuch as it provides for the relief under Section 124(1)(c) of the said Act on the net outstanding amount whereas the amount for the purpose of relief has first to be determined on the basis of the original demand and thereafter the estimated amount/the amount payable has to be adjusted against the deposits made by the petitioner.

(ii) The amount determined by the Respondent No.2 in SVLDRS-3 is in breach of provisions of Section 124 (2) of the Finance (No.2) Act, 2019.

4. Learned Additional Solicitor General of India and learned counsel for Respondent No.2 have supported the action of the respondents.

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

6. Provisions of Chapter V of the Finance (No.2) Act, 2019, whereby "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" has been enacted; is an offer by the Government to settle tax arrears locked in litigation at a substantial discount. Section 124 Finance (No.2) Act 2019 provides the slabs of tax arrears and the discount slabs in percentage for payment by an applicant/declarant to settle the dispute. Section 125 provides that all persons shall be eligible to make a declaration under the Scheme except those mentioned in Clauses (a) to (h). Section 126 empowers the designated Committee to verify the correctness of the declaration made by the declarant under Section 125 in the manner as may be prescribed. Section 127 of the Act empowers the designated Committee to issue statement indicating the amount payable by the declarant and in the event the amount estimated by the designated Committee exceeds the amount declared by the declarant then the designated Committee shall afford an opportunity of hearing to the declarant and thereafter issue a statement in electronic form indicating the amount payable by the declarant. Thereafter, the declarant shall pay the amount through internet banking and on payment the designated committee shall issue a discharge certificate in electronic form within 30 days of the payment and production of proof. Sub-Section 6 and Sub-Section 7 of Section 127 provides for withdrawal or deemed withdrawal of Appeal, Revision, Reference or Writs relating to the matter in question. Section 129 provides for certain immunities to the declarant. Section 130 prohibits payment through input tax credit account, refunds and to take input tax credit of the amount deposited under the Scheme. Section 131 provides for removal of doubts and Section 134 provides for removal of difficulties. Section 132 empowers the Central Government to make Rules by notification to carry out the provisions of the Scheme. Section 133 empowers the Central Board of Indirect Taxes to issue orders, instructions etc. Section 135 provides for protection to the Officers.

7. Thus, perusal of the provisions of the Scheme briefly noted above, shows that the Scheme is a complete Code in itself. In substance, it is a scheme for recovery of duty/indirect tax to unlock the frozen assets and to recover the tax arrears at a discounted amount. Thus, "Sabka Vishwas Scheme", although a beneficial scheme for a declarant, is statutory in nature, which has been enacted with the object and purpose to

minimise the litigation and to realise the arrears of tax by way of settlement at discounted amount in an expeditious manner. In other words the scheme is a step towards the settlement of outstanding disputed tax liability.

8. Provisions of Sections 121(c)/(d)/(e) and 124 are relevant for the purpose of present controversy, which are reproduced below:

"121. In this Scheme, unless the context otherwise requires,--

(a) x x x

(b) x x x

(c) **"amount in arrears" means the amount of duty which is recoverable as arrears of duty under the indirect tax enactment, on account of**--

(i) no appeal having been filed by the declarant against an order or an order in appeal before expiry of the period of time for filing appeal; or

(ii) an order in appeal relating to the declarant attaining finality; or

(iii) the declarant having filed a return under the indirect tax enactment on or before the 30th day of June, 2019, wherein he has admitted a tax liability but not paid it:

(d) "amount of duty" means the amount of central excise duty, the service tax and the cess payable under the indirect tax enactment;

(e) "amount payable" means the final amount payable by the declarant as determined by the designated committee and as indicated in the statement issued by it, in order to be eligible for the benefits under this Scheme and shall be calculated as the amount of tax dues less the tax relief;

x x x

124. (1) Subject to the conditions specified in sub-section (2), the relief available to a declarant under this scheme shall be calculated as follows:—

(a) where the tax dues are relatable to a show cause notice or one or more appeals arising out of such notice which is pending as on the 30th day of June, 2019, and if the amount of duty is--

(i) rupees fifty lakhs or less, than, seventy per cent of the tax dues;

(b) where the tax dues are relatable to a show cause notice for late fee or penalty only, and the amount of duty in the said notice has been paid or is nil, then, the entire amount of late fee or penalty;

(c) where the tax dues are relatable to an amount in arrears and,

(i) the amount of duty is, rupees fifty lakhs or less, then, sixty per cent of the tax dues;

(ii) the amount of duty is more than rupees fifty lakhs, then, forty per cent of the tax dues;

(iii) in a return under the indirect tax enactment, wherein the declarant has indicated an amount of duty as payable but not paid it and the duty amount indicated is,--

(A) rupees fifty lakhs or less, then, sixty per cent of the tax dues;

(B) amount indicated is more than rupees fifty lakhs, then, forty per cent of the tax dues;

(d) where the tax dues are linked to an enquiry, investigation or audit against the declarant and the amount quantified on or before the 30th day of June, 2019 is--

(i) rupees fifty lakhs or less, then, seventy per cent of the tax dues;

(ii) more than rupees fifty lakhs, then, fifty per cent of the tax dues;

(e) where the tax ones are payable on account of voluntary disclosure by the declarant, then, no relief shall be available with respect to tax dues.

(2) The relief calculated under sub-section (1) shall be subject to the

condition that any amount paid as predeposit at any stage of appellate proceedings under the direct tax enactment or as deposit during enquiry, investigation or audit, shall be deducted when issuing the statement indicating the amount payable by the declarant;

Provided that if the amount of predeposit or deposit already paid by the declarant exceeds the amount payable by the declarant, as indicated in the statement issued by the designated committee, the declarant shall not be entitled to any refund."

9. Facts of the present case are that an order in original dated 29.03.2019 was passed by the Respondent No.3 against the petitioner confirming a demand of service tax of Rs. 4,53,63,720/-, Rs. 2,84,02,508/- and Rs. 85,84,024. The amount already deposited by the petitioner i.e. Rs. 3,64,81,370/- + Rs. 2,18,84,061/-, were appropriated by the order in original itself. Thus as per aforesaid order in original dated 29.03.2019 the amount of tax in arrear was Rs. 1,74,66,374/-. This amount was **recoverable as arrears of duty** under the indirect tax enactment. Thus, the aforesaid amount of Rs. 1,74,66,374/- is the "amount in arrears" under Section 121(c) of the Act.

10. The words "amount payable" has been defined in Section 121 (e) of the Act. It means the amount calculated by the authority as the amount of tax dues less the tax relief. Thus, the amount of tax dues being the amount in arrears in terms of provisions of Section 124(1)(c) read with Section 121(c) of the Finance (No.2) Act, 2019 is the amount of duty which is in arrears as per order in original dated 29.03.2019 i.e. Rs. 1,74,66,374/-. Accordingly, it has been reflected in the SVLDRS-3, by the designated authority who computed the amount of tax relief under Section 124(1)(c) at Rs. 69,86,549.60. Thus, the balance amount as estimated amount payable has been determined at Rs. 1,04,79,824.40.

11. As per provisions of Section 124(1) the relief available to a declarant under the Scheme shall be calculated as per Clauses (a),(b),(c),(d) and (e). According to the petitioner Clause (c) is attracted to this case.

12. As per clause (c) the relief available to the petitioner/declarant under the Scheme was to be calculated on the amount of tax dues relatable to an "**amount in arrears**". The words "**amount in arrears**" has been defined in Section 121(c) of the Act 2019, to mean the amount of duty which is recoverable as arrears of duty under the indirect tax enactment on account of (i) no appeal having been filed by the declarant against an order or an order in appeal before expiry of the period of time for filing appeal; or (ii) an order in appeal relating to the declarant attaining finality; or (iii) the declarant having filed a return under the indirect tax enactment on or before the 30th day of June, 2019, wherein he has admitted a tax liability but not paid it. In the definition of the words "the amount in arrears" the words "amount of duty" has been used, which has been defined in Section 121(d) to mean the amount of central excise duty, the service tax and the cess payable under the indirect tax enactment. The words "amount payable" has been defined in Section 121(e). Thus, under the scheme the amount payable by a declarant is the arrears of Tax dues under Section 123 less the Tax relief under Section 124.

13. The amount in arrears as per order in original dated 29.03.2019 is Rs.1,74,66,374/-. The relief under Section 124 of the Act, 2019 "Sabka Vishwas Scheme" has been computed on the aforesaid amount in arrears. Accordingly, the Tax relief under Section 124(1)(c) has been given to the petitioner for Rs.69,86,549.60. The balance amount of Rs. 1,04,79,824.40 determined by the designated authority and payable by the petitioner under Section 127, is in accordance with the provisions of Section 124(1)(c) read with Section 121(c)/(d) and (e) of the Act which does not suffer from any error of law.

14. From the facts and the legal provisions as aforenoted neither the circular is in breach of the provisions of Section 124(1)(c) or sub-section (2) of Section 124 nor the amount estimated as per SVLDRS-3 dated 01.02.2020 suffers from any error of law

15. For all the reasons aforestated, we do not find any merit in this writ petition. Consequently, the Writ Petition fails and is hereby dismissed.

16. After this judgment was dictated in open Court, Sri Anurag Khanna, learned Senior Advocate for the petitioner submits that the SVLDRS-3 was issued on 01.02.2020 but the petitioner could not deposit the amount due to COVID - 19 Pandemic and the pendency of the present writ petition. He, therefore, submits that the respondent no.2 may be directed to accept the payment of the amount determined by SVLDRS-3, within a time bound period.

17. Without issuing any direction in this regard, we leave it open to the petitioner to approach the respondent no.2 to make a request and the respondent no.2 shall be at liberty to consider the request in accordance with law. It is made clear that we have not issued any direction in this regard.

(2021)01ILR A686
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ Tax No. 608 of 2020

M/S R.J. Exim, Meerut & Anr. ..Petitioners
Versus
The Prin. Comm. Central Good and Services Tax & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vikrant Rana

Counsel for the Respondents:
Sri B.K. Singh Raghuvanshi

(A) Civil Law -Central Goods and Service Tax Act, 2017: Section 70, 83, 74(5) - CGST Rules, 2017: Rule 142(1A), 159(5) - Section 74(5) of the Act affords an opportunity to a person chargeable with tax, before service of notice under sub-section (1), to pay the amount of tax and interest under Section 50 and penalty of such tax on the basis of own ascertainment of such tax or the tax ascertained by the proper officer. The proper officer issued an intimation letter dated 22.07.2020 providing an opportunity to the petitioner to file an objection, but the petitioners have failed to do so. The impugned provisional attachment order has been issued by the competent authority under Section 83 of the Act, against which also the petitioner had the opportunity to file an objection under sub-Rule 5 or Rule 159 of the Rules, but they failed to file any objection.

Therefore, impugned orders cannot be said to suffer from any manifest error of law. (para 10, 11)

Writ Petition Rejected. (E-8)

List of Cases cited :-

1. Bindal Smelting Pvt. Ltd. Thru. Its Director Vs Additional Director General, directorate General of GST Intelligence CWP No. 31382 of 2019 (O&M) (Punjab & Haryana High Court) *(distinguished)*

2. Kaish Impex Pvt. Ltd. Through its Director Vs The Union of India, through the Secretary, Department of Legal Affairs, Ministry of Law & Judge & Ors. (Bombay High Court) *(distinguished)*

3. Kushal Ltd. Vs U.O.I. R/Special Civil Application No. 19533 of 2019 (Gujarat High Court) *(distinguished)*

4. CWP No. 11961 of 2020 (O&M) (Punjab & Haryana High Court) *(distinguished)*

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioners and Sri B.K.Singh. Raghuvanshi, learned counsel for the respondents.

2. This writ petition has been filed praying to quash the impugned orders dated 22.07.2020 and 05.02.2020 passed by the respondent no.2 in exercise of powers conferred under Section 83 of the Central Goods and Services Tax Act, 2017. Petitioners have further prayed to issue a direction to the respondents concerned to release forthwith the provisional attachment of the current and saving bank account (Nos.) 306001010028200 and 3060020140796 respectively relating to PAN No.AAMPJ7368L in Union Bank of India, and also to release the FDR dated 24.10.2019 of Rs. 25 Lacs issued in the name of Principal Commissioner, CGST, Meerut in favour of the petitioners.

3. Learned counsel for the petitioners submits that as only show cause notice under Section 70 of the Central Goods and Services Tax Act, 2017 has been issued, the attachment under Section 83 of CGST Act can not be made. Consequently, the impugned orders of provisional attachment are bad and it is liable to be quashed.

4. We have carefully considered the submissions of the learned counsel for the parties.

5. From the record, we find that order dated 22.07.2020 was issued by the proper officer to the petitioners, informing GST DRC-01A under Section 74(5) of the Act, requiring the petitioners to deposit the ascertained amount of Rs. 69,67,729/- + interest @ 24%+ penalty @ 15% or to submit objection under Section 74(1) of the Act. An opportunity was also given by fresh notice so that petitioners may file an objection against the above ascertainment by 14.08.2020 in Part B of this Form.

6. Learned counsel for the petitioners has stated that petitioners have not submitted any objection against the ascertainment dated 22.07.2020 issued by the proper officer, which was followed by the impugned provisional attachment order dated 22.07.2020 issued by the Assistant Commissioner, Central Goods and Service Tax Division-I , Meerut.

7. Aggrieved against the aforesaid provisional attachment, petitioners have filed the present writ petition.

8. From the record, it appears that petitioner No.1, M/s R.J. Exim purchased Readymade Garments worth Rs. 06,50,32,128/-involving IGST Rs.69,67,729/- from the supplier M/s Unimax Overseas, WZ-98, Lamba Complex Jwala Heri, Paschim Vihar, Delhi West. The aforesaid purchase was shown through six invoices, which were mentioned in the intimation of the proper officer dated 22.07.2020. Petitioners took credit of the aforesaid IGST amount of Rs. 69,67,729/-. On verification the aforesaid, M/s Unimax Overseas, WZ-98, Lamba Complex Jwala Heri, Paschim Vihar, Delhi West was found non existent.

9. For the purposes of controversy involved in the present writ petition, the provisions of Sections 74(5), Section 83, Rules 142 (1A) and Rule 159(5) of the CGST Act, 2017 relevant which are reproduced below:-

*"**Section 74 - Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts***

74 (5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

***Section 83** - Provisional attachment to protect revenue in certain cases*

(1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

***Rule 142 (1A)** The proper officer shall, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, shall communicate the details of any tax, interest and penalty as ascertained by the said officer, in **Part A of FORM GST DRC-01A**.*

*(2) Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act, whether on his own ascertainment or, as communicated by the proper officer under sub-rule (1A), he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in **FORM GST DRC-04.***

*(2A) Where the person referred to in sub-rule(1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of **FORM GST DRC-01A.***

Rule 159 (5) Any person whose property is attached may, within seven days of the attachment under sub-rule (1), file an objection to the effect that the property attached was or is not liable to attachment, and the Commissioner may, after affording an opportunity of being heard to the person filing the objection, release the said property by an order in ***FORM GST DRC-23****."*

10. From the perusal of Section 74(5) of the Act, it is evident that a person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax and interest under Section 50 and penalty @ 15% of such tax on the basis of own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment. The intimation dated 22.07.2020 issued by the proper officer to the petitioners is referable to Section 74(5) of the Act and Rule 142(1A) of the Rules. The proper officer afforded opportunity to the petitioners to file an objection, but the petitioners have not filed any objection.

11. The impugned Provisional attachment order has been issued by the competent authority under Section 83 of the Act for the purpose of protecting interest of the Government revenue. Against the order of Provisional attachment under Section 83(1) of the Act, the petitioners have an opportunity to file an objection under sub-Rule 5 of Rule 159 of the Rules. It has been admitted before us by learned counsel for the petitioners that the petitioners have not filed any objection against the impugned provisional attachment dated 22.07.2020. Therefore, the impugned orders cannot be said to suffer from any manifest error of law.

12. Learned counsel for the petitioners has relied upon a judgment of ***Punjab & Haryana High Court dated 20.12.2019 in CWP No. 31382 of 2019 (O&M) (Bindal Smelting Pvt. Ltd. Through its Director Versus Additional Director General, Directorate General of GST Intelligence)*** . Relevant para 10 of the judgment is reproduced below:-

"10. Applying the above quoted provisions of CGST Act, 2017 and taking cue from afore-cited judgments of Gujarat High Court, which has noticed consistent judicial pronouncement and Bombay High Court, we find that in the present case ***attached account is Over Cash Credit account*** *and Petitioner had debit balance of Rs.6.42 Crore, thus question arises that whether continuation of attachment would protect interest of revenue or not. The Petitioner is running unit and more than 100 families are dependent upon Petitioner.* ***Till date no proceedings under Section 74 of CGST Act are pending*** *which would start as soon as show cause notice is issued. The Respondent has seized record of the Petitioner who has further supplied various documents as well put personal appearance through Directors and employees.*

The object and intention of legislature to endow Commissioner with power of attachment under Section 83 is very clear. It is drastic and far-reaching power which must be used sparingly and only on substantive weighty grounds and reasons. The power should be exercised only to protect interest of revenue and not to ruin business of any taxable person. Primarily Section 83 permits to attach property. Property means an asset which may be movable, immovable, tangible, intangible or in the form of some instrument. Cash in hand as well bank account is property, in

the form of liquidity which is better than immovable property and directly affects working in the form of working capital of a dealer. A dealer may be having 15 of 17 CWP No.31382 of 2019(O&M) #16# cash in hand or in account in the form of fixed deposit or saving account. The mandate of Section 83 in our considered opinion is to attach amount lying in an account in the form of FDR or saving and it cannot be intention or purport of ***Section 83*** ***to attach an account having debit balance. No purpose leaving aside securing interest of revenue is going to be achieved except closure of business which cannot be permitted unless and until running of business itself is prohibited by law. The contention of Respondent that they have power to attach bank account irrespective of nature of account cannot be countenanced.***

We are of the opinion that Respondent can attach an account only if there is some balance in the form of FDR or savings. The power of attachment of bank account cannot be exercised as per whims and caprices of the Authority. The Commissioner is bound to ensure that by attachment of property or bank account, interest of revenue is going to be protected. In case a property is mortgaged with bank and value of property is less than outstanding dues of bank, provisional attachment is meaningless and action remains only on paper. In the absence of record showing that interest of revenue is protected by attaching property or bank account, action deserves to be declared as taken without application of mind and formation of opinion on the basis of cogent material*. Thus, attachment of current account having debit balance does not protect interest of revenue, instead merely ruins the business of a dealer. Such an action of attachment of "over cash credit" account for the sake of recovery of confirmed demand, may in some peculiar case, may be still permitted but not at the stage of pending investigation".*

13. In the aforesaid judgment, it is mentioned that the OCC account utilizing credit limit to the tune of Rs. 6.42 Crore was attached and there was debit balance of Rs. 6.42 Crore. On these facts it was held in para 10 of judgment that mandate of section 83 is to attach amount lying in an account in the form of FDR or saving and it cannot be intention or purport of Section 83 to attach an account having debit balance. In the present set of facts, the saving bank account of the petitioners being account Nos. 30600101002800 and 3060020140796 relating to PAN No.AAMPJ7368L in Union Bank of India have been attached. Thus, the aforesaid judgment relied by learned counsel for the petitioners has no bearing on facts of the present case.

14. The judgment dated 17.01.2020 of ***Bombay High Court in Writ Petition No. 3145 of 2019 (Kaish Impex Private Limited through its Director Vs. The Union of India, through the Secretary, Department of Legal Affairs, Ministry of Law & Judge and others)*** relied by the learned counsel for the petitioners, also does not support the case of the petitioners. Relevant para 12 of the aforesaid judgment is reproduced below:-

"Para 12. The judgment order dated 22 October, 2019 proceeds on the assertion that proceedings have been launched against the petitioner under Section 67 and 70 of the Act. As far as section 67, i.e. search is concerned, it is an uncontroverted position that no proceedings have been initiated against the petitioner under section 67 of the Act. On the date of provisional attachment of the bank account, only a summon under of the Act was issued to the petitioner. Section 70 is not mentioned in Section 83 of the Act. No

proceedings were pending against the petitioner under section 62, 63, 64,73 and 74 of the Act. Thus the petitioner contends that power under section 83 could not have been invoked against the petitioner".

15. Perusal of the aforesaid judgment in the case of Kaish Impex Pvt. Ltd.(Supra) shows that provisional attachment order was issued on the ground that proceedings under Sections 67 and Section 70 of the Act have been launched but in fact, it was found that no proceeding was initiated under Section 83 of the Act and only summon was issued for provisional attachment of the bank account. On these facts, provisional attachment was held to be bad. The facts of the present case are entirely different.

16. The judgment dated 17.12.2019 of ***Gujarat High Court at Ahmedabad in R/Special Civil Application No. 19533 of 2019 (Kushal Ltd. Versus Union of India)*** relied by the learned counsel for the petitioners, also does not support the case of the petitioners. Relevant para 14 of the aforesaid judgment is reproduced below:-

"Para 14. On a plain reading of section 83 of the GST Acts, it is clear that a sine qua non for exercise of powers thereunder is that proceedings should be pending under section 62 or section 63 or section 64 or section 67 or section 73 or section 74 of the GST Acts. In the present case, the proceedings under section 67 of the GST Acts are no longer pending and pursuant to the search, proceedings under any of the other sections mentioned in Section 83 have not been initiated. Under the circumstances, on the date when the orders of provisional attachment came to be made, the basic requirement for exercise of powers under section 83 of the GST Acts was not satisfied. The provisional attachment of the bank accounts of the petitioners under section 83 of the GST acts is, therefore, not in consonance with the provisions thereof and cannot be sustained."

17. In the aforesaid judgment in the case of Kaushal Ltd. (Supra), it was held that no proceeding under Section 67 of the Act was pending and, therefore, provisional attachment was held to be bad. In the present case, facts are entirely different.

18. In Judgment dated 09.09.2020 of ***Punjab and Haryana High Court at Chandigarh in CWP No. 11961 of 2020 (O&M)*** , Court as a matter of fact had found that on the date of Provisional attachment order under Section 83 of the Act, proceedings under Section 67 of the Act were over. On these facts, the Court found the attachment order to be bad. Thus, this judgment is also distinguishable on facts of the present case.

19. For all the reasons stated above, we do not find any merits in this writ petition. Consequently, the writ petition fails and is hereby **dismissed.**

(2021)01ILR A691
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ Tax No. 646 of 2020

M/S Indian Oil Corporation Ltd.
...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Shubham Agarwal, Sri Sanyukta Singh

Counsel for the Respondents:
A.S.G.I., Gaurav Mahajan

(A) Civil Law - Central Excise Act, 1944: Section 2(d), 2(f)(ii) ad Fourth Schedule - Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019: Section 125 - CGST/UPGST Act, 2017: Section 9 - GST may be levied even on such goods which are exercisable goods under the Central Excise Act, 1944. Therefore, Superior Kerosene Oil (SKO) shall continue to be exercisable goods under the Central Excise Act, 1944 even if GST on supply of Kerosene Oil (PDS) is levied under the GST laws. (Para 17)

Perusal of the Fourth Schedule to the Central Excise Act, 1944 and the provisions of Section 2(d) read with Section 2(f)(ii) leaves no manner of doubt that Super Kerosene Oil (SKO) is exercisable goods under the Central Excise Act, 1944, even if no rate of duty has been notified by the Central Government under the Act, 1944. Section 125(1)(h) of the Sabka Vishwas Scheme specifically excludes applicability of Scheme with respect to exercisable gods set forth in the Fourth Schedule to the Central Excise Act, 1944. Therefore ,the petitioner was not eligible to make a declaration under Scheme in view of Section 125 of the Finance Act, 2019. (Para 18). (E-8)

List of Cases cited :-

1. K.C. Sachdeva Vs State 1976 Cri.L.J. 1208

2. Indian Oil Corporation Vs Commissioner of Central Excise Vadodara (2010) 12 SCC 750

3. U.O.I. Vs Natdip Textile Processors Pvt. Ltd. 2011 (273) ELT 321 (SC): (2012) 1 SCC 226

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

1. Heard Sri Shubham Agrawal, learned counsel for the petitioner and Sri Gaurav Mahajan, learned counsel for the respondent nos. 2 & 3.

Learned counsel for the petitioner submits as under:

2. This writ petition has been filed for the following relief:-

"(a) Certiorari quashing and setting aside the SVLDRS-3 dated 26.2.2020 (Annexure No.12) passed by the Designated Committee;

(b) Mandamus directing the Designated Committee to accept the SVLDRS-1 Declaration (Annexure No.8) filed by the petitioner.

(c) Mandamus directing the respondent No.1 to delete SKO from Fourth Schedule of Central Excise ***Tariff Act****, 1944, retrospectively, wef 1.7.17;*

Or in the alternative

(d) Declaring continued existence/non-deletion of SKO from the Fourth Schedule of Central Excise ***Tariff Act****, 1944, after 1.7.17, to be violative of section 174 of Central Goods and Service Tax 2017 and also violative of Entry No.84 of List - I (Union List) of the Seventh Schedule to Constitution of India, which has been amended by the Constitution (One Hundred and First) Amendment Act, 2016."*

3. This writ petition was heard at length on 20.11.2020 and the submissions made by learned counsels for the parties were noted.

Submission on behalf of the petitioner

4. Learned counsel for the petitioner has submitted as under :-

(i) A show cause notice dated 17.10.2007 under the Central Excise Act, 1944 was issued to the petitioner for excise duty of Rs.2,96,99,001/- not paid for the period from 01.11.2002 to 31.03.2005. Penalty was also sought to be imposed under Section 11-A of the Central Excise Act 1944 read with Rule 25 of the Central Excise Rules, 2002.

(ii) A scheme known as "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" was enacted by Finance (No.2) Act, 2019. Section 124 of the Finance Act, 2019 provides that tax dues relatable to a show cause notice pending as on 30.06.2019 for more than Rs. 50 lacs shall be available to a declarant to give him relief of 50% of the tax dues. Section 125(1)(h) of the Act 2019 provides that persons seeking to make declaration with respect to excisable goods set forth in the 4th Schedule to the Central Excise Act, 1944 shall not be eligible to make a declaration under this scheme. Disputed commodity i.e. SKO is mentioned in the 4th Schedule of the Central Excise Act as amended by Taxation Laws (Amendment) Act, 2017 (No.18 of 2017) whereby the 2nd Schedule to the Central Excise Tariff Act was renumbered with certain modifications as 4th Schedule, but inclusion of SKO in the 4th Schedule to the Central Excise Act is not permissible inasmuch as after amendment of entry 84 of List 1 of the 7th Schedule to the Constitution of India, the parliament has power to impose Central Excise duty only in respect of 5 items, namely, petroleum crude, high speed diesel oil, motor spirit, natural gas aviation turbine fuel and tobacco and tobacco products which does not include SKO. Therefore, the SKO could not have been included in the 4th Schedule.

(iii) The application of the petitioner for taking benefit of the aforesaid scheme has been arbitrarily rejected by impugned communication dated 26.02.2020 on the ground that as per Section 125 (1)(h) of the Finance (No.2) Act, 2019 the product i.e. SKO is set forth in the 4th Schedule of Central Excise Tariff Act, 1944 and, therefore, the application to avail benefits of SVLDRS scheme can not be accepted.

(iv) Since SKO is not an excisable goods. Therefore, the petitioner could not have been denied the benefit of SVLDRS scheme by the impugned order/communication dated 26.02.2020.

(v) In view of the amended entry 84 of list 1 of the 7th Schedule of the Constitution (one hundred and 1st Amendment) Act, 2016, the 4th Schedule to the Central Excise Tariff Act mentioning therein SKO by the Taxation Laws (Amendment) Act, 2017 (No.18 of 2017) is violative of Section 174 of the Central GST Act which has repealed the Central Excise Act except with respect to the matters provided in the amended entry 84 of list 1 of the 7th Schedule.

(vi) Since GST is being charged as mentioned in the 4th Schedule (List of goods at 5% rate) at Serial No.164 on "Kerosene PDS", therefore, the existence of SKO (Super Kerosene Oil) in the 4th Schedule to the Central Excise Act showing rate of duty as nil, can not be continued under the Central Excise Tariff Act.

Submission on behalf of the respondents

5. Sri Gaurav Mahajan, learned counsel for the respondent nos. 2 & 3 supports the action of the respondents and the impugned order. He further submits that proper procedure was followed before rejecting the application of the petitioner.

6. Sri Gaurav Mahajan, further submits that SKO continues to be an excisable goods falling under the 4th Schedule of the Central Excise Act.

Facts

7. Briefly stated facts of the present case are that the petitioner is **engaged in the manufacturing and clearance of various petroleum products** falling under Chapter 27 of the Central Excise Tariff Act, 1985 (hereinafter referred to as "the Tariff Act"). During the period 01.11.2002 to 31.03.2005 petitioner paid Central Excise duty on the basis of Central Excise invoice in which value was shown much lower than actual price recovered by the petitioner from the buyers as per the commercial invoices in respect of Superior Kerosene Oil (SKO). Consequently, a show cause notice dated 17.10.2007 under Section 11 of the Central Excise Act, 1944 (hereinafter referred to as "the Act 1944") was issued to the petitioner by the Commissioner of Central Excise, Lucknow, requiring them to show cause as to why Central Excise duty amounting to Rs.2,96,99,001/- short paid for the period from 01.11.2002 to 31.03.2005 may not be recovered under Section 11-A and penalty under Section 11-AC of the Act, 1944 read with Rule 25 of the Central Excise Rules, 2002, be not imposed. The petitioner submitted reply dated 17.12.2007 in which the petitioner admitted lower amount shown in the Central Excise invoices and higher amount shown in the commercial invoices but took the stand that subsidy received from the Government will not form part of the value for the purposes of payment of Central Excise Duty. According to the petitioner final order has not yet been passed pursuant to the aforesaid show cause notice. In the mean time, the Finance (No.2) Act, 2019 enacted "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" (hereinafter referred to as "Sabka Vishwas Scheme") which was applied to demands under several enactments including Central Excise Act, 1944. Section 124 of the Finance (No.2) Act, 2019, provides for relief available under the Scheme. Section 125 provides that all persons shall be eligible to make a declaration under the Scheme except classes of persons provided in Clauses (a) to (h). Relevant Clause (h) of Section 125 (1) of the Finance (No.2) Act, 2019 i.e. Sabka Vishwas Scheme is reproduced below:-

*"**Section 125 Declaration under Scheme***

(1) All persons shall be eligible to make a declaration under this Scheme except the following, namely :-

(a) ....

(b) ....

(c) ....

(d) ....

(e) ....

(f) ....

(g) ....

(h) Persons seeking to make declarations with respect to excisable goods set forth in the Fourth Schedule to the Central Excise Act, 1944 (1 of 1944)."

8. Rule 3 of the "Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019" (hereinafter referred to as "Sabka Vishwas Rules") provides for declaration under Section 125 electronically. Rule 4 provides for auto acknowledgment. Rule 6 provides for verification of declaration by the designated committee and issue of estimates etc. in Form No. SVLDRS - 3.

9. The designated committee issued the impugned communication dated 26.02.2020 to the petitioner with the remarks as under :-

"As per Section 125 (h) of the Finance (No.2) Act, 2019, the product i.e. SKO is set forth in the Fourth Schedule of Central Excise Tariff Act, 1944, therefore, the application to avail benefits of SVLDRS Scheme ***can not be accepted****"* .

10. Aggrieved with the aforesaid communication, the petitioner has filed the present writ petition.

Discussion and Findings

11. By the constitution (One Hundred and First Amendment) Act 2016, dated 08.09.2016, Article 246-A was inserted providing for Special Provision with respect to goods and service Tax. By Section 17 of same Amendment Act, the 7th Schedule to the Constitution was amended by substituting in list -1 - Union List, the entry 84 as under :-

Entry 84 of List - 1 - Union List

12. Duties of excise on the following goods manufactured or produced in India, namely :-

"(a) Petroleum Crude; (b) High Speed Diesel; (c) Motor Spirit (commonly known as petrol); (d) natural gas (e) aviation turbine fuel; and (f) tobacco and tobacco products."

13. In **K.C. Sachdeva Vs. State 1976 Cri.L.J. 1208(para 4)** learned Single Judge has observed that the "Petroleum" includes "Kerosene. In its own case i.e. in **Indian Oil Corporation Limited Vs. Commissioner of Central Excise Vadodara (2010) 12 SCC 750** Hon"ble Supreme Court while referring to the Chapter heading 27 of the erstwhile Central Excise Tariff Act 1985 and Notification No.5/98-CE dated 2.6.1998 and Notification No.5/99-CE dated 28.2.1999 noticed the Notification in which it is mentioned that "Kerosene" is any hydro carbon oil (excluding Colza Oil and white spirit) which has a smoke point of 18 mm or more.

14. It appears that on account of the one hundred and First constitution Amendment Act, 2016, the Goods and Service Tax laws were enacted and Central Excise Act, 1944 was also amended by Act 18 of 2017. By Section 174 of the Central Goods and Service Tax Act, 2017 assented by the President on 12.04.2017 and enforced w.e.f. 01.07.2017 certain enactments including the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the 7th Schedule to the Constitution) and the Central Excise Tariff Act, 1985, have been repealed with a saving clause in sub - Section (2).

15. By Act 18 of 2017 (w.e.f. 01.07.2017) several amendments were made in the Central Excise Act, 1944. The relevant amended provisions for the purposes of the present case are Section 2(d), Section 2(f) (ii) and the Fourth Schedule to the Act. The Fourth Schedule has been substituted with reference to the provisions of Section 2(d) and Section 2(f)(ii) of the Act, 1944. Section 2(d) and 2(f)(ii) are reproduced below:-

"Section 2(d)

"Excisable goods*" means "goods" specified in the* ***Fourth Schedule*** *as being subject to a duty of excise and includes salt.*

Explanation.- For the purposes of this clause, "goods" includes any article,

material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable"

Section 2(f)(ii)

*"**Manufacture**" includes any process -*

(i) .....

(ii) .....which is specified in relation to any goods in the section or Chapter notes of the Fourth Schedule as amounting to manufacture; or

(iii)..... and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account."

16. **Section 3** of the Act, 1944 as amended by Act 18 of 2017 is the charging Section. It provides for leavy and collection of duty of excise to be called Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India, at the rates set forth in the Fourth Schedule. Sub-Section 3 of Section 3 empowers the Central Government to provide by Notification rates of duty and tariff values with respect to the articles enumerated in the Fourth Schedule. **Thus, all the items which are enumerated in the Fourth Schedule are excisable goods in terms of the provisions of Section 2(d), read with Section 2(f) and are liable to duty at the notified rates under the charging Section 3 of the Act.**

17. "Manufacture" is the taxable event under the Central Excise Act, 1944 while under **Section 9 of the CGST Act/UPGST Act, the event of taxation is the supply of goods or services** except the supply of alcoholic liquor for human consumption. Sub-Section 2 of Section 9 of the CGST Act/UPGST Act empowers to levy tax on supply of petroleum crude, high speed diesel oil, motor spirit, natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council. **Thus, GST may be levied even on such goods which are excisable goods under the Central Excise Act, 1944. Therefore, Superior Kerosene Oil (SKO) shall continue to be an excisable goods under the Central Excise Act, 1944 even if GST on supply of Kerosene Oil (PDS) is levied under the GST laws.**

18. Perusal of the Fourth Schedule to the Central Excise Act, 1944 and the provisions of Section 2(d) read with Section 2(f)(ii) leaves no manner of doubt that Superior Kerosene Oil is an excisable goods under the Central Excise Act, 1944, even if no rate of duty has been notified by the Central Government under the Act, 1944. Section 125(1)(h) of the Finance (No.2) Act, 2019 (Sabka Vishwas Scheme) specifically excludes applicability of the "Sabka Vishwas Scheme" with respect to excisable goods set forth in the Fourth Schedule to the Central Excise Act 1944. Since the 'SKO" is an excisable goods set forth in the Fourth Schedule to the Central Excise Act, 1944, therefore, the petitioner was not eligible to make a declaration under the Scheme in view of Section 125 of the Finance (No.2) Act 2019.

19. Perusal of the Fourth Schedule shows that against the goods Superior Kerosene Oil "....." is appearing under the column rate of duty. Clause 4 of the additional notes to the Fourth Schedule provides that "....." against any goods denotes that **Central Excise Duty** under

this Schedule is not leviable on such goods. It means that S.K.O. is an excisable goods as defined in Section 2(d) read with Section 2(f) and Section 3 (Charging Section) of the Central Excise Act, 1944 but presently no duty is leviable in the absence of rate of duty in the Fourth Schedule to the Act, 1944.

20. Thus, if the "additional notes" to the Fourth Schedule is read together with Section 2(d), Section 2(f)(ii), Section 3 of the Act, 1944 and Section 125 (1) (h) of the Finance (No.2) Act, 2019, it is clear that Section 125(1)(h) merely makes a person not eligible for declaration with respect to the excisable goods which are set forth in the Fourth Schedule to the Act, 1944.

21. Undisputedly, Superior Kerosene Oil is mentioned in the Fourth Schedule although no rate of duty has been provided. If rate of duty has not been provided it shall merely mean that no duty is leviable in the absence of rate of duty. It does not mean that such goods are not excisable. All the goods mentioned in Fourth Schedule to the Act, 1944 shall continue to be excisable goods unless the goods is removed from the Schedule by an amendment. Section 174 of the CGST Act has not repealed the Central Excise Act, 1944 as respect to the goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution. The Central Excise Act, 1944 as amended by Act 18 of 2017 has been enacted with respect to the goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution which includes S.K.O.

22. The petitioner has sought the relief No. (c) and (d) to delete SKO from the Fourth Schedule of Central Excise Tariff Act, 1944. There is no such Act. The relief sought is without substance. Apart from this, inclusion of SKO in the Fourth Schedule of the Act, 1944 is not violative of Section 174 of the CGST Act, 2017, for detailed reasons given in the foregoing paragraphs.

23. "**Sabka Vishwas Scheme**" is a complete code in itself. An earlier scheme known as "Kar Vivad Samadhan" scheme was considered by Hon'ble Supreme Court in the case of **Union of India Vs. Nitdip Textile Processors Pvt. Ltd. 2011 (273) ELT 321 (SC) : (2012)1 SCC 226** and it was held that such a scheme is a complete code in itself.

24. Provisions in Chapter V of the Finance (No.2) Act, 2019, whereby "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" has been enacted; is an offer by the Government to settle tax arrears locked in litigation at a substantial discount. Section 124 Finance (No.2) Act 2019 provides the slabs of tax arrears and the discount slabs in percentage for payment by an applicant/declarant to settle the dispute. Section 125 provides that all persons shall be eligible to make a declaration under the Scheme except those mentioned in Clauses (a) to (h). Section 126 empowers the designated Committee to verity the correctness of the declaration made by the declarant under Section 125 in the manner as may be prescribed. Section 127 of the Act empowers the designated Committee to issue statement indicating the amount payable by the declarant and in the event the amount estimated by the designated Committee exceeds the amount declared by the declarant then the designated Committee shall afford an opportunity of hearing to the declarant and thereafter issue a statement in electronic form indicating the amount payable by the declarant. Thereafter, the declarant shall

pay the amount through internet banking and on payment, the designated committee shall issue a discharge certificate in electronic form within 30 days of the payment and production of proof. Sub-Section 6 and Sub-Section 7 of Section 127 provides for withdrawal or deemed withdrawal of Appeal, Revision, Reference or Writs relating to the matter in question. Section 129 provides for certain immunities to the declarant. Section 130 prohibits payment through input tax credit account, refunds and to take input tax credit of the amount deposited under the Scheme. Section 131 provides for removal of doubts. Section 134 provides for removal of difficulties. Section 132 empowers the Central Government to make Rules by notification to carry out the provisions of the Scheme. Section 133 empowers the Central Board of Indirect Taxes to issue orders, instructions etc. Section 135 provides for protection to the Officers.

25. Thus, perusal of the provisions of the Scheme briefly noted above, shows that **the Scheme is a complete Code in itself**. In substance, it is a scheme for recovery of duty/indirect tax to unlock the frozen assets and recover the tax arrears at a discounted amount. Thus, "Sabka Vishwas Scheme", although a beneficial scheme for a declarant, is statutory in nature which has been enacted with the object and purpose to minimise the litigation and to realise the arrears of tax by way of settlement at discounted amount in an expeditious manner. In other words the scheme is a step towards the settlement of outstanding disputed tax liability.

26. The discussion made in the foregoing paragraphs leaves no manner of doubt that the petitioner/declarant could avail benefit of the "Sabka Vishwas Scheme" only in accordance with the provisions of the Scheme. Section 125(1)(h) of the Act 2019/"Sabka Vishwas Scheme" has specifically excluded persons seeking to make declarations with respect to excisable goods set forth in the Fourth Schedule to the Central Excise Act, 1944. Undisputedly, S.K.O. is an excisable goods set forth in the Fourth Schedule to the Act, 1944. The petitioner was not eligible to make a declaration under the "Sabka Vishwas Scheme" with respect to "S.K.O.". Therefore, non acceptance of the declaration of the petitioner by the respondents does not suffer from any manifest error of law.

27. For all the reasons aforestated, we do not find any merit in this writ petition. Consequently, the Writ Petition fails and is hereby **dismissed.**

(2021)01ILR A698
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ Tax No. 664 of 2020

Raj Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Balendra Deo Mishra

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Motor Vehicle Act, 1988: Section 48 - Central Motor Vehicle Rules,

1989: Rule 58, 59 - No Objection Certificate - Change in residence

A conjoint reading of the provisions indicates that an application by the owner o a motor vehicle for issuance of a No Objection Certificate (NOC) under Section 48 is to be made in the prescribed Form-28 and the said endorsement of grant or refusal of No Objection Certificate is valid for use before the Registration Authority on whom it is issued. In The present case, the NOC having been issued on the Registering Authority at Gorakhpur, the same would be valid for use only before the Registering Authority mentioned in the endorsement made under Part III of Form i.e., the Registering Authority, Gorakhpur and as per the relevant Rules, the same cannot be held to be valid for use before any other Registering Authority. Therefore, under these circumstances, the petitioner my either apply for correction of the NOC issued by the Registering Authority or make an application for issuance of a fresh registration certificate-containing an endorsement showing that it is valid for use before the Registering Authority at Deoria. (para 8-11)

Writ Petition Rejected. (E-8)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri B.D. Misra, learned counsel for the petitioner and Sri Mata Prasad, learned special standing counsel for the State-respondents.

2. This writ petition has been filed praying for the following relief:

"(i) to issue a writ, order or direction in the nature of Mandamus directing the respondent no.3 to change the address of petitioner in his Registration Certificate of vehicle No.NL03 B1013 (Bus) and accept the due Road Tax with minimum penalty as per law."

3. Briefly stated facts of the present case are that the motor vehicle of the petitioner was registered by the Government of Nagaland and a certificate of registration dated 22.03.2013 had been issued by the Registering Authority, District Transport Office, Tuensang, Nagaland. Subsequently, the petitioner shifted to District Deoria in the State of U.P. and applied for a No Objection Certificate to the Registering Authority at Tuensang, Nagaland.

4. Upon the aforesaid application, the Registering Authority granted the No Objection Certificate in the prescribed form wherein the Registering Authority upon whom the No Objection Certificate was issued, was shown as "RA Gorakhpur". On the basis of the aforementioned No Objection Certificate, the petitioner applied for recording a change in the residence in the certificate of registration of the motor vehicle before the Registering Authority at Deoria. The petitioner contends that the application submitted for change in residence accompanied by the No Objection Certificate issued to the Registering Authority at Gorakhpur is not being accepted by the Registering Authority at Deoria and for the said grievance, the present writ petition has been filed.

5. Learned standing counsel submits that No Objection Certificate having been issued to the Registering Authority at Gorakhpur, on the own application made by the petitioner before the Registering Authority at Tuensang, Nagaland, the said certificate is valid for use only before the Registering Authority on whom it is issued i.e. the Registering Authority at Gorakhpur, and for the said reason, unless the petitioner obtains a No Objection

Certificate valid for use before the Registering Authority at Deoria, the application for change in residence cannot be accepted by the Registering Authority at Deoria.

6. In order to appreciate rival contentions, the relevant statutory provisions with regard to issuance of a No Objection Certificate under Section 48 of the Motor Vehicles Act, 1988, may be referred to. For ease of reference, Section 48 of the Act, 1988 is being extracted below:

"48. No objection certificate.--

(1) The owner of a motor vehicle when applying for the assignment of a new registration mark under sub-section (1) of section 47, or where the transfer of a motor vehicle is to be effected in a State other than the State of its registration, the transferor of such vehicle when reporting the transfer under sub-section (1) of section 50, shall make an application in such form and in such manner as may be prescribed by the Central Government to the registering authority by which the vehicle was registered for the issue of a certificate (hereafter in this section referred to as the no objection certificate), to the effect that the registering authority has no objection for assigning a new registration mark to the vehicle or, as the case may be, for entering the particulars of the transfer of ownership in the certificate of registration.

(2) The registering authority shall, on receipt of an application under sub-section (1), issue a receipt in such form as may be prescribed by the Central Government.

(3) On receipt of an application under sub-section (1), the registering authority may, after making such inquiry and requiring the applicant to comply with such directions as it deems fit and within thirty days of the receipt thereof, by order in writing, communicate to the applicant that it has granted or refused to grant the no objection certificate:

Provided that a registering authority shall not refuse to grant the no objection certificate unless it has recorded in writing the reasons for doing so and a copy of the same has been communicated to the applicant.

(4) Where within a period of thirty days referred to in sub-section (3), the registering authority does not refuse to grant the no objection certificate or does not communicate the refusal to the applicant, the registering authority shall be deemed to have granted the no objection certificate.

(5) Before granting or refusing to grant the no objection certificate, the registering authority shall obtain a report in writing from the police that no case relating to the theft of the motor vehicle concerned has been reported or is pending, verify whether all the amounts due to Government including road tax in respect of that motor vehicle have been paid and take into account such other factors as may be prescribed by the Central Government.

(6) The owner of the vehicle shall also inform at the earliest, in writing, the registering authority about the theft of his vehicle together with the name of the police station where the theft report was lodged, and the registering authority shall take into account such report while disposing of any application for no objection certification, registration, transfer of ownership or issue of duplicate registration certificate."

7. The procedure for making an application for issue of No Objection certificate under Section 48 is prescribed under Rule 58 of the Central Motor Vehicle Rules, 1989 and as per terms thereof, the

application is to be made in the prescribed Form-28. The application for recording change in residence in the certificate of registration of a motor vehicle is to be made in Form-33 as provided under Rule 59 of the Rules, 1989. For ready reference, the Rules 58 and 59 are reproduced below:

*"**58. No objection certificate.** - (1) An application for the issue of a no objection certificate under section 48 in respect of a motor vehicle shall be made in Form 28 to the registering authority by which the vehicle was previously registered, accompanied by*

(a) the certified copy of the certificate of registration;

(b) the certified copy of the certificate of insurance;

(c) evidence of payment of motor vehicle tax up-to-date;

(d) where no tax is payable for a certain period a certificate from the tax collecting authority that no tax is due from the vehicle for the said period.

(2) In the case of a transport vehicle, in addition to the documents referred to in sub-rule (1), documentary evidence in respect of the following matters shall also be furnished, namely:

(a) that the vehicle is not covered by any permit issued by any transport authority;

(b) that the sum of money agreed upon to be paid by the holder of the permit under sub-sections (5) and (6) of section 86, if any, is not pending recovery;

(c) evidence of payment of tax on passengers and goods under any law for the time being in force up to the date of application for a no objection certificate.

(3) On receipt of an application under sub-rule (1), the registering authority shall fill Part III of Form 28 and return that part to the applicant duly signed.

(4) Where the registering authority grants or refuses to grant the no objection certificate, it shall return the duplicate copy of the said Form to the applicant and the triplicate copy to the other registering authority after duly filling and signing Part II thereof.

***59. Change in residence**.- An application for recording a change in the residence in the certificate of registration of a motor vehicle shall be made by the owner of the vehicle in Form 33 accompanied by the certificate of registration and proof of address in the manner specified in rule 4 and the appropriate fee as specified in rule 81."*

8. A conjoint reading of the aforementioned provisions indicates that an application by the owner of a motor vehicle for issuance of a No Objection Certificate under Section 48 is to be made in the prescribed Form-28. The office endorsement regarding grant or refusal of "No Objection Certificate" under Section 48 is to be made in Part-III of the prescribed Form-28 and the said endorsement of grant or refusal of No Objection Certificate is valid for use before the Registering Authority on whom it is issued.

9. In the instant case, upon the application submitted by the petitioner in Form-28 to the Registering Authority at Tuensang, Nagaland, the office endorsement made under Part-III of the prescribed Form-28 indicates that the No Objection Certificate was issued showing the Registering Authority, Gorakhpur as the authority on whom it was issued.

10. The No Objection Certificate having thus been issued on the Registering Authority at Gorakhpur, the same would be valid for use only before the Registering Authority mentioned in the endorsement made under Part-III of Form-28, i.e. the Registering Authority, Gorakhpur and as per the relevant Rules, the same cannot be held to be valid for use before any other Registering Authority.

11. Under the aforesaid circumstances, the petitioner may either apply for correction of the No Objection Certificate issued by the Registering Authority or make an application for issuance of a fresh registration certificate containing an endorsement showing that it is valid for use before the Registering Authority at Deoria, as per the statutory provisions referred to above.

12. With the aforesaid observations, the **writ petition is dismissed.**

(2021)01ILR A702
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ Tax No. 665 of 2020

M/S Libra Int. Ltd. ...Petitioner
Versus
Asst. Comm. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Suyash Agarwal, Sri Ankur Agarwal

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri C.B. Tripathi

(A) Civil Law - U.P. G.S.T. Act, 2017: Section 129 - By virtue of the deeming provision under sub-section (5) of Section 129 all the proceedings in respect of the notice specified under sub-section (3) shall be deemed to be concluded on deposition of entire amount of tax and penalty determined in the penalty order. (Para 15)

Writ Petition Rejected. (E-8)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Suyash Agarwal, learned counsel for the petitioner and Sri C.B. Tripathi, learned Special Counsel for respondent no.1.

2. This writ petition has been filed praying for following reliefs :-

"I. Issue a writ, order or direction in the nature of Certiorari quashing the order no.731 dated 15.2.2018 passed by Respondent no.1 u/s 129(3) of the UPGST Act (Annexure No. 6)

II Issue a writ, order or direction in nature of certiorari quashing GST DRC-07 dated 18.9.2020 (Annexure-9)

III. Issue any other writ, order or direction in favour of the petitioner which this Hon'ble Court deems fit in the facts and circumstances of the case.

IV. Award cost of the petition to the petitioner."

3. Pleadings of the writ petition indicate that the goods and vehicle of the petitioner were intercepted on 11.2.2018 on the ground that the goods in question were being transported without E-Way Bill and a notice under Section 129(3) of the Uttar Pradesh Goods and Services Tax Act, 2017

(hereinafter referred to as "the Act, 2017") was issued specifying the tax and penalty payable. Thereafter, an order for payment of tax of Rs.1,01,844/- and equivalent amount of penalty, total Rs. 2,03,688/-, was passed under Section 129(3) of the Act, 2017.

4. The petitioner claims to have deposited the amount of tax and penalty vide demand draft dated 14.2.2018 and despite the same, an order in **FORM GST DRC-07** dated 18.9.2020 has been received by the petitioner showing the details of demand in respect of tax and penalty determined under Section 129 of the Act, 2017. Learned counsel for the petitioner submits that left with no other remedy, the present writ petition has been filed.

5. Learned counsel appearing for respondent no.1 submits that the order dated 15.2.2018 passed under Section 129(3) of the Act, 2017, has attained finality and the same cannot be assailed at this stage. He further submits that the writ petition is barred by laches and is not liable to be entertained for this reason. Further, submission is made that since the petitioner claims to have deposited the entire amount of interest and penalty by means of a demand draft dated 14.2.2020, in view of the provisions contained under sub-section (5) of Section 138 of the Act, 2017, all proceedings in respect of the notice under Section 129(3) shall be deemed to be concluded.

6. Learned counsel for the State respondent submits that in the event the petitioner has actually deposited the amount towards tax and penalty determined in terms of the order dated 15.2.2018 under Section 129(3) of the Act, 2017, he may apply for a rectification of the order uploaded in **FORM GST DRC-07** alongwith proof of having made the payment pursuant to the demand pertaining to tax and penalty.

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

8. In order to appreciate the contention of the parties, the relevant statutory provision under Section 129 of the Act, 2017, which provides for detention, seizure and release of goods and conveyances in transit may be referred to. Section 129 reads as follows :-

"129. Detention, seizure and release of goods and conveyances in transit.--(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released, --

(a) on payment of the applicable tax and penalty equal to one hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;

(b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty five thousand rupees, whichever

is less, where the owner of the goods does not come forward for payment of such tax and penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.

(3) The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c).

(4) No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within fourteen days of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130:

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fourteen days may be reduced by the proper officer."

9. In terms of sub-section (1) of Section 129, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of the Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure. Sub-section (3) provides for issuance of a notice specifying the tax and penalty payable after detention or seizure of goods or conveyances, and passing of an order for payment of tax and penalty.

10. Sub-section (5) of Section 129 of the Act, 2017, contains a deeming provision, and in terms thereof, upon payment of the amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

11. The summary of the order uploaded electronically in **FORM GST DRC-07** bearing date 18.9.2020 specifying therein the amount of tax, interest and penalty is referable to Rule 142(5) of the Uttar Pradesh Goods and Service Tax Rules, 2017. For ease of reference, sub-rules (5), (6) and (7) of Rule 142 are extracted below :-

"(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in **FORM GST DRC-07**, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.

(6) The order referred to in sub-rule (5) shall be treated as the notice for recovery.

(7) Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in FORM GST DRC-08."

12. Rule 142 of the aforementioned Rules, 2017, is in respect of notice and order for demand of amounts payable under the Act. Sub-rule (5) of Rule 142 provides that a summary of the order issued under certain provisions, including an order issued under Section 129, shall be uploaded electronically in **FORM GST DRC-07** specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax. In terms of sub-rule (6) the order referred to in sub-rule (5) shall be treated as the notice for recovery. Further, sub-rule (7) provides that where a rectification of the order has been passed in accordance with the provisions of Section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in **FORM GST DRC-08**.

13. A combined reading of sub-rules (5), (6) and (7) of Rule 142 of the Rules, 2017, indicate that a mechanism is provided for uploading summary of certain specified orders, including the order issued under Section 129 in **FORM GST DRC-07**, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax. In the event the order aforementioned has been rectified or withdrawn, a summary of the rectification order was of the withdrawal order is uploaded electronically by the proper officer in **FORM GST DRC-08.**

14. We may take note of the fact that implementation of the GST regime has brought about a major reform in the field of indirect taxation and all key aspects starting from registration till filing of the return, raising of e-way bill, filing of the refund claim, passing of an order creating demand of tax and penalty, rectification of the order, etc. are dependant on a technology driven process with regard to which the necessary procedure is provided under the Rules.

15. The challenge sought to be raised to the order dated 15.2.2018 passed under Section 129 (3) of the Act, 2017, having been made at a belated stage, we are of the view that the relief claimed in this regard in terms of relief clause (I), would be barred by laches; moreso, in the light of the fact that the petitioner claims to have deposited the entire amount of tax and penalty determined under the said order, and by virtue of the deeming provision under sub-section (5) all proceedings in respect of the notice specified under sub-section (3) shall be deemed to be concluded.

16. As regards the prayer for quashing the summary of the order uploaded electronically in **FORM GST DRC-07** dated 18.9.2020, as under relief clause (II), we may observe that in the event the petitioner has actually made payment of the entire amount due towards tax and penalty referred to in the notice issued under sub-section (1) of Section 129, he may submit proof thereof before the authority concerned and apply for rectification/withdrawal of the said order.

17. Subject to aforesaid observations, the writ petition is dismissed.

(2021)01ILR A706
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ Tax No. 666 of 2020

M/S G.K. Trading Co., Ghaziabad ...Petitioner

Versus

Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Praveen Kumar

Counsel for the Respondents:
A.S.G.I., C.S.C., Ramesh Chandra Shukla, Sri C.B. Tripathi

(A) Civil Law - U.P. GST Act, 2017/ CGST Act, 2017: Section 2(91), 4(2), 6(2)(b), 67 to 72

The word "inquiry" in Section 70 has a special connotation and a specific purpose to summon any person whose attendance may be considered necessary by the proper officer either to give evidence or to produce a document or any other thing. The word "inquiry" in Section 70 is not synonymous with the word "proceedings", in Section 6(2)(b) of the U.P.G.S.T Act/C.G.S.T Act.

The words "any proceedings" on the "same subject matter" used in Section 6(2)(b) of the Act, which is subject to conditions specified in the notification issued under sub-section (1); means any proceeding on the same cause of action and for the same dispute involving some adjudication proceedings which may include assessment proceedings, proceedings for penalties etc., proceedings for demand and recovery under Section 73 and 74 etc.

Section 6(2)(b) of the C.G.S.T. Act prohibits a proper officer under the Act to initiate any proceeding on a subject-matter where on the same subject-matter proceeding by a proper officer under the U.P.G.S.T. Act has been initiated.

It has been observed that there is no proceeding by a proper officer against the petitioner on the same subject-matter referable to Section 6(2)(b) of the U.P.G.S.T. Act. It is merely an inquiry by a proper officer under Section 70 of the C.G.S.T. Act. (Para 19)

Writ Petition Rejected. (E-8)

List of Cases cited :-

1. Liberty Oil Mills & ors. Vs U.O.I. & ors. (1984) 3 SC 465

2. Ballabh Das Vs Dr. Madan Lal & ors. (1970) 1 SCC 761

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Praveen Kumar, learned counsel for the petitioner and Sri C. B. Tripathi, learned special counsel for the Union of India.

2. This writ petition has been filed praying for the following relief:-

(i) To issue a writ, order or direction in the nature of mandamus commanding the respondent nos. 3 and 4 not to proceed with any inquiry against the petitioner and to talk any coercive steps against the petitioner, in pursuance of the impugned summoned.

(ii) To issue any other suitable writ, order or direction which the Hon'ble

Court may deem fit and proper under the facts and circumstances of the case.

(iii) To award costs of the petition to the petitioner.

Submissions:-

3. Sri Praveen Kumar, learned counsel for the petitioner submits as under:-

(i) The respondent no.5 has inspected the business premises of the petitioner on 30.05.2018, which was followed by a summon dated 02.06.2018 under Section 70 of the U.P. GST Act. Lastly, a summon dated 14.09.2020 was issued by the respondent no.5- Assistant Commissioner (SIB), Commercial Tax, Range-C, Ghaziabad under Section 70 of U.P. GST Act, requiring the petitioner to explain two input tax credit taken by him.

(ii) After the aforesaid summon dated 02.06.2018 issued by the respondent no.5, the respondent no.4 has issued summon dated 24.07.2019 under Section 70(1) of CGST Act, 2017, requiring the petitioner to tender his statement in the inquiry. The aforesaid summon was followed by summons dated 26.08.2019 and 26.08.2020.

(iii) Once inquiry has been initiated by the respondent no.5 under U.P. GST Act, the respondent nos. 3 and 4 cannot initiate any proceeding in view of the provisions of Section 6 (2) (b) of U.P. GST Act, 2017.

(iv) Since inquiry has already been initiated by the respondent no.5, therefore, the respondent nos. 3 and 4 cannot initiate any inquiry against the petitioner in view of the provisions of Section 6(2)(b) of U.P. GST Act, 2017.

4. Sri C.B. Tripathi, learned special counsel for the State-respondents submits as under:-

(i) Section 6 (2) (b) of U.P. GST Act, 2017 prohibits initiation of a proceeding on the same set of facts. It does not prohibit inquiry by the authorities under U.P. Act or under Central Act.

(ii) In Section 70 of CGST Act the word "Inquiry" has been used while in Section 6(2)(b) of U.P. GST Act, 2017 the words " Proceeding" has been used. Thus Section 6 (2)(b) prohibits "Proceeding" and not "Inquiry". In other words "Inquiry" has not been prohibited under Section 6(2)(b) of the U.P. GST. Act, 2017.

(iii) Jurisdiction of the respondent nos. 2 and 5 under U.P. GST Act is only the State of U.P., while the jurisdiction under the Central Act, is whole of India.

(iv) The subject matter of inquiry by the respondent Nos 3/4 under the CGST Act is different or wider than the subject matter of inquiry by the respondent No. 5 under the U.P. GST Act. The inquiry by the respondent No.5 is confined only to some incriminating material found in the survey dated 30.05.2018 and the evidences of Input Tax Credit illegally taken by the petitioner on the basis of invoices of two alleged dealers. No such facts are indicated in the summon issued by the respondent Nos.3/4. Thus, even the inquiry is not on the same set of facts.

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

Facts:-

6. Briefly stated facts of the present case are that the petitioner had obtained registration in Form GSTREG-06 under the U.P. GST Act, 2017 and the Registration Rules, w.e.f. 01.11.2017 for trade in Iron Bars and Rods and Non-Alloy Steel etc. etc. On 30.05.2018, a survey was conducted by the respondent No.5 at the business premises of the petitioner in which no business activity was found. Consequently, the respondent No.5 (Deputy Commissioner, S.I.B.) issued a summon to the petitioner dated 02.06.2018 under Section 70 of the U.P. GST Act requiring him to submit details of purchases and sales, list of buyers and sellers and certain other documents. The Assistant Commissioner (SIB), Commercial Tax, Range-C, Ghaziabad issued a summon to the petitioner dated 14.09.2020 under Section 70 of the Act asking him to submit explanation with respect to certain input tax credits taken by him including the input tax credit taken on the basis of invoices M/s Glider Traders Private Ltd., whose registration was cancelled several months prior to the date of the alleged invoice.

7. It appears that some inquiry was being conducted by the Directorate General of Goods and Services Tax Intelligence, Meerut Zonal Unit, Meerut, which issued summons dated 24.07.2019 to the petitioner under Sections 70 and 174 of the CGST Act, 2017 requiring the petitioner to appear in person on 25th or 26th July, 2019 at 12.00 hours to tender statement in person, but the petitioner has not responded to the summon. Another summon dated 26.08.2019 was issued to the petitioner by the respondent No.4 requiring the petitioner to submit copies of Invoices issued along with transport documents since July, 2017 till date, copies of invoices issued by suppliers and transport documents since July, 2017 till date, copies of purchase ledgers since July, 2017 till date, copies of Sales ledgers since July, 2017 till date, copies of Liability ledgers of ITC claimed and Cash deposited since July, 2017 till date and copies of Balance Sheet, Profit/Loss account for the Financial year 2017-18 and 2018-19. However, the petitioner has not submitted any information. Therefore, the respondent No.3 again issued a summon dated 26.08.2020 to the petitioner under Section 70 of the CGST Act, 2017 requiring him to tender statement, give evidence and produce copies of purchase and sales ledgers since July, 2017 till date. It appears that pursuant to the aforesaid summon, the petitioner neither appeared before the respondent No.4 nor submitted any details and instead merely wrote a letter dated 11.09.2020 that detail inquiry is being conducted by the respondent No.5. Now, the petitioner has filed the present writ petition praying for the relief as afore-quoted.

Discussion and Findings:-

8. Provisions of the U.P. GST Act and the CGST Act are almost pari materia. For the purposes of the controversy involved in the present writ petition, the relevant provisions are Sections 2(91), 4(2), 6(2)(b) and Chapter XIV (Section 67 to 72) of the Uttar Pradesh Goods and Services Tax Act, 2017 which are reproduced below:-

"Section 2. In this Act, unless the context otherwise requires--

2 (91) " Proper Officer**" in relation to any function to be performed under this Act, **means the Commissioner or the officer of the State Tax who is assigned that function by the Commissioner.

Section 4 (2) The Commissioner shall have jurisdiction over the whole of the State, the Special Commissioner and an Additional Commissioner in respect of all or any of the functions assigned to them, shall have jurisdiction over the whole of the State or where the State Government so directs, over any local area thereof, and all other officers shall, subject to such conditions as may be specified, have jurisdiction over the whole of the State or over such local areas as the Commissioner may, by order, specify.

Section 6 (2) Subject to the conditions specified in the notification issued under sub-section (1),-

(a) where any proper officer issues an order under this Act, he shall also issue an order under the Central Goods and Services Tax Act, 2017 as authorised by the said Act under intimation to the jurisdictional officer of central tax;

(b) where ***a proper officer under the Central Goods and Services Tax Act,2017 has initiated any proceedings on a subject-matter, no proceedings shall be initiated by the proper officer under this Act on the same subject- matter.***

Chapter XIV (Inspection, Search, Seizure and arrest)

Section 67. Power of inspection, search and seizure- (1) *Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that--*

(a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a go down or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act, he may authorise in writing any other officer of State tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or go down or any other place.

(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of State tax to search and seize or may himself search and seize such goods, documents or books or things:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorized by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

(3) The documents, books or things referred to in sub-section (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made

thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

(4) The officer authorised under sub-section (2) shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

(5) The person from whose custody any documents are seized under sub-section (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

(6) The goods so seized under sub-section (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

(7) Where any goods are seized under sub-section (2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the period of six months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months.

(8) The Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section(2), be disposed of by the proper officer in such manner as may be prescribed.

(9) Where any goods, being goods specified under sub-section (8), have been seized by a proper officer, or any officer authorised by him under sub-section (2), he shall prepare an inventory of such goods in such manner as may be prescribed.

(10) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

(11) Where the proper officer has reasons to believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the rules made thereunder for prosecution.

(12) The Commissioner or an officer authorised by him may cause purchase of any goods or services or both by any person authorised by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person-in-charge of the business premises shall refund the

amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier.

Section 68. Inspection of goods in movement.-*(1) The Government may require the person-in-charge of a conveyance carrying any consignment of goods of value exceeding such amount as may be specified to carry with him such documents and such devices as may be prescribed.*

(2) The details of documents required to be carried under sub-section (1) shall be validated in such manner as may be prescribed.

(3) Where any conveyance referred to in sub-section (1) is intercepted by the proper officer at any place, he may require the person-in-charge of the said conveyance to produce the documents prescribed under the said sub-section and devices for verification, and the said person shall be liable to produce the documents and devices and also allow the inspection of goods.

Section 69. Power to arrest.-*(1) Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub- section(2) of the said section, he may, by order, authorise any officer of State tax to arrest such person.*

(2) Where a person is arrested under sub-section (1) for an offence specified under sub-section (5) of section 132, the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.

(3) Subject to the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), --

(a) where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;

(b) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station.

Section 70. Power to summon persons to give evidence and produce documents.- (1) The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a Civil Court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(2) Every such inquiry referred to in sub-section (1) shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

Section 71. Access to business premises*.- (1) Any officer under this Act, authorised by the proper officer not below the rank of Joint Commissioner, shall have access to any place of business of a registered person to inspect books of account, documents, computers, computer programs, computer software whether installed in a computer or otherwise and such other things as he may require and which may be available at such place, for the purposes of carrying out any audit, scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.*

(2) Every person-in-charge of place referred to in sub-section (1) shall, on

demand, make available to the officer authorised under sub-section (1) or the audit party deputed by the proper officer or a cost accountant or chartered accountant nominated under section 66--

(i) such records as prepared or maintained by the registered person and declared to the proper officer in such manner as may be prescribed;

(ii) trial balance or its equivalent;

(iii) statements of annual financial accounts, duly audited, wherever required;

(iv) cost audit report, if any, under section 148 of the Companies Act, 2013 (18 of 2013);

(v) the income-tax audit report, if any, under section 44-AB of the Income-tax Act, 1961 (43 of 1961); and

(vi) any other relevant record, for the scrutiny by the officer or audit party or the chartered accountant or cost accountant within a period not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by the said officer or the audit party or the chartered accountant or cost accountant.

Sec 72. Officers to assist proper officers.- *(1) All officers of Police, Railways, Customs, and those officers engaged in the collection of land revenue, including village officers, officers of Central tax and officers of Union territory tax shall assist the proper officers in the implementation of this Act.*

(2) The Government may, by notification, empower and require any other class of officers to assist the proper officers in the implementation of this Act when called upon to do so by the Commissioner.

Section 6 of the C.G.S.T. Act:

Section 6 - Authorisation of officers of State tax or Union territory tax as proper officer in certain circumstances

(1) Without prejudice to the provisions of this Act, the officers appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act are authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify.

(2) Subject to the conditions specified in the notification issued under sub-section (1),--

(a) where any proper officer issues an order under this Act, he shall also issue an order under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as authorised by the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, under intimation to the jurisdictional officer of State tax or Union territory tax;

(b) where a proper officer under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

(3) Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act shall not lie before an officer appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act.

9. **Crux of the submissions** of the learned counsel for the petitioner is that once, the respondent No.5 [Deputy Commissioner (SIB), Ghaziabad], has conducted a survey of the business premises of the petitioner on 30.05.2018 and is investigating in the matter pursuant to the aforesaid survey, no inquiry can be initiated or summon can be issued by the respondent No.4 under Section 70 of the C.G.S.T. Act against the petitioner even if basis of material of inquiry/ investigation by the respondent Nos.4 and 5 may be

different. In other words, the respondent No.5, i.e. State Authority may investigate/ inquire in all the matters pertaining to the business of the petitioner and, therefore, the summons in the matter of inquiry issued by the respondent No.4 is barred by the provisions of Section 6(2)(b) of the C.G.S.T. Act.

Inquiry under Section 70

10. The words "subject-matter", "proceedings" and "inquiry" have not been defined either under **the State G.S.T. Act or the Union Territory G.S.T. Act or the C.G.S.T. Act.** Therefore, these words have to be interpreted in the context of the aforesaid Acts. The word "inquiry" in Section 70 has a special connotation and a specific purpose **to summon any person** whose attendance may be considered necessary by the proper officer either **to give evidence or to produce a document or any other thing**. It cannot be intermixed with some statutory steps which may precede or may ensue upon the making of the inquiry or conclusion of inquiry. The process of inquiry under Section 70 is specific and unified by the very purpose for which provisions of Chapter XIV of the Act confers power upon the proper officer to hold inquiry. The word "inquiry" in Section 70 is not synonymous with the word "proceedings", in Section 6(2)(b) of the U.P.G.S.T. Act/ C.G.S.T. Act.

11. In **Liberty Oil Mills and others vs. Union of India and others, (1984) 3 SCC 465 (para-15)**, Hon'ble Supreme Court considered the provisions of Import and Export Control Act and Imports (Control) Order, 1955 where the word "investigation" was not defined and held that in the context it means **the process of collection of evidence or the gathering of material.**

12. Provisions of Section 70 has been enacted for collecting evidence in matters involving tax evasion which may also lead to confiscation. After inquiry is completed and materials for tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized, by reason of fraud or wilful misstatement or suppression of facts or otherwise are found, then it may lead to demands and recovery under Section 73 or Section 74, as the case may be. When action for assessment, demand and penalty etc. including action under Section 73 or 74 is taken, that shall amount to proceedings referable to Section 6(2)(b) of the Act but the inquiry under Section 70 is not a proceeding referable to Section 6(2)(b) of the Act.

"Subject-Matter" under Section 6(2)(b):-

13. The words "subject-matter" used in Section 6(2)(b) of the Act has not been defined under the Act. In the case of **Ballabh Das vs. Dr. Madan Lal and others, (1970) 1 SCC 761 (para-5)**, Hon'ble Supreme Court interpreted the words "subject-matter" in the context of Civil Procedure Code where also these words have not been defined. Hon'ble Supreme Court held held that:

*"**The expression ''subject-matter'** has a reference to a right in the property which the plaintiff seeks to enforce. That **expression includes the cause of action and the relief claimed**. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit it cannot be said that the subject-matter of the second suit is the same as that in the previous suit. .... Mere identity of some of the issues in the two suits did not bring about an identity of the subject-matter in the two suits. As observed in Rakhma Bai v. Mahadeo Narayan, (I.L.R.*

42 Bom.1155), the expression "subject-matter" in Order XXIII, Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject-matter" means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis C.J. in Singa Reddi vs. Subba Reddi, (ILR 39 Mad. 987), that ***where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit."***

14. Thus, the phrase "subject-matter", or the phrase "on the same subject-matter", used in Section 6(2)(b) of the U.P.G.S.T. Act/ C.G.S.T. Act with reference to any proceedings, means same cause of action for the same dispute involved in a proceeding before proper officer under the U.P.G.S.T. Act and the C.G.S.T. Act.

Effect of Section 6(2)(b) and Section 70 of the C.G.S.T. Act:-

15. Section 6(2)(b) prohibits ***initiation of proceedings by the proper officer under U.P.G.S.T. Act on the same subject-matter where a proper officer under the C.G.S.T. Act has initiated any proceedings on the same subject-matter subject to the conditions specified in the notification issued under sub-Section (1).*** Section 6(2)(b) of C.G.S.T. Act imposes similar prohibition upon the proper officer under the C.G.S.T. Act. Thus, Section 6(2)(b) of the C.G.S.T. Act/ U.P.G.S.T. Act prohibits initiation of any proceedings on the same subject-matter by a proper officer under the C.G.S.T. Act/ by a proper officer under the State G.S.T. Act, as the case may be, on the same subject-matter.

16. Section 70 of the U.P.G.S.T. Act or C.G.S.T. Act is part of Chapter XIV which contains provisions for inspection, search, seizure and arrest. Section 70 of both the Acts are pari materia which empowers the proper officer under the Act **to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry.**

17. Thus, Section 6(2)(b) of the C.G.S.T. Act prohibits separate initiation of proceedings **on the same subject-matter** by the proper officer under the C.G.S.T. Act when proceeding on the same subject-matter by the proper officer under the State Act has been initiated, whereas Section 70 of the U.P.G.S.T./ C.G.S.T. Act merely empowers the proper officer to summon any person in any inquiry. The word "proceedings" used in Section 6(2)(b) is qualified by the words "subject-matter" which indicates an adjudication process/ proceedings on the same cause of action and for the same dispute which may be proceedings relating to assessment, audit, demands and recovery, and offences and penalties etc. These proceedings are subsequent to inquiry under Section 70 of the Act. The words "in any inquiry" used in Section 70 of the Act is referable to the provisions of Chapter XIV, i.e. Section 67 (power of inspection, search and seizure), Section 68 (inspection of goods in movement), Section 69 (power to arrest), Section 71 (access to business premises) and Section 72 (officers to assist proper officers). Therefore, proper officer under the U.P.G.S.T. Act or the C.G.S.T. Act may invoke power under Section 70 in any inquiry. Prohibition of Section 6(2)(b) of

the C.G.S.T. Act shall come into play only when any proceeding on the same subject-matter has already been initiated by a proper officer under the U.P.G.S.T. Act.

18. Thus, the words "**any proceeding**" on the same "**subject-matter**" used in Section 6(2)(b) of the Act, which is subject to conditions specified in the notification issued under sub-Section (1); means any proceeding on the same cause of action and for the same dispute involving some adjudication proceedings which may include assessment proceedings, proceedings for penalties etc., proceedings for demands and recovery under Sections 73 and 74 etc.

Conclusions:-

19. In view of the above, we have reached to the following conclusions :-

(i) The word "inquiry" in Section 70 has a special connotation and a specific purpose **to summon any person** whose attendance may be considered necessary by the proper officer either **to give evidence or to produce a document or any other thing.** It cannot be intermixed with some statutory steps which may precede or may ensue upon the making of the inquiry or conclusion of inquiry. The process of inquiry under Section 70 is specific and unified by the very purpose for which provisions of Chapter XIV of the Act confers power upon the proper officer to hold inquiry. The word "inquiry" in Section 70 is not synonymous with the word "proceedings", in Section 6(2)(b) of the U.P.G.S.T. Act/ C.G.S.T. Act.

(ii) The words "**any proceeding**" on the same "**subject-matter**" used in Section 6(2)(b) of the Act, which is subject to conditions specified in the notification issued under sub-Section (1); means any proceeding on the same cause of action and for the same dispute involving some adjudication proceedings which may include assessment proceedings, proceedings for penalties etc., proceedings for demands and recovery under Section 73 and 74 etc.

(iii) Section 6(2)(b) of the C.G.S.T. Act prohibits a proper officer under the Act to initiate any proceeding on a subject-matter where on the same subject-matter proceeding by a proper officer under the U.P.G.S.T. Act has been initiated.

(iv) Facts briefly noted in paras-6 and 7 above, would disclose that there is no proceeding by a proper officer against the petitioner on the same subject-matter referable to Section 6(2)(b) of the U.P.G.S.T. Act. It is merely an inquiry by a proper officer under Section 70 of the C.G.S.T. Act.

20. For all the reasons afore-stated, we do not find any merit in **the present writ petition**. Consequently, the writ petition fails and is hereby **dismissed.**

(2021)01ILR A715
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 Tax No. 671 of 2020

M/S Ramky Infra. Ltd., Hyderabad ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shubham Agrawal

Counsel for the Respondents:
C.S.C., Sri C.B. Tripathi

(A) Civil Law - U.P. VAT Act, 2008: Section 29(7) read with U.P. Tax on Entry of Goods into Local Areas Act, 2007- Section 9(4) - Tax - Assessment/ Re-assessment - The Court held that where the whole of the turnover has escaped assessment on account of not passing an assessment order, the provisions of Section 29(1) of the Act, 2008 can be invoked by the Assessing Authority and the authorization under sub-section (7) can be granted by the competent authority. It is not incumbent upon the Assessing Authority to make the assessment first and then only to proceed under Section 29(1) for bringing to tax the turnover not assessed. (Para 15)

Writ Petition Rejected. (E-8)

List of Cases cited :-

1. Catalysts Vs St. of U.P. & ors. 2014 UPTC 1054 (DB) (Para-26) *(distinguished)*

2. M/s Harbilas Prabhu Dayal Vs Commissioner of Sales Tax, 1979 UPTC 999

3. Commissioner of Sales Tax Vs Jag Mohan Nath (1972) 29 STC 663 (All) *(followed)*

4. Commissioner, Sales Tax U.P. Vs Bhuj Singh Mohan Singh, Bulandshahar 1974 Vol. VI tax Law Diary 134 *(followed)*

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. This case was listed as a fresh case on 09.12.2020 relating to Assessment Year 2012-13 but no one appeared on behalf of the petitioner to press the writ petition. Therefore, the case was adjourned for 14.12.2020. On 14.12.2020, none appeared for the petitioner to press the writ petition even in the revised call. Therefore, the case was adjourned for 15.12.2020.

2. Today also none has appeared for the petitioner to press the writ petition even in the revised call. Sri C.B. Tripathi, learned Special Counsel for the State-respondents is present.

3. This writ petition has been filed praying for the following relief:

"(a)Certiorari quashing the impugned order dated 20.08.2020 passed by the no.3.

(b) Mandamus/ Prohibition restraining the respondent no.2 from initiating any assessment/ reassessment proceedings against the petitioner in pursuance of the order dated 20.08.2020 passed by the respondent no.3.

(c) Mandamus directing the respondent authorities to produce/ bring on record the exparte assessment order dated 18.3.16, the order sheet maintained by the assessing authority, report furnished by the assessing authority (respondent no.2) before the Joint Commissioner (Executive), Mirzapur, as recorded in the order dated 30.3.19, registers R-5A, 5B;"

4. The impugned order dated 20.08.2020 is an authorisation granted by the Additional Commissioner Grade-I, Commercial Tax, Varanasi Zone - II, Varanasi under Section 29(7) of the U.P. VAT Act, 2008 (hereinafter referred to as 'the Act, 2008') read with Section 9(4) of the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 (hereinafter referred to as 'the Act, 2007').

5. The Additional Commissioner has granted the authorisation on the facts of the present case on the ground that purchases of U.P. iron and steel of Rs.15,51,47,792/-, purchase of Ex-U.P. iron and steel of

Rs.7,61,61,195.04 and bitumen of Rs.13,03,70,473/- escaped assessment to entry tax under the Act, 2007 inasmuch as for reasons mentioned in the impugned order, the assessment order of entry tax under Section 9(4) of the Act, 2007 for the Assessment Year 2012-13 could not be passed.

6. Section 29(1)/(7) of the U.P. VAT Act, 2008 (hereinafter referred to as 'the Act, 2008') are reproduced below:

*"**29. Assessment of tax of turnover escaped from assessment.**- (1) If the assessing authority has reason to believe that the whole or any part of the turnover of a dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under assessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or re-assess the dealer to tax according to law :*

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not escaped assessment or full assessment as the case may be.

Explanation I. - Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment to the best of its judgment.

Explanation II. - For the purpose of this section and of section 31, "assessing authority" means the officer or authority who passed the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

Explanation III. - Notwithstanding the issuance of notice under this sub-section, where an order of assessment or re-assessment is in existence from before the issuance of such notice it shall continue to be effective as such, until varied by an order of assessment or re-assessment made under this section in pursuance of such notice.

(7) Where the Commissioner, on his own or on the basis of reasons recorded by the assessing authority, is satisfied that it is just and expedient so to do, authorises the assessing authority in that behalf, such assessment or re-assessment may be made within a period of eight years after expiry of assessment year to which such assessment or re-assessment relates notwithstanding such assessment or re-assessment may involve a change of opinion:

Provided that it shall not be necessary for the Commissioner to hear the dealer before authorising the assessing authority."

7. Perusal of the afore-quoted provisions shows that if the Assessing Authority has reason to believe that **the whole or any part** of the turnover of a dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under assessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, after issuing notice to the dealer and making such inquiry as may be considered necessary, **assess or re-assess** the dealer to tax according to law. Section 29(3) of the Act, 2008 provides that except as otherwise provided in this section or elsewhere in this Act, no order of assessment or re-assessment under any provision of this Act

for any assessment year shall be made after the expiration of three years from the end of such assessment year. Sub-section (7) of Section 29 provides for extended period of limitation upto eight years. It provides that where the Commissioner, on his own motion or on the basis of reasons recorded by the assessing authority, is satisfied that it is just and expedient so to do, authorises the assessing authority in that behalf, **such assessment or re-assessment** may be made within a period of eight years after expiry of assessment year to which **such assessment or re-assessment** relates.

8. Thus, the normal period of limitation for assessment or reassessment is three years as provided under Sub-Section (3) of Section 29. Beyond the aforesaid period of limitation, an Assessing Authority can make assessment or reassessment if he is authorised by the Commissioner by order passed under Sub-Section (7) of Section 29, which empowers the Commissioner to issue authorisation for making assessment or reassessment within a period of eight years after expiry of assessment year to which the assessment or reassessment relates.

9. In the present set of facts, there is no dispute that somehow for the Assessment Year 2012-13, assessment under the Act, 2007 escaped to notice of the Assessing Authority. Detailed circumstances leading to the escaping and passing of the assessment order under the Act, 2007 for the Assessment Year 2012-2013 have been mentioned in the impugned order. Thus, extended period of limitation under Sub-section (7) of Section 29 of the Act, 2008 was invokable for which authorisation has been granted by the Additional Commissioner by the impugned order dated 20.08.2020.

10. From perusal of the writ petition, it appears that the basic objection of the petitioner to the impugned order is that reassessment proceedings can take place only when there is an assessment order and there is reason to believe that there has been a case of no assessment or escaped assessment. In support of the aforesaid objection, the petitioner has relied upon a judgment of this Court in the case of **Catalysts vs. State of U.P. and others, 2014 UPTC 1054 (DB)(Para-26).**

11. The judgment in the case of **Catalysts vs. State of U.P. and others (supra)** was rendered by this Court in three writ petitions, namely, Writ Tax No.704 of 2010, 705 of 2010 and 706 of 2010. In Writ Tax Nos.704 and 705, both of 2010, the petitioners have challenged the order passed by the competent authority granting permission for initiation of proceedings under Section 21. Both these writ petitions were dismissed by this court. Third writ petition, i.e. Writ Tax No.706 of 2010, was allowed by this court on the facts of that case. To appreciate facts of the aforesaid judgment in Writ Tax No.706 of 2010, it would be appropriate to reproduce paragraphs-7, 25, 26 and 27 of the said judgment, as under:

"7. In Writ Petition No.706 of 2010, the learned counsel submitted that the Assessing Officer treated enzymes as a unclassified item and taxed the same at the rate of 10% for the assessment year 2006-07 under the U.P. Trade Tax Act. The petitioner preferred an appeal, which was allowed and the matter was remanded back to the Assessing Officer for fresh assessment. During the pendency of assessment proceedings before the Assessing Officer pursuant to the remand order of the appellate authority

reassessment proceedings were initiated under Section 21 of the Act. The learned counsel submitted that during the pendency of original assessment proceedings the question of escaped assessment does not arise and, therefore, question of issuance of notice under Section 21 of the Act was wholly illegal and had been issued without any application of mind and was liable to be quashed. In support of his submission, the learned counsel has placed reliance on various decisions, which will referred hereinafter.

25. With regard to Writ Petition No.706 of 2010, we find that the Assessing Officer had treated enzyme as an unclassified item and had taxed it at the rate of 10% for the assessment year 2006-07 under the U.P. Trade Tax Act. The petitioner filed an appeal, which was allowed and the assessment order was set aside and the matter was remitted to the Assessing Officer to pass a fresh assessment order. During reconsideration of the matter reassessment proceedings was initiated under Section 21 of the Act.

26. In M/s Harbilas Prabhu Dayal Vs. Commissioner of Sales Tax, 1979 UPTC 999 a Full Bench of this Court held that once proceedings are remanded by the appellate authority, the entire matter is at large.

27. We are of the opinion that reassessment proceedings can only take place when there is an assessment order and there is reason to believe that there has been a case of under assessment or escaped assessment. In the event, there is no assessment order there can be no reassessment proceedings. "

12. The afore-quoted portion of the judgment in the case of Catalysts (supra) is the foundation of the present writ petition. Perusal of the aforesaid judgment in Writ Tax No.706 of 2010 would show that the facts were that the assessment order passed by the Assessing Authority was set aside by the Appellate Authority for the Assessment Year 2006-07 under the U.P. Trade Tax Act, 1948 and the matter was remanded to the Assessing Authority to pass a fresh assessment order. During remand proceedings, the Assessing Authority eventually initiated proceedings under Section 21 of the U.P. Trade Tax Act, 1948, which is para materia with Section 29 of the Act, 2008. On these facts, relying upon a full bench judgment in the case of **M/s Harbilas Prabhu Dayal Vs. Commissioner of Sales Tax, 1979 UPTC 999**, this court held that hence proceedings are remanded by the appellate authority, the entire matter is at large. In the background of these facts and the legal position, this court held in para-27, which has been relied by the petitioner in the present case; that reassessment proceedings can only take place when there is an assessment order. Since no assessment order was passed by the Assessing Authority pursuant to the remand order and the entire matter was at large before him, therefore, it was held by this court that there is no question of initiating reassessment proceedings. Thus, the aforesaid judgment in the case of Catalysts (supra) is distinguishable on the facts of the present case.

13. Besides above, if the judgment in the case of Catalysts (supra) is read in the manner as interpreted by the petitioner, it shall be in conflict with the law settled by a Full Bench (5 Judges) of this court in the case of **Commissioner of Sales Tax vs. Jag Mohan Nath (1972) 29 STC 663 (All)** in which the Full Bench interpreted the pari materia provision of Section 21(1) of the U.P. Sales Tax Act, 1948 and held as under (Majority view):-

"33. The principle of law laid down by the Supreme Court in the cases of Ghanshyamdas v. Regional Assistant Commissioner, Sales Tax, Nagpur MANU/SC/0216/1963 and Anandji Haridas & Co. Private Ltd. v. S.P. Kushare MANU/SC/0298/1967 applies equally to assessments under the U.P. Sales Tax Act and assessment proceedings in cases where no returns are filed by a dealer can be made both under Section 7(3) and Section 21(1). Which of the two sections will apply to a particular case will, however, depend on the circumstances of each case. The non-furnishing of returns by a dealer, and the consequent failure to pay the tax due, vest in the assessing authority the power to make a best judgment assessment both under Section 7(3) and Section 21(1) of the Act. If the circumstances are such as to attract the provisions of Section 21(1), the assessment will be made under that provision, otherwise under Section 7(3). It is not incumbent on the assessing authority to make the assessment first under Section 7(3) and then only to proceed under Section 21 for bringing to tax the turnover not assessed under Section 7(3). The powers contemplated by Section 7(3) and Section 21 are independent of each other and can be resorted to independently according to the material available to the assessing authority."

14. The Full Bench judgment in the case of Jag Mohan Nath (supra) has also been followed by a Division Bench of this court in **Commissioner, Sales Tax U.P. vs. Bhuj Singh Mohan Singh, Bulandshahar (S.T.R. No.214 of 1971, decided on 04.09.1974) 1974 Vol.VI Tax Law Diary 134.**

15. Perusal of sub-section (7) of Section 29 of the Act, 2008 leaves no manner of doubt that it empowers the Commissioner to grant authorisation and also empowers the Assessing Authority to make assessment or reassessment within a period of eight years after expiry of assessment year to which such assessment or reassessment relates. Sub-section (1) of Section 29 empowers the Assessing Authority to make assessment or reassessment where he has reason to believe that whole or any part of the turnover of a dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under assessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof. **Thus, where whole of the turnover has escaped assessment on account of not passing an assessment order, the provisions of Section 29(1) of the Act, 2008 can be invoked by the Assessing Authority and the authorisation under sub-section (7) can be granted by the competent authority.** It is not incumbent upon the Assessing Authority to make the assessment first and then only to proceed under Section 29(1) for bringing to tax the turnover not assessed.

16. For all the reasons afore-stated, we find that the **writ petition** is without substance. Consequently, it is hereby **dismissed**. However, there shall be no order as to costs.

(2021)01ILR A720
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ Tax No. 705 of 2020

Beenu Gupta ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra, Sri Vipin Kumar Kushwaha

Counsel for the Respondents:
A.S.G.I., Sri Ramesh Chandra Shukla

(A) Civil Law - Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 - clause (e) of Section 123 read with clause (c) of Section 121

The petitioner has filed return under the service tax prior to 30th June, 2019 and deposited the amount of duty along with the returns which was filed belatedly. Clause (e) of Section 123 provides that where an amount in arrears relating to the declarant is due, the amount in arrears shall be the tax dues. The words "amount in arrears" defined in sub- clause (iii) of clause (c) of Section 121 provides that the amount of duty which is recoverable as arrears of duty under the indirect tax enactment on account of the declarant having filed a return under the indirect tax enactment on before 30th day of June, 2019, wherein in the present case the petitioner has admitted a tax liability but not paid it. Therefore, clause (e) of Section 123 read with clause (c) of Section 121 of the SVLDR Scheme is not applicable to the facts of the present case. (Para 12, 13)

Writ Petition Rejected. (E-8)

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

(A) Issue a writ, order or direction in the nature of certiorari quashing the illegal rejection of declarations dated 15.1.2020 and 25.12.2019 by respondent no. 3 designated committee, as disclosed in remarks column in Form SVLDRS-1 dated 15.1.2020 and 25.12.2019 (Annexure-4 and 6) submitted electronically by petitioner.

(B) Issue a writ, order or direction in the nature of mandamus directing respondent no. 3 to process and accept the declarations dated 15.1.2020 submitted electronically by petitioner under the provisions of Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019.

(c) Issue any other writ, order or direction, which this Hon'ble Court may deem fit in the facts and circumstances of the case.

(D) Award costs of the petition to the petitioner.

3. Learned counsel for the petitioner submits that the petitioner has deposited the amount along with returns belatedly and therefore arose some interest liability which the petitioner could not deposit, and therefore, the petitioner has filed a declaration under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (hereinafter referred to as 'SVLDR Scheme') but the declaration has been wrongly rejected by the impugned orders.

4. We have perused the impugned orders and we find that the **designated authority has rejected declaration on the ground that "as per report of the division vide letter dated 13.01.2020, no duty amount has been declared in return as payable but not paid. Hence not covered under the category of arrears."**

5. Clause (c) of Section 121 defines the words "amount in arrears". Clause (d)

defines the words "amount of duty". Both the clauses (c) and (d) of Section 121 of Finance (No. 2) Act, 2019 are reproduced below :-

(c) "amount in arrears" means the amount of duty which is recoverable as arrears of duty under the indirect tax enactment, on account of--

(i) no appeal having been filed by the declarant against an order or an order in appeal before expiry of the period of time for filing appeal; or

(ii) an order in appeal relating to the declarant attaining finality; or

(iii) the declarant having filed a return under the indirect tax enactment on or before the 30th day of June, 2019, wherein he has admitted a tax liability but not paid it;

(d) "amount of duty" means the amount of central excise duty, the service tax and the cess payable under the indirect tax enactment.

6. Section 123 of the SVLDR Scheme defines the words 'tax dues" for the purposes of the Scheme.

7. Learned counsel for the petitioner has admitted before us that the case of the petitioner does not fall under clause (a) or (b) of Section 123 of the SVLDR Scheme.

8. Learned counsel for the petitioner has placed reliance on clauses **(c), (d), and (e) of Section 123**, which are reproduced below :-

(c)where an enquiry or investigation or audit is pending against the declarant, the amount of duty payable under any of the indirect tax enactment which has been quantified on or before the 30th day of June, 2019;

(d) where the amount has been voluntarily disclosed by the declarant, then, the total amount of duty stated in the declaration;

(e) where an amount in arrears relating to the declarant is due, the amount in arrears.

9. The definition of the words "tax dues" as provided in Section 123 of the SVLDR Scheme shows that it is not expansive in nature inasmuch as it starts with the word "means".

10. **Clause-C of Section 123** relates to matters where any enquiry or investigation or audit is pending against the declarant, the "amount of duty" payable under any of the indirect tax enactment which has been quantified on or before 30th June, 2019. This clause is not applicable in the case of the petitioner inasmuch as it is not the case of the petitioner that any enquiry or investigation or audit is pending against him.

11. **Clause (d) of Section 123** provides that where the amount has been voluntarily disclosed by the declarant, then the total amount of duty as stated in the declaration shall be the tax dues. The words "amount of duty" has been defined in clause (d) of Section 121 which means the amount of central excise duty, the service tax and the cess payable under the indirect tax enactment. The petitioner has deposited the amount of duty along with his regular returns under the service tax law but it was filed belatedly. Thus no amount of duty was payable under the service tax law, therefore the provisions of clause (d) of Section 123 has no application on the facts of the present case.

12. **Clause (e) of Section 123** provides that where an amount in arrears relating to the declarant is due, the amount in arrears shall be the tax dues. The words "amount in arrears" has been defined in clause (c) of Section 121. Sub-clause (iii) of clause (c) of Section 121 provides that the "amount in arrears" means the amount of duty which is recoverable as arrears of duty under the indirect tax enactment on account of the declarant having filed a return under the indirect tax enactment on or before the 30th day of June, 2019, wherein he has admitted a tax liability but not paid it.

13. The admitted facts of the present case are that the petitioner has filed return under the service tax law prior to 30th June, 2019 and deposited the amount of duty along with the returns which was filed belatedly. Therefore, clause (e) of Section 123 read with clause (c) of Section 121 of the SVLDR Scheme is not applicable on the facts of the present case. The circular relied by learned counsel for the petitioner has no application to the facts of the present case inasmuch as the circulars dated 25th September, 2019 and 29th October, 2019 relied by learned counsel for the petitioner is referable to sub-clause (iii) of clause (c) of Section 121 of the SVLDR Scheme.

14. Provisions of Chapter V of the Finance (No.2) Act, 2019, whereby "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" has been enacted; is an offer by the Government to settle tax arrears locked in litigation at a substantial discount. Section 124 Finance (No.2) Act 2019 provides the slabs of tax arrears and the discount slabs in percentage for payment by an applicant/declarant to settle the dispute. Section 125 provides that all persons shall be eligible to make a declaration under the Scheme except those mentioned in Clauses (a) to (h). Section 126 empowers the designated Committee to verify the correctness of the declaration made by the declarant under Section 125 in the manner as may be prescribed. Section 127 of the Act empowers the designated Committee to issue statement indicating the amount payable by the declarant and in the event the amount estimated by the designated Committee exceeds the amount declared by the declarant then the designated Committee shall afford an opportunity of hearing to the declarant and thereafter issue a statement in electronic form indicating the amount payable by the declarant. Thereafter, the declarant shall pay the amount through internet banking and on payment the designated committee shall issue a discharge certificate in electronic form within 30 days of the payment and production of proof. Sub-Section 6 and Sub-Section 7 of Section 127 provides for withdrawal or deemed withdrawal of Appeal, Revision, Reference or Writs relating to the matter in question. Section 129 provides for certain immunities to the declarant. Section 130 prohibits payment through input tax credit account, refunds and to take input tax credit of the amount deposited under the Scheme. Section 131 provides for removal of doubts and Section 134 provides for removal of difficulties. Section 132 empowers the Central Government to make Rules by notification to carry out the provisions of the Scheme. Section 133 empowers the Central Board of Indirect Taxes to issue orders, instructions etc. Section 135 provides for protection to the Officers.

15. Thus, perusal of the provisions of the Scheme briefly noted above, shows that the Scheme is a complete Code in itself. In

substance, it is a scheme for recovery of duty/indirect tax to unlock the frozen assets and to recover the tax arrears at a discounted amount. Thus, "Sabka Vishwas Scheme", although a beneficial scheme for a declarant, is statutory in nature, which has been enacted with the object and purpose to minimise the litigation and to realise the arrears of tax by way of settlement at discounted amount in an expeditious manner. In other words the scheme is a step towards the settlement of outstanding disputed tax liability.

16. For all the reasons aforestated we do not find any merit in this writ petition.

17. Consequently, the writ petition fails and is hereby dismissed.

(2021)01ILR A724
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.01.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Service Single No. 262 of 2021

Ashish Tyagi & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Vineet Kumar Pandey, Pradeep Kumar Tiwari

Counsel for the Respondents:
C.S.C., Ashok Shukla

A. Drugs and Cosmetics Act, 1940 – Sections 21 and 33 – Drugs and Cosmetics Rules, 1945 – Rule 49 – Service law – Recruitment – Essential qualification – Changing – Repugnancy with the Central law – Power of the State Government – Central Government within its concurrent domain of legislation has exhausted the legislative power on the aspect of prescribing the essential eligibility qualifications for selection – There is no scope open to the State Government for fixing a different or additional recruitment criteria of Drug Inspectors – Held, amended Rule 8 of the U.P. Food and Drug Administration Department Gazetted Officers' (Drugs) Service (Third Amendment) Rules, 2015 lacks authority and being inconsistent with Rule-49 of the Drugs and Cosmetics Rules, 1945, the same is liable to be set aside. (Para 15 and 17)

B. Constitution of India – Article 254 – Central legislation and State legislation – Repugnancy – Legislative competence – Held, Once the area of primary legislation is exhausted by the Central Government and rules are made, the legislative competence of the State or its rule making authority stands eclipsed to the extent of inconsistency – A contrary attempt made by the State would be clearly repugnant to the very objects of the law made by the Central Government. (Para 15)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Civil Misc. Writ Petition No. 46079 of 2010, Kuldeep Singh & ors. Vs St. of U.P. & anr. decided on 10.04.2014

2. Writ Petition(c) 2475 of 2019, U.P.S.C. Vs Nidhi Pandey & anr. decided on 18.02.2020

3. Jaspal Reddy Vs St. of A.P., (1994) 4 SCC 391

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

"Heard learned counsel for the petitioners.

It is strange to note that the advertisement stated to have been issued on 10.08.2016 is in the teeth of full bench judgment rendered by this Court in a bunch of writ petitions leading case being

W.P.No.46079 of 2010 decided on 10.04.2014.

The petitioners have asserted that their exclusion from the zone of consideration has occasioned on account of the incorporation of the condition of experience in the advertisement, although except petitioner no.1 the other petitioners have failed to apply. It is also stated that the Commission on account of this anomaly had not proceeded with the process of selection for about four years. The selection process through interviews adhering to the same conditions was reiterated and notified by letter dated 24.12.2020. The petitioners having come to know about the faulty process have thus approached this Court.

It is well settled that every advertisement for recruitment in public service must proceed strictly in accordance with the statutory rules. In the present case the full bench judgment which ought to have been adhered to for this purpose also seems to have been side tracked for no valid reason and thereby the zone of consideration is sought to be frozen. All the petitioners are possessed with the requisite eligibility since prior to the date of advertisement,therefore, it cannot be said that the requisite qualification was acquired by the petitioners after the date of advertisement.

The delay in approaching this Court is a circumstance unfavourable to the petitioners but an illegality going to the root of the process of selection cannot be viewed lightly by this Court.

In the circumstances of the case, the petitioners are permitted to make a representation to the opposite party no.1 within a period of ten days' from today. In case a representation is filed, the same shall be decided by the opposite party no. 1 passing a reasoned and speaking order. The order so passed be communicated to the petitioners without any delay.

Until decision on the representation filed by the petitioners, the selection held, if any, may not be acted upon.

The writ petition is accordingly disposed of."

1. Before the aforesaid order could be signed, Sri Ashok Shukla, learned counsel for U.P. Public Service Commission brought to the notice to this Court an amendment made in the relevant Service Rules, 1995 notified on 18.11.2015 titled as U.P. Food and Drug Administration Department Gazetted Officers' (Drugs) Service (Third Amendment) Rules, 2015. This amendment brought in the parent rules has been promulgated in exercise of the powers under Article 309 of Constitution of India. The comparative position of the relevant provision i.e. Rule-8 is reproduced below.

COLUMN-1 Existing Rule	**COLUMN-2 Rule as substituted**
8. Academic qualification *A candidate for direct recruitment to the post of Inspector of Drugs must possess the following qualification:*	***8. Academic qualification*** *A candidate for direct recruitment to the post of Inspector of Drugs must possess such qualifications as have been prescribed under Rule-49 of the Drugs and Cosmetics Rules, 1945 made by the Central Government in accordance with the provisions contained in section 21 of the Drugs and Cosmetics Act, 1940.* *(i) Degree in Pharmacy or Pharmaceutical Sciences*

	or Medicine with specialization in Clinical Pharmacology or Microbiology or equivalent from a recognized University; *(ii) (a) Eighteen months experience in the manufacture of at least one of the substances specified in Schedule"C" to the Drug and Cosmetics Rules, 1945; or* *(b) Eighteen months' experience in testing of atleast one of the substances specified in Schedule 'C' to the Drugs and Cosmetics Rules, 1945 in a laboratory approved for this purpose by the licensing authority; or* *(c) Three years experience in the inspection of firms manufacturing any of the substances specified in Schedule 'C' to the Drugs and Cosmetics Rules, 1945 during the tenure of their services as Drug Inspector of any State Government or Central Government*

2. It may be noted that the Central Government, in exercise of the powers vested by virtue of Section 33 read with Section 21 of the Drugs and Cosmetics Act, 1940, had promulgated the statutory rules in the year 1945 known as Drugs and Cosmetics Rules, 1945 whereunder Rule 49 reads as under:

"49. Qualifications of Inspectors. *--A person who is appointed an Inspector under the Act shall be a person who has a degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialisation in Clinical Pharmacology or Microbiology from a University established in India by law:-*

Provided that only those Inspectors--

(i) who have not less than 18 months' experience in the manufacture of at least one of the substances specified in Schedule C, or

(ii) who have not less than 18 months' experience in testing of at least one of the substances in Schedule C in a laboratory approved for this purpose by the licensing authority, or

(iii) who have gained experience of not less than three years in the inspection of firm manufacturing any of the substances specified in Schedule C during the tenure of their services as Drugs Inspectors;

shall be authorised to inspect the manufacture of the substances mentioned in Schedule C:

Provided further that the requirement as to the academic qualification shall not apply to persons appointed as Inspectors on or before the 18th day of October, 1993."

3. In the light of the statutory rule reproduced above, the question that crops for consideration is as to whether the power of the State for prescription of essential qualifications to fill up the posts of Drug Inspector stands denuded otherwise than what has been prescribed under Rule 49 of Drugs and Cosmetics Rules, 1945 framed under Section-21 read with Section 33 of the Act, 1940.

4. A question to this effect previously cropped up before this Court which on a reference being made to the Full Bench was

decided in a bunch of writ petitions leading case being ***Civil Misc. Writ Petition No. 46079 of 2010 (Kuldeep Singh and others v. State of U.P. and another).*** The questions referred to the Full Bench read as under:

"(1) Whether the experience required in the proviso to Rule 49 of the Drugs and Cosmetics Rules, 1945 is only a bar of authorization to inspect the manufacture of substances, or is an essential qualification under Rule 49 for direct appointment as Drug Inspector under Rule 5 (4) of the U.P. State Drug Control Gazetted Officers' Service Rules, 1995.

(2) Whether the Division Bench judgment in State of U.P. Vs. Zunab Ali & Ors.1 has been correctly decided."

5. On a consideration of the matter, the Full Bench of this Court answered the reference by observing as under:

"27. We, accordingly, answer the questions referred to the Full Bench as follows:

(i) The experience referred to in the first proviso to Rule 49 of the Drugs and Cosmetics Rules, 1945 has not been made an essential qualification for appointment as a Drug Inspector. The effect of the first proviso is that only an Inspector who holds the experience as specified in it is authorized to inspect the manufacture of a substance specified in Schedule C to the Rules.

(ii) The judgment of the Division Bench in Zunab Ali (supra) has been correctly decided.

28. The reference is answered accordingly."

6. Learned counsel for the petitioner has also placed before this Court a Division Bench judgement of Delhi High Court rendered in a bunch of writ petitions instituted by Union Public Service Commission, the leading case being ***Writ Petition(c) 2475 of 2019 (Union Public Service Commission v. Nidhi Pandey and another).***

7. In the controversy decided by the Delhi High Court, the relevant Service Rules providing for additional eligibility criteria framed in exercise of powers under Article 309 of the Constitution of India being in conflict with the provisions of Rule 49 of Drugs and Cosmetics Rules, 1945 came under consideration. The Delhi High Court on an elaborate consideration of the issue has clearly opined that the rule making power of the Government under Article 309 of the Constitution of India, whether Central or State, is transitory and the rules so framed cannot be interpreted in a manner which may have a conflicting impact of overreach as against the primary legislation made by the Central Government in furtherance of the objects of Section 33 read with Section-21 of the Drugs and Cosmetics Act, 1940. The position of legislative exercise of powers under Article 309 of Constitution of India was thus clarified and this Court is in full agreement with the opinion expressed by the Delhi High Court on this aspect of the matter.

8. A similar question has now come up before this Court looking to the advertisement made by the U.P. Public Service Commission which has prescribed eligibility qualifications as per the amended Rule-8 reproduced above.

9. The rule making power in the present case has also been exercised by the State Government under Article 309 of the

Constitution of India. The precise question is as to whether such a rule can be operated by the U.P. Public Service Commission insofar as the recruitment on the post of Drug Inspector is concerned

10. It is true that the advertisement was made as far back as on 10.8.2016 but the selection, for the reasons best known to the Commission, could not progress any further. In furtherance of the advertisement made, when the schedule of selection through interview was notified by letter dated 24.12.2020, the petitioners came to know about the selection process and have thus come up before this Court assailing the advertisement and process of selection. The ground that the advertisement made by the Commission does not stand in conformity with the eligibility qualifications prescribed under Rule 49 of the Drugs and Cosmetics Rules, 1945 is the main argument put forth by the learned counsel for the petitioners.

11. On a close scrutiny of the advertisement, it is gathered that the experience postulated under the amended rules w.e.f. 18.11.2015 framed under Article 309 of the Constitution of India has been set out. The prescription of such a qualification is not sanctified under Rule 49 of Drugs and Cosmetics Rules, 1945, hence a grievance excluding the petitioners from the zone of consideration is thus manifested on the face of advertisement. The petitioner no. 1 who has applied for appointment is excluded on account of the prescription of qualifications and rest of the petitioners have averred that they stood deprived of applying against the posts due to the untenable qualifications prescribed in the advertisement.

12. It is argued that right of equal consideration for selection in public service is guaranteed under Article 14 of the Constitution of India and such a right cannot be taken away under the garb of a principle which has no sanctity under law. In support of the arguments advanced, the petitioners have heavily relied upon the Full Bench judgement rendered by this Court as well as the Division Bench judgement of Delhi High Court mentioned above.

13. Per contra, Sri P.K. Singh and Sri Ashok Shukla, learned counsel appearing for the State and U.P. Public Service Commission have argued that the State Government, by virtue of Entry 41 List-II Schedule VII of the Constitution of India, is competent to legislate with respect to public services under the State and any additional qualification prescribed in the rules made under Article 309 of the Constitution of India, unless challenged before this Court, is bound to be complied with by the Public Service Commission, therefore, the advertisement issued by the U.P. Public Service Commission stands wholly in conformity with law. In support of the argument put forth by the State Government as well as by U.P. Public Service Commission, the judgement rendered by the apex court in the case of **Jaspal Reddy v. State of Andhra Pradesh reported in (1994) 4 SCC 391**, has been placed reliance upon.

14. This Court may note that the rule making power for prescription of the essential eligibility qualifications to appoint Drug Inspectors is traceable to Section 21 read with Section 33(1) and (2)(b) of the Drugs and Cosmetics Act, 1940, which for ready reference may be reproduced below:

"**21. Inspectors**.--(1) The Central Government or a State Government may,

by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Inspectors for such areas as may be assigned to them by the Central Government or the State Government, as the case may be.

(2) The powers which may be exercised by an Inspector and the duties which may be performed by him, the drugs or classes of drugs or cosmetics or classes of cosmetics in relation to which and the conditions, limitations or restrictions subject to which, such powers and duties may be exercised or performed shall be such as may be prescribed.

(3) No person who has any financial interest in the import, manufacture or sale of drugs or cosmetics shall be appointed to be an Inspector under this section.

(4) Every Inspector shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (45 of 1860), and shall be officially subordinate to such authority having the prescribed qualifications, as the Government appointing him may specify in this behalf."

"**33. Powers of Central Government to make rules**. --(1) The Central Government may after consultation with, or on the recommendation of the Board and after previous publication by notification in the Official Gazette, make rules for the purpose of giving effect to the provisions of this Chapter:

Provided that consultation with the Board may be dispensed with if the Central Government is of opinion that circumstances have arisen which render it necessary to make rules without such consultation, but in such a case the Board shall be consulted within six months of the making of the rules and the Central Government shall take into consideration any suggestions which the Board may make in relation to the amendment of the said rules.

(2) Without prejudice to the generality of the foregoing power, such rule may--

(a) .....

(b) prescribe the qualifications and duties of Government Analysts and the qualifications of Inspectors;"

15. A conjunctive reading of the above provisions on its plain reading would show that the Central Government within its concurrent domain of legislation has exhausted the legislative power on the aspect of prescribing the essential eligibility qualifications for selection. There is no scope open to the State Government for fixing a different or additional recruitment criteria of Drug Inspectors. Once the area of primary legislation is exhausted by the Central Government and rules are made, the legislative competence of the State or its rule making authority stands eclipsed to the extent of inconsistency. A contrary attempt made by the State would be clearly repugnant to the very objects of the law made by the Central Government. Section 33(1) and (2)(b) read with Section 21 of the Act clearly postulate that the essential conditions of recruitment i.e. qualifications shall be prescribed by the Central Government and this power once exercised in consultation with the Board leaves no scope for the State Government to legislate at variance. The State irrespective of the powers under Article 246 read with Entry-41 of List-II Schedule-VII or Article 309 of the Constitution of India looses its base and any law framed thereunder contrary to the Central legislation would be void. Moreover, the consultative process

envisaged under Section 33(1) of the Act, 1940 cannot be done away with by the State Government even if there existed a scope.

16. This position is elaborately discussed in the judgements rendered by the Full Bench of this Court as well as by Delhi High Court in the judgements mentioned above. The position of law put forth on the strength of decision in Satpal Reddy case is distinguishable for the reason that in the case of Satpal Reddy, the provisions of the Transport Act stood at variance and left enough scope for the State to legislate within the scope of Section 213 mentioned therein. The situation in the present case looking to the mandate of Section 21 read with Section 33 of the Act, 1940 is different. In the present case, the Parliament has firstly exhausted the legislative power on the subject of prescription of eligibility qualifications and secondly the law makes the Central Government a repository of such a power leaving no scope for the State Government to step in so long as Rule-49 is amended.

17. In my humble consideration, therefore, the advertisement issued by the U.P. Public Service Commission on 10.8.2016 as per amended Rule-8 of the Service Rules lacks authority and being inconsistent with Rule-49 of the Drugs and Cosmetics Rules, 1945, the same is liable to be set aside and is accordingly set aside. The selection held in pursuance thereof is also set aside with the liberty open to the State to issue a fresh advertisement or corrigendum inviting applications from the eligible candidates having regard to the prescribed qualifications as per Rule 49 of the Drugs and Cosmetics Rules, 1949. The U.P. Public Service Commission being the selection body, is also expected to proceed in accordance with law, as applicable.

18. The writ petition is accordingly allowed with no order as to cost.

(2021)01ILR A730
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2021

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ -A No. 4577 of 2019

Sonu Yadav ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam, Sri Mohd. Fahad, Sri Sanjeev Singh, Sri Suresh Bahadur Singh, Sri Ved Prakash Mishra

Counsel for the Respondents:
C.S.C.

A. Service law – Indian Penal Code,1860- Section 323/504- Selection on the Police Constable post – Criminal case against the candidate – Deliberate concealment of fact – Effect – No case at the time of online submission of application – After 2 years, an affidavit declaring pendency of no criminal case filed – One month earlier to this affidavit, a N.C.R. was filed against the candidate, which was informed to the District Magistrate through second affidavit after 1½ months – N.C.R. filed for petty offence under Section 323/504 I.P.C., which has been compounded too – Held, Concealment of fact relating to the filing of N.C.R. is not reflected – The conduct of candidate is fair. (Para 4.05, 4.06 and 4.07)

Writ Petition allowed (E-1)

List of Cases cited:-

1. Avtar Singh Vs U.O.I. , (2016) 8 SCC 471

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. संक्षेप में प्रकरण के तथ्य

1.01 याचिकाकर्ता/अभ्यर्थी ने पुलिस आरक्षी व आरक्षी पी0ए0सी0 के पदों पर सीधी भर्ती वर्ष 2015 के अन्तर्गत पुलिस आरक्षी पद पर भर्ती किये जाने के लिए ऑनलाईन आवेदन पत्र दिनाँक 19.02.2016 को प्रस्तुत किया था, जिसका रजिस्ट्रेशन नम्बर 10217540181 आवंटित किया गया।

1.02 उ0प्र0 पुलिस भर्ती एवं प्रोन्नति बोर्ड लखनऊ द्वारा चयन प्रक्रिया की अर्हता पूर्ण करने के फलस्वरुप याचिकाकर्ता/अभ्यर्थी के गृह जनपद में पुलिस अधीक्षक, गाजीपुर द्वारा शारीरिक परीक्षण (नाप-तौल), स्वास्थ्य परीक्षण एवं चरित्र सत्यापन की कार्यवाही पूर्ण कराने के उपरान्त जे0टी0सी0 प्रशिक्षण हेतू,आवंटित किये गये जनपद गाजीपुर के पुलिस अधीक्षक को नियुक्ति आदेश निर्गत किये जाने के लिए पत्रावली प्रेषित की गयी।

1.03 पुलिस अधीक्षक, गाजीपुर द्वारा याचिकाकर्ता/अभ्यर्थी की शारीरिक एवं स्वास्थ्य परीक्षण की कार्यवाही पूर्ण होने के उपरान्त, चरित्र सत्यापन की कार्यवाही कराई गयी। थानाध्यक्ष विरनो जनपद गाजीपुर के चरित्र सत्यापन की आख्या दिनांक 26.06.2018 के अनुसार याचिकाकर्ता/अभ्यर्थी के विरुद्ध एक एन0सी0आर0 संख्या 76/2018 अंतर्गत धारा 323/504 भा0दं0सं0, थाना विरनो, जनपद गाजीपुर में पंजीकृत होने के कारण, उसके चरित्र सत्यापन की संस्तुति नहीं की गई।

1.04 इसके उपरान्त प्रकरण में जिलाधिकारी गाजीपुर के पत्र संख्या 55/15-जे0ए0/2018 दिनांक 20.08.2018 के द्वारा अवगत कराया गया कि संयुक्त निदेशक, अभियोजन गाजीपुर से प्राप्त आख्यानुसार, अभ्यर्थी के विरुद्ध एन0 सी0आर0 संख्या 76/2018 अन्तर्गत धारा 323/504 भा0दं0सं0, में दोनों पक्षों के बीच आपस में दिनाँक 28.06.2018 को सुलहनामा हो गया है तथा अभ्यर्थी के विरुद्ध अन्य कोई विपरीत तथ्य नहीं है। जिसके दृष्टिगत अभ्यर्थी के चरित्र को कोई आपत्ति नहीं है।

1.05 इसी क्रम में अभ्यर्थी, आवेदिका जिलाधिकारी के समक्ष उपस्थित हुआ पर उसको प्रशिक्षण के लिए अनुमति प्रदान नहीं करी गयी। अतः अभ्यर्थी ने इस न्यायालय के समक्ष रिट 'ए' सं0 21425/2018 दाखिल की, जो इस न्यायालय के आदेश दिनाँक 20.11.2018 द्वारा निस्तारित की गयी व आदेशित किया गया की पुलिस अधीक्षक, अम्बेडकर नगर, अभ्यर्थी के आवेदन को, उच्चतम न्यायालय द्वारा **अवतार सिंह बनाम भारत सरकार व अन्य 2016 (8) SCC 471** में पारित निर्णय के प्रकाश में तीन माह में अभ्यर्थी द्वारा पुलिस अधीक्षक, अम्बेडकर नगर निस्तारित करने का आवेदन कर निवेदन किया कि-

(i) अभ्यर्थी ने सत्यापन प्रपत्र दिनाँक 04.06.2018 को नियुक्ति प्राधिकारी के समक्ष प्रस्तुत किया था, परन्तु उसमें जानकारी के अभाव में किसी भी आपराधिक मामले की जानकारी प्रदान नहीं करायी थी, जब कि उसके विरुद्ध एक एन0सी0आर दिनांक 05.05.2018 को धारा 323/504 भा0दं0सं0 के अन्तर्गत पंजीकृत थी।

(ii) उपरोक्त सत्यापन प्रपत्र प्रस्तुत करने के उपरान्त, उपरोक्त एन0सी0 आर0 की जानकारी अभ्यर्थी को मिली तथा इसके उपरान्त अभ्यर्थी का वादी से आपसी सुलहनामा 28.06.2018 को हो गया व इस आशय का एक शपथ पत्र दिनाँक 16.07.2018 को जिलाधिकारी, गाजीपुर के समक्ष प्रस्तुत कर दिया गया।

(iii) इसके पूर्व ही अभ्यर्थी ने, शपथपत्र दिनांक 22.06.2018 के माध्यम से उसके विरुद्ध एन0सी0आर0 पंजीकृत होने की सूचना जिलाधिकारी गाजीपुर को प्रेषित की कर दी थी तथा उसकी एक प्रति पुलिस अधीक्षक गाजीपुर को भी प्रेषित कर दी थी।

(iv) इसके उपरान्त जिलाधिकारी, गाजीपुर ने उपरोक्त सुलहनामा का संज्ञान लेते हुए, अभ्यर्थी के पक्ष में चयन हेतु अनापत्ति पत्र दिनाँक 20.08.2018 को, पुलिस अधीक्षक गाजीपुर को प्रेषित भी कर दिया।

1.07 इस न्यायालय के आदेश दिनांक 20.11.2018 के अनुसार अभ्यर्थी के निवेदन का निस्तारण पुलिस अधीक्षक, अम्बेडकर नगर द्वारा 27.02.2019 को किया गया, जिसके द्वारा अभ्यर्थी का अभ्यर्थन/चयन निरस्त करने का आदेश दिया गया। आदेश के मुख्य अंश निम्न है:-

"15- इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि विभाग की नियमावली, भर्ती की विज्ञप्ति, कार्मिक विभाग के उक्त शासनादेश एवं मा0 सर्वोच्च न्यायालय के उक्त निर्णयों से यह स्पष्ट होता है कि पुलिस विभाग की सेवा संवेदनशील एवं सुरक्षा से सम्बन्धित होने के कारण सभी माप दण्डों पर उत्कृष्ट अभ्यर्थी को ही सेवा दी जानी चाहिए, जिससे सेवा में आने के पश्चात् अभ्यर्थी द्वारा अनुचित प्रोत्साहन प्राप्त हो सके।

16- आपके पत्र से उपलब्ध अभिलेखों के अनुसार पक्षकारों द्वारा दिनाँक 27.06.2018 (छायाप्रति संलग्न) को समझौता किया गया है। सुलहनामा थाने के भारसाधक अधिकारी को नोटरी एफिडेविड पर दिया गया है। थाने के भारसाधक अधिकारी के समक्ष दिये गये सुलहनामें को मेरिट पर दोषमुक्ति नहीं कही जा सकती है। पुनः दिनाँक 04.06.2018 (छाया प्रतिसंलग्न) में उक्त अभियोगों का उल्लेख उनके द्वारा नहीं किया गया है, इससे स्पष्ट है कि उक्त अभियोग से सम्बन्धित तथ्यों को छिपाया गया है। पुलिस विभाग की सेवा संवेदनशील होने के साथ सुरक्षा से सम्बन्धित है। अपराधों को रोकने एवं अपराधियों को दण्ड दिलवाने का विधिक उत्तरदायित्व पुलिस विभाग का है। अतएव इनको पुलिस की सेवा दिये जाने पर उन्हे यह अनुचित प्रोत्साहन प्राप्त हो सकेगा कि वे स्वेच्छा उपहति एवं लोक शान्ति भंग कराने को प्रकोपित कराने के आशय से साशय अपमान हेतु अभियोगों के सम्बन्ध में थाना के भारसाधक अधिकारी के समक्ष सुलहनामा दाखिल करा दिये।

17- श्री सोनू सादत द्वारा प्रस्तुत शपथ पत्र दिनाँक 04.06.2018 (छाया प्रतिसंलग्न) में उक्त अभियोगों का उल्लेख उनके द्वारा नहीं किया गया है, इससे स्पष्ट है कि उक्त अभियोग से सम्बन्धित तथ्यों को छिपाया गया है। पुलिस विभाग की सेवा संवेदनशील होने के साथ सुरक्षा से सम्बन्धित है। अपराधों को रोकने एवं अपराधियों को दण्ड दिलवाने का विधिक उत्तरदायित्व पुलिस विभाग का है। अतएव इनको पुलिस की सेवा दिये जाने पर उन्हे यह अनुचित प्रोत्साहन प्राप्त हो सकेगा कि वे स्वेच्छा उपहति एवं लोक शान्ति भंग कराने को प्रकोपित कराने के आशय से साशय अपमान हेतु अभियोगों के सम्बन्ध में थाना के भारसाधक अधिकारी के समक्ष सुलहनामा दाखिल करा दिये।

18- उपरोक्त वर्णित तथ्यों दिनाँक 27.02.2019 के क्रम में, अभ्यर्थी को अभ्यर्थन/चयन निरस्त होने योग्य है।"

1.08 उपरोक्त वर्णित तथ्यों के क्रम में, अभ्यर्थी को अभ्यर्थन/चयन निरस्त होने योग्य है।"

1.09 अभ्यर्थी ने आज्ञापत्र याचिका में मुख्यतया निम्न आधार लिए हैं:-

(i) 06.06.2018 को सत्यापन शपथपत्र दाखिल करते समय अभ्यर्थी को उसके विरुद्ध एन0सी0आर0 दिनाँक 05.05.2018 पंजीकृत होने की जानकारी का अभाव था। इसलिए उक्त का उल्लेख सत्यापन प्रपत्र में नहीं किया था। (ii) उपरोक्त एन0सी0आर0 की जानकारी प्राप्त होते ही, इस आपराधिक प्रकरण के

पंजीकरण की सूचना शपथ पत्र दिनाँक 22.06.2018 के माध्यम से जिलाधिकारी, गाजीपुर व पुलिस अधीक्षक, गाजीपुर को प्रेषित किया गया। तद्उपरान्त 28.06.2018 को सुलाहनामा होने पर उसकी भी सूचना 16.07.2018 को शपथपत्र के माध्यम से पुलिस अधिक्षक व जिलाधिकारी गाजीपुर को भी प्रेषित की गई। यह तथ्य जिलाधिकारी, गाजीपुर की अभ्यर्थी के चयन हेतू अनापत्ति पत्र दिनाँक20.08.2018 में उल्लेखित भी है। अतः आपराधिक मामले की जानकारी जानबूझ कर नही छुपाई गई थी।

अभ्यर्थी के आवेदन को उच्चतम न्यायालय के **'अवतार सिंह'** के मामले मेंं पारित निर्णय के सिद्धान्तों के अनुकूल निर्धारित किया जाये, इसके बावजूद, अभ्यर्थी आवेदन मात्र इस कारण से निरस्त कर दिया गया कि सुलहनामें को गुणदोष के आधार पर दोषमुक्ति नहीं माना जा सकता है, जबकि वर्तमान प्रकरण, एन0सी0आर0 पंजीकरण से संबंधित था जहाँ सुलहनामा के बाद विचारण का प्रश्न ही नहीं रह जाता है। अतः आक्षेपित आदेश रद्द किया जाये।

1.10 प्रतिवादी की ओर से प्रतिशपथपत्र दाखिल किया गया है, जिसमें मुख्य रुप से कथन किया गया कि-

(i) उ0प्र0 पुलिस मुख्यालय द्वारा जारी परिपत्र दिनाँक 22.05.2018 के अनुच्छेद 7 में विशिष्ठ रुप से उल्लेखित किया गया है कि "किसी अभ्यर्थी के चरित्र सत्यापन के दौरान कोई प्रतिकूल तथ्य सामने आने पर, उसे नियुक्ति प्राधिकारी द्वारा अनुपयुक्त घोषित किया जायेगा" तथा अनुच्छेद 8(ज) में उल्लेखित है कि "यदि अभ्यर्थी द्वारा प्रस्तुत किये गये शपथपत्र में अंकित तथ्य गलत पाये जाये तो भर्ती के लिए अभ्यर्थी का कोई दावा नहीं होगा" ऐसा ही विज्ञापन में भी उल्लेखित है।

(ii) अभ्यर्थी ने अपने ऊपर लगे आपराधिक मामले की जानकारी छुपाकर सेवा नियुक्त प्राप्त की अर्थात् सेवा नियुक्ति छल से प्राप्त करी गयी अतः अभ्यर्थी के चयन को निरस्त करने का आदेश न्यायोचित है।

(iii) इस न्यायालय के आदेश दिनाक 20.11.2018 मेंं विशिष्ठ निदेश था कि अभ्यर्थी के आवेदन को उच्चतम न्यायालय के **'अवतार सिंह'** के मामले मेंं पारित निर्णय के सिद्धान्तों के अनुकूल निर्धारित किया जाये, इसके बावजूद, अभ्यर्थी आवेदन मात्र इस कारण से निरस्त कर दिया गया कि सुलहनामें को गुणदोष के आधार पर दोषमुक्ति नहीं माना जा सकता है, जबकि वर्तमान प्रकरण, एन0सी0आर0 पंजीकरण से संबंधित था जहाँ सुलहनामा के बाद विचारण का प्रश्न ही नहीं रह जाता है। अतः आक्षेपित आदेश रद्द किया जाये।

1.10 प्रतिवादी की ओर से प्रतिशपथपत्र दाखिल किया गया है, जिसमें मुख्य रुप से कथन किया गया कि-

(i) उ0प्र0 पुलिस मुख्यालय द्वारा जारी परिपत्र दिनाँक 22.05.2018 के अनुच्छेद 7 में विशिष्ठ रुप से उल्लेखित किया गया है कि "किसी अभ्यर्थी के चरित्र सत्यापन के दौरान कोई प्रतिकूल तथ्य सामने आने पर, उसे नियुक्ति प्राधिकारी द्वारा अनुपयुक्त घोषित किया जायेगा" तथा अनुच्छेद 8(ज) में उल्लेखित है कि "यदि अभ्यर्थी द्वारा प्रस्तुत किये गये शपथपत्र में अंकित तथ्य गलत पाये जाये तो भर्ती के लिए अभ्यर्थी का कोई दावा नहीं होगा" ऐसा ही विज्ञापन में भी उल्लेखित है।

(ii) अभ्यर्थी ने अपने ऊपर लगे आपराधिक मामले की जानकारी छुपाकर सेवा नियुक्त प्राप्त की अर्थात् सेवा नियुक्ति छल से प्राप्त करी गयी अतः अभ्यर्थी के चयन को निरस्त करने का आदेश न्यायोचित है।

(iii) अभ्यर्थी ने अपना शपथपत्र दिनाँक 04.06.2018 सत्यापित करते समय अपने विरुद्ध एन0सी0आर0 पंजीकृत है, इस तथ्य की जानकारी थी, फिर भी मिथ्या शपथ पत्र दाखिल किया। (**अवतार सिंह' (पूर्व में उल्लेखित**) निर्णय के अनुसार भी अभ्यर्थी के विरुद्ध पारित चयन को निरस्त करने का आदेश न्यायोचित है।

1.11 अभ्यर्थी द्वारा प्रतिउत्तर शपथपत्र भी दाखिल किया जिसमें आज्ञापत्र याचिका के कथनों का समर्थन किया।

<u>अभ्यर्थी के पक्ष में निवेदन:-</u>

2.00 संजीव सिंह व उनके सहायक सुरेश बहादुर सिंह, अभ्यर्थी के विद्वान अधिवक्ताओं ने मुख्य रुप से निवेदन किया कि-

(i) अभ्यर्थी को शपथपत्र सत्यापित करते समय, उसके विरुद्ध कोई एन0सी0आर0 पंजीकृत थी, इसकी जानकारी नहीं थी, अतः इसकी सूचना शपथपत्र में नहीं दी थी। प्रकरण में जानकारी का अभाव था न कि जानकारी होते हुए भी छिपाने का। शपथपत्र में समस्त जानकारी सदभावना में उल्लेखित की गयी थी।

(ii) अभ्यर्थी ने अपने विरुद्ध एन0सी0आर0 दिनाक 05.05.2018 पजीकृत होने की सूचना प्राप्त होने पर तुरंत ही इसकी जानकारी शपथपत्र दिनाँक 22.06.2018 के माध्यम से जिलाधिकारी व पुलिस अधीक्षक, गाजीपुर को

प्रेषित कर दी अर्थात् एन0सी0आर0 पंजीकृत होने के महज 1 1/2 महिने के भीतर ही समस्त जानकारी सक्षम अधिकारी को दे दी गई थी।

(iii) इसके अतिरिक्त सुलहनामा की सूचना भी 16.07.2018 को जिलाधिकारी, गाजीपुर को प्रेषित कर दी गई तथा इस जानकारी के बाद अभ्यर्थी के पक्ष में जिलाधिकारी गाजीपुर ने चयन हेतु अनापत्ति भी दिनाँक 22.08.2018 को दे दी, परन्तु पुलिस प्राधिकारी ने उसका उचित संज्ञान लिए बिना ही अभ्यर्थी के विरुद्ध आदेश पारित कर दिया।

(iv) उच्चतम न्यायालय द्वारा पारित **'अवतार सिंह' (पूर्व में उल्लेखित)** के निर्णय के अनुसार अगर आपराधिक मामले की जानकारी जानबूझ कर नहीं छुपाई गयी है व अपराध की प्रकृति मामूली हो तो सेवा नियुक्ति के पक्ष में आदेश दिया जा सकता है, जबकि वर्तमान प्रकरण में जानकारी प्राप्त होते ही अभ्यर्थी ने उसके विरुद्ध एन0सी0आर0 के पंजीकृत होने की व सुलहनामा होने की जानकारी सक्षम प्राधिकारी को दे दी थी व प्रकरण में अपराध की प्रकृति मामूली है। अभ्यर्थी ने समस्त कार्यवाही सद्भावना से की है। अतः वर्तमान याचिका स्वीकार की जाये।

प्रतिवादी के पक्ष में कथन

3. अभ्यर्थी के पक्ष के कथन का विरोध करते हुए वेद प्रकाश मिश्रा सरकारी अधिवक्ता ने कथन किया कि-

(i) अभ्यर्थी ने जानबूझ के अपने ऊपर लंबित आपराधिक मामले की जानकारी छुपाई व छल कपट से सेवा नियुक्ति प्राप्त करने का प्रयास किया।

(ii) विज्ञापन व परिपत्र में यह विशिष्ठ रुप से उल्लेखित है कि,चरित्र सत्यापन के दौरान कोई प्रतिकूल तथ्य सामने आने पर उक्त अभ्यर्थी को अनुपयुक्त घोषित किया जायेगा।

(iii) आक्षेपित आदेश उच्चतम न्यायालय द्वारा पारित 'अवतार सिंह' के निर्णय के अनुसार ही पारित किया गया है। सुलहनामा के आधार पर दोषमुक्ति स्पष्ट रुप से दोषमुक्त का आदेश नहीं माना जा सकता है।

विश्लेषण .

4. उभयपक्ष के अधिवक्ताओं को सुना व पत्रावली का परिशीलन किया।

4.01 यह अविवादित है, कि अभ्यर्थी के विरुद्ध 05.05.2018 को एक एन0सी0आर0, धारा 323/504 भा0दं0सं0 के अंतर्गत पंजीकृत हुई, जिसकी जानकारी अभ्यर्थी द्वारा शपथपत्र दिनांक 04.06.2018 में नहीं दी गई। प्रथम बार इस एन सी आर के पंजीकृत होने की जानकारी अभ्यर्थी द्वारा शपथपत्र दिनाँक 22.06.2018 के माध्यम से जिलाधिकारी, गाजीपुर को दी गई उपरोक्त एन0सी0आर0 में सुलहनामा शपथपत्र 27.06.2018 को सत्यापित हुआ तथा जिसकी जानकारी भी सक्षम अधिकारी को शपथ पत्र दिनांक 16.07.2018 के माध्यम से दी गई, जिसका उल्लेख जिलाधिकारी की चयन अनापत्ति पत्र दिनांक 20.08.2018 में किया गया है। आक्षेपित आदेश में इस सुलहनामें को कोई महत्व नहीं दिया गया तथा इसे निष्प्रभावी किया गया की अभ्यर्थी द्वारा एन0सी0आर0 के पंजीकरण के तथ्य को छिपाया गया।

4.02 यह भी अविवादित है कि पुलिस विभाग की सेवा एक अनुशासित सेवा है जिसका कर्तव्य अपराधों को रोकना एवं अपराधियों को दण्ड दिलवाने की प्रक्रिया का विधिक उत्तरदायित्व का निर्वहन करना है।

4.03 उच्चतम न्यायालय द्वारा **'अवतार सिंह' (पूर्व में उल्लेखित)** के निर्णय के अनुच्छेद 38 में यह प्रतिपादित किया गया है कि,-

"38.1 किसी अभ्यर्थी द्वारा नियोक्ता को दोषसिद्धि, दोषमुक्ति या गिरफ़्तारी या किसी लंबित आपराधिक मामले की जानकारी, चाहे वो सेवा में प्रवेश करने से पहले या बाद में दी गयी हो, सत्य ही होनी चाहिए और आवश्यक जानकारी को छुपाना या उसका गलत उल्लेख नहीं होना चाहिए।

38.2. झूठी सूचना देने के लिए सेवाओं की समाप्ति या उम्मीदवारी को रद्द करने का आदेश पारित करते समय नियोक्ता को ऐसी जानकारी देते समय मामले की विशेष परिस्थितियों का, यदि कोई हो, संज्ञान में रखेगा।

38.3 नियोक्ता निर्णय लेते समय कर्मचारी के लिए लागू सरकारी आदेशों / निर्देशों / नियमों को ध्यान में रखेगा।

38.4 किसी ऐसे आपराधिक मामले में शामिल होने की जानकारी का छुपाना या गलत सूचना देना, जिसमें आवेदन/ सत्यापन प्रपत्र भरने से पहले ही दोषसिद्ध या दोषमुक्त कर दिया गया था और ऐसा तथ्य बाद में नियोक्ता के ज्ञान में आता है, तो निम्नलिखित में से कोई भी प्रक्रिया जो उपयुक्त हो, अपनायी जा सकती है।

38.4.1 ऐसे मामलों में जहां दोषसिद्घ का आदेश में अपराध की प्रकृति मामूली हो, जैसे कि कम उम्र में नारे लगाना या एक छोटे से अपराध के लिए, जिसका अगर खुलासा किया जाता तो भी, अभ्यर्थी प्रश्नागत पद के लिए अयोग्य नहीं हो जाता, तो नियोक्ता अपने विवेक से इस तथ्य को छुपाने व ग़लत जानकारी देने के कृत्य की उपेक्षा या कमी को क्षमा कर सकता है।

38.4.2 जहां दोषसिद्घ ऐसे मामले में हुआ हो, जो मामूली प्रकृति का नहीं है, तब नियोक्ता कर्मचारी की उम्मीदवारी या सेवाओं को निरस्त कर सकता है।

38.4.3. अगर पहले से ही तकनीकी आधार पर नैतिक क्रूरता या जघन्य / गंभीर प्रकृति के अपराध से जुड़े मामले में दोषमुक्त का आदेश पारित किया जा चुका है और यह स्पष्ट रुप से दोषमुक्त का मामला नहीं है, या उचित संदेह का लाभ दिया गया है, तो नियोक्ता, कर्मचारी के पूर्ववर्ती रहन-सहन व सभी प्रासंगिक तथ्य पर विचार कर के कर्मचारी की निरंतरता के प्रति, उचित निर्णय ले सकता है।

38.5 ऐसे मामले में जहां कर्मचारी ने सत्यता पूर्वक पूर्ण हुए आपराधिक मामले की घोषणा की है, नियोक्ता को तब भी पूर्ववर्ती रहन-सहन पर विचार करने का अधिकार है और उसको उम्मीदवार को नियुक्त करने के लिए बाध्य नहीं किया जा सकता है।

38.6 यदि मामले में तुच्छ प्रकृति के आपराधिक मामले के लंबित होने का तथ्य को सत्य रूप से चरित्र सत्यापन प्रपत्र में घोषित किया गया है, तो मामले के तथ्यों और परिस्थितियों में नियोक्ता, अपने विवेक से, ऐसे आपराधिक मामले के निर्णय के अधीन उम्मीदवार को नियुक्त कर सकता है।

38.7 कई लंबित अपराधिक मामलों की सूचना को जानबूझकर छुपाने के मामले में इस तरह की असत्य सूचना अपने आप में महत्वपूर्ण हो जायेगी और नियोक्ता ऐसे व्यक्ति की उम्मीदवारी रद्द करने या सेवाओं को रद्द करने का या के नियुक्ति को रद्द करने का उचित आदेश पारित कर सकता है क्योंकि ऐसे व्यक्ति जिसके विरुद्ध कई आपराधिक मामले लंबित हों तो उसकी नियुक्ति उचित नहीं हो सकती है।

38.8 आवेदन पत्र भरने के समय यदि उम्मीदवार को यह ज्ञात नहीं हो कि कोई आपराधिक मामला लंबित है , फिर भी इसका प्रतिकूल प्रभाव पड़ सकता है और नियुक्ति प्राधिकारी अपराध की गंभीरता को देखते हुए निर्णय ले सकेगा।

38.9 यदि सेवा में कर्मचारी स्थायी हो जाता है, तो सत्यापन आवेदन पत्र में असत्य जानकारी प्रस्तुत करने के आधार पर पदच्युति या सेवामुक्ति के आदेश पारित करने से पूर्व विभागीय जांच करना आवश्यक होगा।

38.10 छुपाने या गलत जानकारी के निर्धारण के लिए सत्यापन प्रपत्र विशिष्ट होना

चाहिए न की अस्पष्ट, केवल ऐसी जानकारी जिसे विशेष रूप से उल्लिखित किया जाना आवश्यक था, की सूचना दी जानी चाहिए। यदि जानकारी नहीं मांगी जाती है, परन्तु प्रासंगिक हो और नियोक्ता के जानकारी में आये तो वो जानकारी अनुकूलता के प्रश्न को संबोधित करते समय एक उद्देश्यपूर्ण रुप में विचारार्थ की जा सकती है। हालाँकि, ऐसे मामलों जहां कोई तथ्य पूछा ही न गया हो तो उसके पूर्व में किसी व्यक्ति को 'suppressio veri' या 'suggestio falsi' (सत्य का शमन या असत्य का सुझाव) का दोषी ठहराया जाए, तथ्य की जानकारी आवश्यक रुप से उसकी जानकारी में होनी चाहिए। (उपरोक्त टिप्पणी न्यायालय द्वारा किया गया है)

4.04 उपरोक्त वर्णित तथ्य व विधिक परिपेक्ष, में सर्वप्रथम यह निर्धारित करना है कि, क्या वर्तमान प्रकरण में अभ्यर्थी द्वारा आपराधिक मामले की तथ्यात्मक सूचना, जानबूझ कर छुपाई गई है तथा क्या अभ्यर्थी द्वारा शपथपत्र दाखिल करने के बाद, बहुत कम समयन्तराल में आपराधिक मामले की सूचना को सक्षम अधिकारी के समक्ष उल्लेखित करने का कृत, उसकी सद्भावना को दृष्टिगत करता है?

4.05 इसी क्रम में अभ्यर्थी के एक शपथ पत्र दिनाँक 04.06.2018 को सत्यापित किया जिसमें यह घोषित किया कि "यह कि मेरे विरुद्ध कोई आपराधिक मुकदमा/मामला मेरी जानकारी में कभी पंजीकृत नहीं हुआ और न ही कोई पुलिस विवेचना (INVESTIGATION) लम्बित है।" यह भी विदित है कि इससे पूर्व 05.05.2018 एक एन0सी0आर0 अभ्यर्थी के विरुद्ध पंजीकृत हो गयी थी। जिसकी सूचना शपथ पत्र दिनाँक 22.06.2018 व सुलहनामे की सूचना शपथपत्र दिनाँक 16.07.2018, के द्वारा सक्षम अधिकारी को दे दी गयी थी। थानाध्यक्ष बिरनो जनपद गाजीपुर के चरित्र सत्यापन की आख्या दिनाँक 26.06.2018 के अनुसार एन0सी0आर0 पंजीकृत की सूचना पुलिस प्राधिकारी को दी गयी। अतः यह कहना की एन0सी0आर0 की सूचना जानकारी होते भी जानबूझ के छुपाई, प्रकरण के तथ्यों से परिलक्षित नहीं होता है, क्योंकिमास के भीतर ही अभ्यर्थी ने सही सूचना पुलिस अधीक्षक व जिलाधिकारी को प्रेषित कर दी थी। यहाँ यह भी उल्लेखनीय है कि जिलाधिकारी, गाजीपुर ने सुलाहनामे के तथ्य का संज्ञान लेते हुए अभ्यर्थी के चयन को अनंतिम दिनांक 20.08.2018 को पुलिस अधीक्षक गाजीपुर को प्रेषित कर दी थी। अतः वर्तमान प्रकरण में अभ्यर्थी का कृत सुलहनामा पूर्णतः सही है तो ऐसी परिस्थितियों में उच्चतम न्यायालय द्वारा दी गये **'अवतार सिंह' (पूर्व में उल्लेखित)** के निर्णय के सिद्धान्त के दृष्टि में क्या आक्षेपित आदेश न्याय संगत है?

4.06 इसके पश्चात दिनाँक 19.07.2018 को अभ्यर्थी के विरुद्ध एन0सी0आर0 को धारा 323/504 भा0दं0सं0 में अन्वर्जनीय पंजीकृत की गयी थी, जिसमें अभ्यर्थी को जमानत हो गयी है।

4.07 उच्चतम न्यायालय द्वारा **'अवतार सिंह' (पूर्व में उल्लेखित**) के प्रकरण में पारित निर्णय में प्रतिपादित सिद्धान्तो के परिपेक्ष में यह विदित है कि किसी भी अभ्यर्थी द्वारा नियोक्ता को उसके विरुद्ध सभी पंजीकृत आपराधिक मामले चाहे उसमें उसको दोष सिद्ध या दोषमुक्त किया जा चुका है या लंबित हो की

जानकारी सत्यतापूर्वक, सेवा में प्रवेश करने के पूर्व आवश्यक रुप से देनी चाहिए तथा ऐसी जानकारी को छुपाने या असत्य जानकारी देने की दशा में नियोक्ता को ऐसे अभ्यर्थी की उम्मीदवारी या सेवा को निरस्त करने का अधिकार रहेगा। **"अवतार सिंह"** में ऐसे मामलों में नियोक्ता द्वारा निर्णय लेते समय कुछ तथ्य या कारकों को ध्यान में रखने को उपेक्षा की है, जिसके फलस्वरुप अभ्यर्थी द्वारा तथ्यों को छुपाने या असत्य जानकारी देने के कृत्य की उपेक्षा या त्रुटि को क्षमा किया जा सकता है। ऐसे आपराधिक मामले जिसके अंतर्गत छोटे अपराध या ऐसे अपराध जिसकी प्रकृति मामूली हो और यदि आवेदनपत्र प्रस्तुत करते समय किसी लंबित मामले की जानकारी नहीं हो व बाद में उसकी जानकारी प्राप्त होती है तो अपराध की गंभीरता पर विचार करके नियोक्ता द्वारा उचित निर्णय लिया जा सकता है, इसके अतिरिक्त नियोक्ता, अभ्यर्थी के पूर्व रहन सहन का भी संज्ञान ले सकता है और मामले की विशेष परिस्थितियों का ध्यान भी रख सकता है। उपरोक्त मापदण्डों को अगर वर्तमान प्रकरण के तथ्य व परिस्थितियों में लागू किया जाये तो यह विदित होता है कि वर्तमान प्रकरण में,

(i) यह नहीं कहा जा सकता है कि अभ्यर्थी को प्रथम स्तर पर आवेदन पत्र भरते समय उसके विरुद्ध सन0सी0आर0 के पंजीकरण की सूचना थी। अतः उसने उक्त तथ्य को जानबूझ कर नहीं छुपाया।

(ii) आवेदन पत्र भरने केमाह के भीतर अभ्यर्थी ने उसके विरुद्ध एक एन0सी0आर0 पंजीकृत है, इस तथ्य की जानकारी सक्षम अधिकारी को दे दी थी। बाद में सुलहनामा होने की सूचना भी प्रेषित कर दी थी।

(iii) अभ्यर्थी के विरुद्ध धारा 323/504 भा0दं0सं0 के अंतर्गत पंजीकृत हुई थी। धारा 323 में वर्णित अपराध जिसमें दोष सिद्ध होने पर एक साल तक की सजा व रु0 1000 तक का जुर्माना लगाया जा सकता है तथा धारा 504 में वर्णित अपराध में दोष सिद्ध होने पर 2 वर्ष तक की सजा व जुर्माने का प्रावधान है। अतः यह अपराध मामूली अपराध की श्रेणी में आयेंगे न की किसी संगीन अपराध की श्रेणी में। पत्रावली के परिशीलन से यह तथ्य परिलक्षित नहीं होता है कि प्रकरण में कोई उपद्रव कारित की गयी थी या लोक शांति भंग की संभावना उत्पन्न हुई थी।

(iv) इसके अतिरिक्त प्रकरण की विशेष परिस्थितियों में कि, अभ्यर्थी नमासि के भीतर ही एन0सी0आर0 की जानकारी नियोक्ता को प्रेषित कर दी थी व अभ्यर्थी व शिकायकर्ता के मध्य सुलहनामे का तथ्य भी सक्षम प्राधिकारी को दे दिया गया था जिसका जिलाधिकारी ने संज्ञान लेते हुए, अभ्यर्थी के पक्ष में चयन हेतु संस्तुति भी कर दी थी। अभ्यर्थी के पूर्व रहन सहन को देखा जाये तो उसके विरुद्ध उक्त एन0सी0आर0 के अतिरिक्त कोई और आपराधिक मामला दर्ज नहीं हुआ है। अतः अभ्यर्थी का कृत सदभावना पूर्ण रहा।

(v) आक्षेपित आदेश के परिशीलन से यह भी विदित है कि आदेश में उपरोक्त वर्णित सिद्धान्तों व प्रकरण के तथ्यों व परिस्थितियों का सही संज्ञान नहीं लिया गया है व वर्तमान प्रकरण की तुलना किसी अपराध के विचारण से कर, गलती की है, क्योंकि जबकि वर्तमान प्रकरण में एन0सी0आर0 पंजीकृत होने के उपरान्त सुलहनामा हो गया था, अतः अग्रसर कोई कार्यवाही नहीं हुई है। अतः आक्षेपित आदेश तथ्यों व विधिक दृष्टिकोण से न्यायसंगत नहीं है।

निष्कर्ष:-

5. उपरोक्त विश्लेषण के फलस्वरुप पुलिस अधीक्षक, अम्बेडकर नगर द्वारा पारित आक्षेपित आदेश दिनांक 27.02.2019 निरस्त करने योग्य है, अतः निरस्त किया जाता है तथा विपक्षीगण को आदेशित किया जाता है कि वो अभ्यर्थी/याचिकाकर्ता (सोनू यादव) को अविलम्ब

प्रशिक्षण की अनुमति प्रदान करें। इस निर्देश के साथ वर्तमान आज्ञापत्र याचिका स्वीकार व अंतिम रुप से निस्तारित की जाती है।

(2021)01ILR A738
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2020

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-A No. 5259 of 2020

Bindresh Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

A. Service law – Selection on the Constable post – Failure to submit O.B.C. Certificate – Effect – Held, merely for the reason that O.B.C. certificate was not submitted by the petitioner within the time, the authorities would not be justified in denying petitioner's consideration for appointment in O.B.C. category – If a person belonging to a reserve category, a certificate issued by the competent authority to this effect is only affirmation of the fact which is already in existence – The purpose of such certificate is enable the authorities to believe in the assertion of the candidate that he belongs to a reserved category. (Para 13)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Ram Kumar Gijroya Vs Delhi Subordinate Services Selection Board reported in (2016) 4 SCC 754.

2. Special Appeal No. 762 of 2016, Arvind Kumar Yadav Vs U.P. Recruitment and Promotion Board & ors. decided on 05.12.2016

3. Special Appeal No.156 of 2017 (Gaurav Sharma Vs State of U.P. & ors.) decided on 04.05.2017

4. Seema Kumari Sharma Vs St. of H.P. (1998) 9 SCC 128

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

1. Heard Sri Siddharth Khare, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The petitioner has preferred the present writ petition with the prayer to direct the respondents-authorities to consider the candidature of the petitioner under OBC category and to undertake follow up proceeding for appointment of the petitioner on the post of Constable pursuant to the advertisement dated 16.11.2018..

3. Facts in brief as contained in the writ petition are that an advertisement was issued by the respondents on 16.11.2018 inviting applications for the post of constable in Civil Police and Provincial Armed Constabulary (in short "P.A.C."). The process of selection comprises of written examination followed by the document verification and physical standard test which is subsequently followed by physical efficiency test and medical examination.

4. The petitioner is an O.B.C. candidate and pursuant to the aforesaid advertisement, he applied for the post of constable. An admit card was issued by the respondents permitting the petitioner to appear in the written examination which was held on 28.1.2019. The petitioner duly

appeared in the written examination. The petitioner duly passed the same and thereafter, the petitioner was issued admit card for document verification/physical standard test (hereinafter referred to as "DV/PST"). The petitioner duly appeared in the aforesaid examination on 19.12.2019 at Reserved Police Line, Gorakhpur. During the course of document verification, an objection was raised by the respondents-authorities to the effect that the petitioner was not able to produce the OBC certificate within cut off date. Though the petitioner was not able to produce the aforesaid caste certificate but he was permitted to undergo physical efficiency test. Final result of the aforesaid examination was declared on 2.3.2020 and the name of the petitioner was placed at serial No.5659 in the list of selected candidates. In the aforesaid select list, the candidature of the petitioner was considered as general class category candidate. It further reflects from perusal of the result that the petitioner secured 179.5000 marks where as the cut of marks under OBC category is 176.2834. Insofar as the general class category candidates are concerned, the cut of marks was 180.4081.

5. It is argued that as per procedure prescribed under Para 5.4 (under the heading of remark) that OBC certificate was required to be issued between 01.04.2018 and 08.12.2018. The petitioner has OBC certificate dated 29.11.2018. It is argued that at the relevant point of time, the aforesaid caste certificate was misplaced, as such he was not able to produce the same at the time of document verification and physical standard test. It is further argued that though the petitioner was not able to produce the caste certificate dated 29.11.2018 before the aforesaid committee but he was able to produce OBC certificates before the aforesaid committee which were issued on 04.02.2018 and 07.02.2018. The aforesaid caste certificates were duly accepted by the respondents-authorities and the petitioner was permitted to participate in the document verification/physical standard test. It is argued that only objection which was raised by the respondents-authorities is that at the relevant point of time, the caste certificate, which was duly produced by the petitioner before the authorities, was not within the cut of date. In this view of the matter, the candidature of the petitioner was shifted to the general category candidate from OBC category candidate. It is further argued that it is settled principle of law that in case, a person belonging to a particular category and if he failed to submit document at the time of verification, the same would not give authority to the respondents either to cancel his candidature or shift from OBC category to general category. Learned counsel for the petitioner also placed reliance upon a judgement of Hon'ble Supreme Court in the case of ***Ram Kumar Gijroya Vs. Delhi Subordinate Services Selection Board reported in (2016) 4 SCC 754.*** In the aforesaid case, it has been held by Hon'ble Supreme Court that even if there is a delay in furnishing the caste certificate, the same would not be fatal in order to non-suit the candidature of a candidate. It is argued that in view of the aforesaid judgment, respondents are liable to treat the candidature of the petitioner as O.B.C. category candidate and appoint him as constable pursuant to the advertisement in question.

6. A counter affidavit has been filed by the learned Standing Counsel on behalf of the respondents. It is argued by learned Sanding Counsel that Board has advertised the posts of constable in Civil Police and Constable P.A.C 2018 in the year 2018 and

online forms were invited from 19.11.2018 and the last date for submission online form was 08.12.2018. It is further argued that the candidate should submit his/her online form between 19.11.2018 and 08.12.2018 pursuant to the advertisement in question. Learned Standing Counsel relied upon paragraphs 5, 6, point 6 and point No.10 of paragraph No.5 of the advertisement dated 16.11.2018 which provides for reservation. The aforesaid paragraphs are quoted below:-

Paragraph 5 of the advertisement dated 16.11.2018:-

"उत्तर प्रदेश लोक सेवा ;अनुसूचित जातियों अनुसूचित जनजातियों और अन्य पिछडे वर्गों के लिए आरक्षण द्धअधिनियम – 1994 ;समय समय पर यथा संशोधितद्ध की अनुसूची–दो के अनुसार क्रीमीलेयर के अर्न्तगत आने वाले उत्तर प्रदेश के अन्य पिछडे वर्ग के अभ्यर्थियों को आरक्षण का लाभ अनुमन्य नहीं है। अन्य पिछडे वर्ग के लिए जाति प्रमाण–पत्र (प्रारूप–1) 01 अप्रैलए 2018 या उसके बाद का किन्तु इस भर्ती प्रकिया हेतु निर्धारित आवेदन करने की अन्तिम तिथि तक निर्गत होना चाहिए।"

Paragraph 6 of the advertisement dated 16.11.2018:-

"अन्य पिछडे वर्ग के लिए जाति प्रमाण पत्र राज्य सरकार द्वारा निर्धारित प्रारूप–1 पर (01 अप्रैल, 2018 या उसके बाद का किन्तु इस भर्ती प्रकिया हेतु निर्धारित आवेदन करने की अन्तिम तिथि) निर्गत होना चाहिए।"

Point No.6 of Paragraph 5 of the advertisement dated 16.11.2018:-

"आरक्षण/आयु में छूट का लाभ चाहने वाले उत्तर प्रदेश के आरक्षित श्रेणी के अभ्यर्थी आवेदन में अपनी श्रेणी अवश्य अंकित करें तथा निर्धारित प्रारूप पर सक्षम अधिकारी द्वारा जारी प्रमाण पत्र आवेदन करने से पूर्व प्राप्त कर लें एवं जब उनसे अपेक्षा की जाये जब वे उसे प्रस्तुत करें। राज्य सरकार द्वारा निर्धारित प्रारूप के अतिरिक्त किसी अन्य प्रारूप में प्रस्तुत प्रमाण पत्र मान्य नहीं होगा।""

Point No.10 of Paragraph 5 of the advertisement dated 16.11.2018:-

"आरक्षण की दावेदारी के समर्थन में सम्बन्धित मूल प्रमाण पत्र निर्धारित प्रारूप मे प्रस्तुत न किये जाने पर यह अवधारणा की जायेगी कि अभ्यर्थी आरक्षण का दावेदार नहीं है एवं तदानुसार यह दावेदारी निरस्त करए यदि अभ्यर्थी सामान्य श्रेणी की समस्त पात्रताओं को पूर्ण करता हो तोए उसे सामान्य श्रेणी के अन्तर्गत मानते हुए भर्ती प्रक्रिया में सम्मिलित कर लिया जायेगा। इस सम्बन्ध में किसी संशोधन/परिवर्तत हेतु पुनः कोई अवसर प्रदान नहीं किया जायेगा।"

7. It is argued that the petitioner has not followed the provisions prescribed in the advertisement issued by the Board for submitting O.B.C. certificate issued between 01.04.2018 and 08.12.2018 and as such the candidature of the petitioner was shifted from O.B.C. category to general category. It is stated in sub paragraph 6 of paragraph No.7 of the counter affidavit that cut of marks of the petitioner is 179.50000 which is less than cut off marks 180.4081 of general category candidates (Male) and as such the petitioner is not entitled for his selection. Learned Standing Counsel further relied upon judgment rendered by this Court in ***Special Appeal No.762 of 2016 (Arvind Kumar Yadav Vs. U.P. Recruitment and Promotion Board and others).*** He further relied upon a full bench judgment of this Court passed in ***Special Appeal No.156 of 2017 (Gaurav Sharma Vs. State of U.P. and others***) decided on 04.05.2017. It is argued that insofar as the law laid down by Hon'ble Supreme Court in the case of ***Ram Kumar Gijroya (supra)*** is concerned, the ratio of the same is not applicable in the facts and circumstances of the case.

8. In response to the arguments raised by the learned Standing Counsel, it is argued by Sri Siddharth Khare, learned counsel for the petitioner that the facts of

the case before the full bench is different from this case and the law laid down by the Supreme Court in the case of ***Ram Kumar Gijroya (supra)*** is fully applicable in the present facts and circumstance of the case.

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

10. The Apex Court in the case of ***Ram Kumar Gijroya (supra)***, reliance of which has placed by the learned counsel for the petitioner, deals with the provisions that whether a candidate, who appears in the examination under the O.B.C. category and submits his certificate after the last date mentioned in the examination, is eligible for selection to the post under the O.B.C. category or not. Learned counsel placed reliance upon following paragraphs of the aforesaid judgment:-

"3. The important question of law to be decided in these appeals is whether a candidate who appears in an examination under the O.B.C. category and submits the certificate after the last date mentioned in the advertisement is eligible for selection to the post under the O.B.C. category or not.

4 . As the question of law arising in all these appeals is similar, for the sake of convenience and brevity, we refer to the facts of Civil Appeal arising out of SLP(C) No. 27550 of 2012, which has been filed against the impugned judgment and order dated 24.01.2012, The necessary relevant facts required to appreciate the rival legal contentions advanced on behalf of the parties are stated in brief hereunder:

"The Respondent-Delhi Subordinate Services Selection Board (hereinafter referred to as "the DSSSB") invited applications for selection to the post of Staff Nurse in the Department of Health and Family Welfare, Govt. of NCT of Delhi by way of publishing an Advertisement No. 09/2007 in the Newspaper. The last date of submission of the application form in the advertisement for the said post was 21.01.2008. The Appellant submitted his application form before the due date and was subsequently issued the admit card to appear in the examination. Having appeared in the examination, he was shortlisted for selection. However, his name did not appear in the final list of selected candidates. On enquiry, he was informed by the concerned official that he was not selected to the post for the reason that he had failed to submit the OBC certificate issued by the appropriate authority along with application form before the last date of submission of application form."

6. The learned single Judge disposed of the writ petition vide judgment and order dated 24.11.2010, placing reliance on the judgment in the case of Pushpa (supra), wherein the controversy centred around the same advertisement/Notification issued by the same Respondent. The learned single Judge observed that the only ground for declining the applications filed by the Appellants was that the O.B.C. certificates had been issued and submitted after the cut off date and therefore they were not eligible for appointment to the post. The learned single Judge further held that the Respondent did not cite any other authority to distinguish the decision in Pushpa's case (supra) from the facts of the present case. Consequently, the learned single Judge disposed of the writ petition and directed the Respondent to reconsider the application of the Appellant and the other aggrieved candidates against the O.B.C. category within a period of one month.

14. The Division Bench of the High Court erred in not considering the decision rendered in the case of Pushpa (supra). In that case, the learned single Judge of the

High Court had rightly held that the Petitioners therein were entitled to submit the O.B.C. certificate before the provisional selection list was published to claim the benefit of the reservation of O.B.C. category. The learned single judge correctly examined the entire situation not in a pedantic manner but in the backdrop of the object of reservations made to the reserved categories, and keeping in view the law laid down by a Constitution Bench of this Court in the case of ***Indra Sawhney v. Union of India 1992 (Supp) 3 SCC 217*** *as well as* ***Valsamma Paul v. Cochin University and Ors. (1996) 3 SCC 545.*** *The learned single Judge in the case of Pushpa (supra) also considered another judgment of Delhi High Court, in the case of Tej Pal Singh (supra), wherein the Delhi High Court had already taken the view that the candidature of those candidates who belonged to the S.C. and S.T. categories could not be rejected simply on account of the late submission of caste certificate.*

The relevant paragraph from the judgment of this Court in the case of Indra Sawhney (supra) has been extracted in the case of Pushpa (supra) along with the speech delivered by Dr. Ambedkar in the constituent assembly and reads thus:

9....

xxx

251. Referring to the concept of equality of opportunity in public employment, as embodied in Article 10 of the draft Constitution, which finally emerged as Article 16 of the Constitution, and the conflicting claims of various communities for representation in public administration, Dr. Ambedkar emphatically declared that reservation should be confined to 'a minority of seats', lest the very concept of equality should be destroyed. In view of its great importance, the full text of his speech delivered in the Constituent Assembly on the point is appended to this judgment. But I shall now read a few passages from it. Dr Ambedkar stated:

"...firstly, that there shall be equality of opportunity, secondly, that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration .... Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity .... Therefore the seats to be reserved, if the reservation is to be consistent with Sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation ... we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, ... Constituent Assembly Debates, Vol. 7, pp. 701-702 (1948-49).

These words embody the raison d'etre of reservation and its limitations. Reservation is one of the measures adopted by the Constitution to remedy the continuing evil effects of prior inequities stemming from discriminatory practices against various classes of people which have resulted in their social, educational and economic backwardness. Reservation is meant to be addressed to the present social, educational and economic backwardness caused by purposeful societal discrimination. To attack the continuing ill effects and perpetuation of such injustice, the Constitution permits and

empowers the State to adopt corrective devices even when they have discriminatory and exclusionary effects. Any such measure, in so far as one group is preferred to the exclusion of another, must necessarily be narrowly tailored to the achievement of the fundamental constitutional goal."

15. In the case of ***Pushpa (supra)****, relevant paragraphs from the case of* ***Tej Pal Singh (supra)*** *have also been extracted, which read thus:*

11....

xxx

17. The matter can be looked into from another angle also. As per the advertisement dated 11th June, 1999 issued by the Board, vacancies are reserved for various categories including 'SC' category. Thus in order to be considered for the post reserved for 'SC' category, the requirement is that a person should belong to 'SC' category. If a person is SC his is so by birth and not by acquisition of this category because of any other event happening at a later stage. A certificate issued by competent authority to this effect is only an affirmation of fact which is already in existence. The purpose of such certificate is to enable the authorities to believe in the assertion of the candidate that he belongs to 'SC' category and act thereon by giving the benefit to such candidate for his belonging to 'SC' category. It is not that Petitioners did not belong to 'SC' category prior to 30th June, 1998 or that acquired the status of being 'SC' only on the date of issuance of the certificate. In view of this position, necessitating upon a certificate dated prior to 30th June, 1998 would be clearly arbitrary and it has no rationale objective sought to be achieved.

18. While taking a particular view in such matters one has to keep in mind the objectives behind the post of SC and ST categories as per constitutional mandate prescribed in Articles 15(4) and 16(4) which are enabling provisions authorising the Government to make special provisions for the persons of SC and ST categories. Articles 14(4) and 16(4), therefore, intend to remove social and economic inequality to make equal opportunities available in reality. Social and economic justice is a right enshrined for protection of society. The right in social and economic justice envisaged in the Preamble and elongated in the Fundamental Rights and Directive Principles of the Constitution, in particular Articles 14, 15, 16, 21, 38, 39 and 46 are to make the quality of the life of the poor, disadvantaged and disabled citizens of the society meaningful."

11. So far as the judgment delivered by the Full Bench of this Court in ***Gaurav Sharma (supra)*** is concerned, the same, apparently, has no applicability; in as much as, the Full Bench of this Court was dealing with the candidature of an OBC candidate, for which declaration had to be in the format as requisite information had to be furnished so as to determine as to whether the person is belonging to non-creamy layer in the OBC category of State or not? In view of the same, the court is of the opinion that ratio of the full bench judgement will not apply in the facts and circumstance of the present case.

12. The Supreme Court in the case of ***Seema Kumari Sharma vs. State of H.P. (1998) 9 SCC 128*** has considered the issue regarding failure of a candidate to furnish a certificate regarding reservation claimed by her along with the application form. The Hon'ble Supreme Court has observed that the failure of a candidate to submit certificate regarding weightage or reservation at the time of submission of

application form does not dis-entitle her to claim consideration on the basis thereof. The Supreme Court observed that the respondents did not dispute the certificate, but only disputed the time of its production before them to claim consideration. The appellant had already appeared for the examinations conducted, but her result had not been announced. She filed a representation claiming award of 10 marks allotted for the candidates belonging to IRDP Families (Families belonging to backward Panchayat). The Supreme Court allowed the appellant's claim and directed declaration of her result and for inclusion of her name in the training meant for Junior Basic Teachers' Training Course and also directed her appointment to be considered in accordance with the Rules, if she completed her training successfully. The Supreme Court in fact, directed that the certificate produced by the candidate, which would otherwise entitle her to claim weightage, even on a later date, can be considered for providing appointment.

13. In the facts and circumstances of the case merely for the reason that O.B.C. certificate was not submitted by the petitioner within the time, the authorities would not be justified in denying petitioner's consideration for appointment in O.B.C. category. If a person belonging to a reserve category, a certificate issued by the competent authority to this effect is only affirmation of the fact which is already in existence. The purpose of such certificate is enable the authorities to believe in the assertion of the candidate that he belongs to a reserved category.

14. In view of the same, the court is of the opinion that the petitioner is entitled for the relief as claimed for by him in the present writ petition.

15. In view of the aforesaid, this writ petition is disposed of with the direction upon the authorities concerned to treat the petitioner as O.B.C. category candidate and pass further orders in respect of his candidature.

16. It goes without saying that correctness of the certificate would, otherwise, be open to be examined before issuing a formal order of appointment to the petitioner.

17. The aforesaid exercise be completed within a period of three months from the date of production of self attested computer generated copy of this order downloaded from the official website of High Court Allahabad.

18. With the aforesaid observations, the writ petition is allowed.

(2021)01ILR A744
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.12.2020

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 8509 of 2020

Ashish Kumar Mishra & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Laltaprasad Misra, Prafulla Tiwari

Counsel for the Respondents:
C.S.C., Manish Jauhari, Mohd. Altaf Mansoor, Nitin Kapoor, P.K. Srivastava, Pradip Kumar Srivastava, Renu Mishra

A. U.P. State Electricity Board Services of Engineers Regulations, 1970 – Regulation 5(1)(d) – Service law – Promotion on the post of Assistant Engineer – Misconduct – Obtaining AMIE Course without permission of competent authority – AMIE is a recognized engineering degree course that can be studied in distance education mode – This course does not demand any classroom attendance and anyone who meets the specified eligibility criteria can become a graduate engineer in the least possible time and expense – Since AMIE course arrange Postal Classes, it is especially suitable for employed person, as they can study this course without being interfering with their job – Only it was mandatory to inform the appointing authority through his superior officers regarding their enrollment in the AMIE course but no prior permission was required. (Para 37 and 40)

B. Service law – Misconduct – Meaning – Misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand – It is a forbidden quality of an act and is necessarily indefinite – 'Misconduct' in office may be defined as unlawful behaviour or neglect by a public officer of his duties i.e. devotion to duty. (Para 29)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Union of India & ors. Vs Harjeet Singh Sandhu, (2001) 5 SCC 593

2. Baldev Singh Gandhi Vs St. of Punj. & ors. , (2002) 3 SCC 667

3. M. M. Malhotra Vs U.O.I. & ors. , (2005) SCC 351

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The petition seeks issuance of a writ in the nature of certiorari for quashing the impugned order dated 20.03.2020 passed by respondent no.4, contained at Annexure 1 to the petition and also to quash the list dated 27.05.2020 issued by respondent no.6 containing names of 30 Junior Engineers.

The petition also seeks to quash the list prepared by respondent no.7 containing names of 30 Junior Engineers who have acquired the B. Tech/AMIE Degree without taking due permission from the appointing authority and command the respondents to consider for promotion and to promote only those Junior Engineers as Assistant Engineers under 8.33% quota as stands prescribed in Regulation 5(1)(d) of the U.P. State Electricity Board Services of Engineers Regulations, 1970 who have acquired B.Tech/AMIE degree after taking permission from the competent authority.

2. The brief facts giving rise to the present petition are stated as under :

i. The petitioners were recruited and appointed as Junior Engineers by direct recruitment through a selection conducted by the Electricity Service Commission of the UPPCL. The petitioners while working as Junior Engineers obtained engineering degree after obtaining due permission from the competent authority.

ii. For making promotion on the post of Assistant Engineers from the post of Junior Engineers under 8.33% quota, a letter dated 07.08.2019 was issued from the office of respondent no.5 calling for applications from the Junior Engineers under the 8.33% quota in the prescribed format accompanied with educational certificates including the diploma/degree, mark-sheet and permission letter/order of the competent authority. A reminder letter dated 06.09.2019 was also issued to this effect. Letter dated 07.08.2019 and

06.09.2019 makes it clear that the names of only those Junior Engineers is to be considered for promotion on the post of Assistant Engineers under the 8.33% quota who have acquired the B.E./AIME Degree after taking due permission from the department for taking admission for pursuing the course of B.E./AIME.

iii. The petitioners submitted their application forms for being considered for promotion on the post of Assistant Engineers to the competent authority, which have been forwarded by the Superintending Engineer to the Chief Engineers vide letter dated 07.09.2019 and 13.09.2019. Total 104 Junior Engineers submitted their application forms on the post of Assistant Engineers under 8.33% quota to the controlling/competent officer. The petitioner no.1 finds place at serial no.53 whereas the name of petitioner no.2 was at Serial No.57.

iv. The Screening Committee scrutinize the application forms as submitted by the Junior Engineers, their character rolls and the personal files of the Junior Engineers and after the said exercise, the committee prepared a list of the suitable candidates for the promotion to the post of Assistant Engineers. The list so prepared was forwarded by the Chairman of Screening Committee to the Board and the Board prepared a final list known as "select list' containing the names of the candidates from amongst which the promotion is made.

v. The State Government in order to grant relaxation in qualifying service for promotion has framed the Rules known as "U.P. Government Servants Relaxation in Qualifying Service for Promotion Rules 2006, which was lastly amended on 24.04.2013 vide U.P. Government Servants Relaxation in Qualifying Service for Promotion (First Amendment) Rules, 2013 and the same have been adopted by the Uttar Pradesh Corporation Limited in its 100th Meeting held on 31.07.2013.

vi. Earlier the petitioners have filed a writ petition Service Single No.32367 of 2019 (Ashish Kumar Mishra and another vs. State of U.P. and others) before this Hon'ble Court with the prayer to command to the respondents to consider for promotion and to promote only those Junior Engineers as Assistant Engineers under 8.33% quota as prescribed in Regulation 5(1)(d) of the U.P. State Electricity Board Services of Engineers Regulations, 1970 who have acquired B.Tech/AMIE degree after taking permission from the competent authority. The said writ petition was disposed of vide order dated 25.11.2019 passed by a coordinate Bench of this Court with direction to decide the representation of the petitioners.

vii. In pursuance to order passed by this Court dated 25.11.2019, the petitioners jointly submitted a representation dated 29.11.2019, which has been rejected by the impugned order dated 20.03.2020, contained at Annexure 1 to the writ petition. Therefore, the instant writ petition.

3. Dr. L. P. Mishra, learned counsel for the petitioners has submitted that the petitioners were recruited and appointed as Junior Engineers by direct recruitment through a selection process conducted by the Electricity Service Commission of the U.P.P.C.L. The next promotional post from the Junior Engineer is Assistant Engineer. It is submitted that the said promotion is made in accordance with the U.P. State Electricity Board Services of Engineers Regulations 1970 (for short "Regulations 1970) which have been framed by the Uttar Pradesh Electricity Board in exercise of Powers conferred under section 79 (c) of

the Electricity (Supply) Act, 1948. He has referred the Regulations 5 (1) of the Regulations 1970, which have been amended from time to time. The same reads as under:

5. Source of Recruitment :

(1).As per the rules, the total sanctioned posts of Assistant Engineer for recruitment in the service will be divided into different categories and the proceedings for recruitment/ promotion against vacancies of each category will be done separately every year and the year and the category in which the posts are vacant, the recruitment / promotion shall be made in that category.

(a). for direct recruitment from Trained Engineers - 50.33%

(b).By promotion from amongst members of Junior Engineers in the manner prescribed in Appendix 'C' - 40%

(c). By promotion from amongst the confirmed and qualified computers (Selection Grade) (E/M) in the manner prescribed in Appendix 'C - 1.33%

(d). By promotion from amongst the degree holder Junior Engineers/Computer who have qualified B.E./AIME and have rendered 10 years of qualified service as Junior Engineer/Computer on 1st of July of the selection year.

Provided that the number of posts to be filled against the category (d) shall be divided amongst Junior Engineers and Computers in proportion described above under category (b) and (c).

4. The learned counsel for the petitioners Mr. Mishra has submitted that the petitioners while working as Junior Engineers has obtained B.Tech degree after taking due permission from the appointing authority as for acquiring any degree while remaining in service, the prior permission is required from the appointing/competent authority as per order dated 25.01.1979, issued by the Board which has been followed by another order dated 18.08.1982, providing therein that if, any employee of the Board has taken the admission in any educational institute for acquiring any qualification without the permission of the authority, then disciplinary proceedings will be initiated against such employee and a request be also made to the institute to cancel the admission of such employee.

5. The learned counsel for the petitioners has submitted that the applications were invited for making promotion on the post of Assistant Engineer from the post of Junior Engineer under 8.33% quota vide letter dated 07.08.2019 and the eligible Juniors Engineers who acquired the B.E./AMIE degree submitted their application forms in the prescribed format annexing the copy of the permission. Reminder letter dated 06.09.2019 was also issued to direct the Junior Engineers to submit attested copy of permission letter granted by the department. The petitioners have also submitted their application forms in the prescribed format.

It has also been submitted by the learned counsel for the petitioners that the select list so forwarded to respondent no.6 by respondent no.7 includes the several names of Junior Engineers who have acquired B.E./AMIE degree without taking due permission from the competent authority, which is utter violation of the order dated 07.08.2019 and 06.09.2019. Learned counsel submits that on earlier occasion when the respondents were going

the promote those Junior Engineers who have acquired the degree of B.E./A.M.I.E. without taking due permission from the competent authority, the petitioners have filed a Writ Petition Service Single No.32367 of 2019 (Ashish Kumar Mishra and another vs. State of U.P. and others) before this Hon'ble Court, which has been disposed of vide judgment and order dated 25.11.2019. While disposing of the aforesaid writ petition, the Hon'ble Court has been pleased to direct the respondents to decide the representation in accordance with law within a period of three weeks in terms of Circular dated 07.08.2019.

6. Learned counsel for the petitioners Sri Mishra, has submitted that in pursuance to order dated 25.11.2019, the petitioners submitted a joint representation to the U.P. Power Corporation Limited and the same was rejected by the impugned order dated 20.03.2020 in an illegal and arbitrary manner without considering the facts and without application of mind.

7. Learned counsel for the petitioners has submitted that the Managing Director while passing the impugned order has failed to consider the true import and purport of the Circular issued by the Board on 25.01.1979 and 18.08.1982 which inter-alia provides that acquiring educational qualification while in service of UPPCL without its permission is a misconduct. The Managing Director also failed to consider the import and purport of the letter dated 07.08.2019 issued by the opposite party no. 5 wherein it was clearly mentioned that the Junior Engineers who have not submitted the attested copies of educational certificates and the permission letter/order their name shall not be considered for promotion under 8.33% quota. Further, while rejecting the representation of the petitioners, the Managing Director instead of placing reliance on the letter dated 07.08.2019 has placed reliance on the condition No. 17 of proforma attached with the letter dated 07.08.2019 which indeed also supports the case of the petitioners, in as much as, the said condition was mentioned in the proforma only in order to consider those Junior Engineers for promotion to the post of Assistant Engineers under 8.33% quota who have taken due permission from the department for acquiring degree.

8. It has also been submitted by the learned counsel for the petitioners that while passing the impugned order, the Managing Director has failed to consider that the Circulars issued by the Board were supplemental to the Regulations, 1970 as the Regulations, 1970 are silent on the issue of acquiring degree without the permission of the Department. It is more than well settled that if, the Rules of Regulations are silent on some issues then the same can be supplemented and supplanted by the Government orders i.e. Board Circulars in the case in hand. The Managing Director while placing reliance on office circular dated 11.07.1996, whereby the procedure of making promotion was prescribed has recorded that in the procedure nowhere it has been provided that the Junior Engineers who have not taken permission for obtaining Engineering/A.M.I.E. Degree while remaining in service cannot be promoted to the post of Assistant Teacher under 8.33 % quota but while giving the said finding has failed to consider that the competent authority i.e. the Apex Body of the Corporation had already taken a decision that obtaining an Engineering/A.M.I.E. degree while remaining in service of the corporation without obtaining prior

permission for undertaking such a course is a misconduct. An act of commission or omission constituting a misconduct cannot at all form the edifice of eligibility for promotion to a higher post.

9. It is submitted that the reason assigned by the Managing Director in the impugned order to the effect that Board Circular dated 18.08.1982 does not puts a bar for making promotion of Junior Engineers who have acquired the degree without the permission of the Department is completely misconceived, in as much as, the admission taken by a Government Servant in an academic course without prior permission of the competent authority constitutes 'misconduct' and any person who has committed 'misconduct' cannot be awarded by promotion to higher post for obtaining degree unauthorisedly.

10. In support of the arguments, learned counsel for the petitioners Dr. L. P. Mishra has relied upon the judgments of Hon'ble the Apex Court in the cases reported at (2013) 16 SCC 147 [Union of India and another vs. Ashok Kumar Aggarwal]; (2008) 4 SCC 171 [Dhananjay Malik and others vs. State of Uttaranchal and others]; (1998) 8 SCC 753 [State of Orrisa and others vs. Mamtarani Sahoo and another]; (1999) 7 SCC 84 [Paper Products Ltd. vs. Commissioner of Central Excise]; and (2007) 2 SCC 326 [Commissioner of Income Tax, Bhopal vs. Ralson Industries Ltd.]

11. Per contra, the learned counsel appearing on behalf of the respondents vehementaly opposed the submissions made by the learned counsel for the petitioner and submitted that all private respondents have obtained AMIE degree (except opposite party no.10 who had already obtained B.E. degree in the year 1993). The learned counsel further submitted that for obtaining the AMIE degree, there are no requirement for prior permission from the higher authorities as per the office order dated 19.12.1985. It is submitted that the present writ petition filed by the petitioners is nothing but sheer abuse of the process of the law as the petitioners have not come with clean hands before this Hon'ble Court as they have not only concealed the material information from this Hon'ble Court but have deliberately tried to mislead this Hon'ble Court by showing incorrect and misleading documents. The private respondents, admittedly, have requisite qualification required for being eligible for the selection on the promotional posts of Assistant Engineer and they all are senior to the petitioners. They have been selected by the Screening/Selection Committee. He has referred the Office Order No.3293-N-IX/FEB/85 dated 19.12.1985 by which no requirement of any permission for departmental employees for joining AMIE Engineering Course. However, it was made obligatory on the employee concerned only to intimate / inform the Board/appointing authority through his/her superior officer about joining in A.M.I.E. Engineering Course.

12. The learned Standing Counsel has also submitted that all private respondents in pursuance of the aforesaid office memo dated 19.12.1985 had already informed/intimated their respective appointing authorities through their superior officers about pursuing A.M.I.E. Engineering Course, which has already been forwarded by the superior authorities to their higher authorities for necessary and further action. The petitioners had done B.E. (Part Time/Evening Classes) while in

the services of the respondent department. For doing B.E. (Part-Time/Evening Classes), which is not a correspondence course, therefore, it is required attendance and therefore, permission of the employer is mandatory. For the doing said regular Engineering course, an employee has to obtain permission from the authorities concerned in terms of the Office Order No.1717-N.G.-09 (A)/RA.VI.P./88-62-K-85 dated 27.05.1988, whereby it was made mandatory to obtain requisite permission from the Authorities concerned for doing B.E. (Part-Time/Evening Classes) course but for the AMIE course, where there is no requirement of attending regular classes, it was only obligatory on the part of the employee to intimate/inform their respective appointing authorities through their superiors which in the present case had been done by all the private respondents.

13. It is also submitted that reliance of the petitioners on circulars dated 07.08.2019 & 06.09.2019 (Annexure No.8 & 9 to the Writ Petition) is also totally unwarranted and misconceived and there is nothing in the said circular that suggest that permission for doing AMIE course is mandatory, whereas the said circulars were issued to seek certain information and do not lay down any mandatory guidelines, thus, will have no impact on the position of the private respondents. Such circulars can not override the Office Order dated 19.12.1985 which were issued particularly for a specific purpose whereby it had been categorically provided that there was no requirement of any permission for departmental employees for joining AMIE Engineering Course. It is further submitted that there is no Rule or Regulation or Order that the permission is required even for appearing in A.M.I.E examinations and that an employee who had not taken prior permission shall not be eligible for consideration for promotion on the Post of Assistant Engineer against 8.33% quota.

14. Learned counsel for the respondents has submitted that letter dated 20.05.2020 was issued only to collect the information of disciplinary proceedings of employees under 8.33% quota. Vide letter dated 07.08.2019, it is evident that it was only the information which the department seeks from the employees. There was no such arrangement made by the department for those employees who have obtained their degree without the permission by the department will be deprived of promotion. It has also been submitted that the eligibility for promotion on the post of Assistant Engineer against 8.33% quota has been provided in the Regulations namely U.P.S.E.B. Service Engineers Regulations 1970 as amended on 28.11.2014. There is no rule or office order that permission was required for appearing in the examination of AMIE and that an employee who had not taken permission shall not be eligible for promotion on the post of Assistant Engineer against 8.33% quota. All the private respondents have granted the certificate of clearing AMIE examination and they appearing after giving prior permission/intimation to their superior officers/ competent authorities.

It is pertinent to mention that the permission is only required for the employees who have obtained the degree from the courses where the attendance were required for obtaining such degree i.e. B.E. (Part Time/Evening Classes) but in the course of AMIE, which is a correspondence course, no attendance is required. Therefore, the petitioner has failed to make out any case for interference and thus, the

present petition has no merit and it is liable to be dismissed.

15. Pleadings have been completed by way of counter affidavits and rejoinder affidavits which are already on the record.

16. I have given our anxious consideration to the submissions made by the learned counsel for the parties and also perused the pleadings on record.

17. The moot questions arose for consideration in the present writ petition are that -

i. Whether is it case of the petitioners that private respondents have obtained degree without obtaining the permission of the competent authority as required ?

ii. Whether the Government can, by way of administrative instructions, fill up the gaps and supplement the Rules and issue instructions not in consistent with the Rules already framed, if Rules are silent on any particular point ?

iii. Whether in the case of the private respondents who have been admittedly obtained AMIE Degree, which is a correspondence course and in that case, prior permission is required or not ?

18. For the proper adjudication of the instant writ petition, the Court has to examine the Circulars of the Government issued from time to time. The respondents have relied on the office order No.3293-N-IX/FEB/85 dated 19.12.1985 which provides that prior permission is not required when the employee obtained the engineering degree from the course of AMIE. For ready reference, the office order dated 19.12.1985 is reproduced as under :

UTTAR PRADESH STATE ELECTRICITY BOARD

"SHAKTI BHAWAN", 14-ASHOK MARG, LUCKNOW

No.3293-N-IX(A)/FEB/85 Date: Dec,19,1985

All General Managers/Chief Engineers/
Chief Zoal Engineers/Addl. Chief Engineers/
Chief Project Managers,
U.P.State Electricity Board,

SUBJECT: Permission for joining BE/AMIE
Engineering Degree course in case of
departmental employees.

Sir,

Kindly refer Board's letter No. 632-K-IX(A)/SEB/85, dated
14-2-1985 on the subject mentioned above.

On re-consideration Board have decided to withdraw the above order (in part) only to the extent that no restrictions shall be imposed on Field Authorities in granting permission for joining AMIE Engineering Course to the departmental employees.

It will be obligatory on the employee concerned to intimate the Board/appointing authority through his superior officer about his joining AMIE Engineering course.

Orders in R.O.No. 632-K-IX(A)-SEB/85, dt. 14-2-85 in respect of permission for admission to B.E. Degree course shall, however, stand without any change.

I am directed to say that necessary action in the matter may kindly be taken accordingly.

Yours Faithfully,
Sd/- illegible
(O.P.Gupta)
JOINT SECRETARY
No.3293(1)K-IX(A)/SEB/85 of date.

Copy forwarded to all Superintending Engineers, U.P.State Electricity Board, with reference to Board's Letter No. 632-K-IX(A)/SEB/85, dt. 14-2-1985 for information and necessary action.

By Order,
Sd/- illegible
(O.P.Gupta)
JOINT SECRETARY

19. The other important Circular is of dated 27.05.1988, which is quoted as under :

बी0 ई0 अध्ययन हेतु अनुमति का नियम

दिनांकः मई 27,1988
सं0 1717 एन. जी.–09 (अ) /रा. वि. प. /88–62–के /85

कार्यालय ज्ञाप

परिषद में कार्यरत कर्मचारियों को बी0ई0 (पार्ट टाइम) के अध्ययन करने हेतु पूर्व में निर्गत किये गये सभी आदेशों का अतिक्रमण करते हुए सम्यक विचारोपरान्त परिषद सहर्ष आदेश देते हैं कि अब से अराजपत्रित कर्मचारियों को बी0ई0(पार्ट टाइम) के अध्ययन हेतु अनुमति केवल मुख्य अभियन्ता (जल विद्युत) उ0 प्र0 राज्य विद्युत परिषद, लखनऊ द्वारा अधोलिखित प्रतिबन्धों के साथ प्रदान की जाएगीः–

(1) एक शिक्षा सत्र में उपर्युक्त अनुमति किसी कार्यालय में कार्यरत कर्मचारियों की कुल संख्या के 10 प्रतिशत से अधिक कर्मचारियों को अनुमन्य नहीं होगी।

(2) यदि अनुमति प्रदान करने के उपरान्त ऐसा प्रतीत होता है कि जिस कर्मचारी को उक्त अनुमति प्रदान की गई है उससे उसके कार्य में शिथिलता आ गई है या उसके कार्य सम्पादन में हास उत्पन्न हो गया है अथवा उक्त अनुमति देना परिषदीय हित में नहीं है, तो किसी भी समय बिना किसी पूर्व सूचना के उसकी अनुमति निरस्त की जा सकेगी।

(3) केवल उन कर्मचारियों को अध्ययन की अनुमति प्रदान किये जाने पर विचार किया जाएगा जो प्रेषण/वितरण क्षेत्र के अन्तर्गत एक ही स्थान पर 3 वर्ष से कम तथा ताप/जल विद्युत परियोजनाओं पर 5 वर्ष से कम समय से कार्यरत हों। इस अवधि से अधिक उक्त विशेष स्थान पर कार्यरत कर्मचारियों को अध्ययन की अनुमति प्रदान नहीं की जायेगी।

(4) कर्मचारी को अध्ययन की अनुमति केवल उतनी ही अवधि के लिए दी जाएगी जितनी अवधि उस पाठ्यक्रम विशेष के लिए निर्धारित है। अपरिहार्य कारणों से (जिसका पूर्व विवरण उपलब्ध कराना आवश्यक होगा) विशेष परिस्थिति में मात्र एक पाठ्यक्रम तक इसे बढ़ाया जा सकता है। इससे अधिक की अनुमति नहीं दी जाएगी।

(5) अध्ययन की अनुमति प्राप्त करने हेतु कर्मचारियों के प्रार्थना–पत्र एवं वचन–पत्र ;न्दकमतजांपदहद्ध निर्धारित प्रपत्र पर (संलग्नक–1) सम्बन्धित क्षेत्रीय अधिकरी द्वारा अपनी संस्तुति के साथ आगामी कार्यवाही हेतु मुख्य अभियन्ता (जल विद्युत) को प्रेषित किये जाएंगे।

(6) निर्धारित प्रपत्र पर अनुमति प्राप्त करने के प्रस्ताव सत्र आरम्भ होने की दिनांक से कम से कम 60 दिन पूर्व मुख्य अभियन्ता (जल विद्युत) को अवश्य उपलब्ध हो जाने चाहिए।

(7) कर्मचारी को एक पाठ्यवर्ष के लिए अध्ययन की अनुमति प्रदान कर दिये जाने के बाद अगले पाठ्यवर्ष के लिए पुनः अनुमति प्राप्त हो जाने के उपरान्त ही अध्ययन जारी किया जा सकता है।

(8) अनुमति के नवीनीकरण के मामले मुख्य अभियन्ता (जल विद्युत) को प्रेषित करते समय कर्मचारी की पिछले सत्र के अंक–पत्र ;डंतोंीममजद्ध की प्रमाणित फोटो–प्रतिलिपि भी उपलब्ध कराना अनिवार्य होगा।

(9) ऐसे कर्मचारी जो वी0ई0 (पार्ट टाइम) की सुविधा प्रदान करने वाले संस्थान के नगर से किसी अन्य नगर में तैनात है, तथा उन्होंने परिषद में तीन वर्ष की नियमित सेवा पूर्ण कर ली है, यदि उन्हें किसी संस्थान में अध्ययन हेतु प्रवेश सुनिश्चित हो जाता है तो वैसी स्थिति में अन्य औपचारिकताओं के पूर्ण होने पर इन कर्मचारियों को पार्ट टाइम अध्ययन की अनुमति प्रदान किये जाने में कोई आपत्ति नहीं हेगी किन्तु प्रतिबन्ध यह होगा कि अध्ययन के उद्देश्य हेतु इन कर्मचारियों के स्थानान्तरण पर कोई विचार नहीं किया जायेगा बल्कि उन्हें वित्तीय हस्त–पुस्तिका भाग (2), खण्ड 2 से 4 के मूल नियम 84 तथा सहायक नियम 146 (ए) (संलग्नक–2) के अन्तर्गत बिना वेतन के अध्ययन अवकाश का उपभोग करते हुए अध्ययन पूर्ण करना होगा। कर्मचारी से इस आशय के सहमति पत्र प्राप्त हो जाने पर ही उन्हे अनुमति प्रदान किये जाने पर विचार किया जा सकेगा।

(10)ऐसे कर्मचारी जो0 बी0ई0 (पार्ट टाइम) के अध्ययन की सुविधा प्रदान करने वाले संस्थान के नगर

में ही तैनात हैं और उन्हें एक पाठ्यसत्र के लिए अनुमति प्रदान की जा चुकी है, स्थानान्तरित होने पर उनके स्थानान्तरण को इस आधार पर रोके जाने पर कोई विचार नहीं किया जाएगा कि वे एक पाठ्य–सत्र पूरा कर चुके हैं और शेष पाठ्य–सत्र उन्हे पूरे करने है। दूसरे तथा अनुवर्ती पाठ्य–सत्रों को पूरा करने की अनुमति उन्हें इस प्रतिबन्ध के साथ दी जा सकती है कि वे उपरोक्त प्रस्तर (9) में दर्शायी गई स्थिति के अनुसार अध्ययन अवकाश को स्वीकृत कराकर पाठ्य–सत्र पूरा करें।

2. पूर्व में परिषद द्वारा जिन कर्मचारियों को बी0 ई0 (पार्ट टाइम) के अध्ययन हेतु अनुमति प्रदान की जा चुक है, उन्हें अगले पाठ्य–सत्र में अध्ययन हेतु यदि अनुमति के नवीनीकरण की आवश्यकता होती है तो ऐसे मामले भी उपरोक्त प्रतिबन्धों के साथ मुख्य अभियन्ता (जल विद्युत) द्वारा ही निस्तारित किए जाएंगे।

सदस्य सचिव

अनुलग्नक–1

20. The Circular dated 07.08.2019 of the U.P. Power Corporation Limited is quoted as under :

कार्यालय मुख्य अभियन्ता (हाइड्रिल)
उ0 प्र0 पावर कारपोरेशन लि0
तृतीय तल, शक्ति भवन विस्तार
14– अशोक मार्ग, लखनऊ।
दूरभाष : 0522–2288656 ईमेलः बमीलकमसचबस/हउंपसण्बवउ फैक्सः 0522–2288655

संख्या 564–अनु0–प्रथम/2019 दिनांक 07 अगस्त 2019

विषयः नियमित बी0ई0/ए0 एम0 आई0 ई0 डिग्रीधारी अवर अभियंता (वि0 एवं यां0/सिविल) से सहायक अभियन्ता (वि0 एवं यां0/सिविल) पद पर प्रोन्नति के सम्बन्ध में वांछित बी0 ई0/ए0 एम0 आई0 ई0 डिग्री उपलब्ध कराने जाने के सम्बन्ध में।

1. प्रबन्ध निदेशक,
पूर्वान्चल/पश्चिमांचल/मध्यांचल/दक्षिणांचल/के स्को, वि0 वि0 नि0 लि0 वाराणसी/मेरठ/लखनऊ/आगरा/कानपुर।

2. निदेशक (का0 प्र0 एवं प्रशा0) उ0 प्र0 पावर ट्रांसमिशन, कारपोरेशन लि0 लखनऊ।

3. समस्त कारपोरेट कार्यालय (मुख्य अभियंता–पूजा एवं लेखा), नियोजन, पी0 पी0 ए0, ई0 टी0 आई0, विद्युत सेवा आयोग, जॉच समिति सी0 एम0 यू0 डी0, रेस्पो सामग्री प्रबन्ध कम्प्युटराईजेशन यूनिट, परीक्षण अभियन्ता (जानपद) मुख्यालय, संयुक्त सचिव प्रशासन।

कृपया उपरोक्त विषयक के सम्बन्ध में अवगत कराना है कि अवर अभियन्ता (वी0 एवं यां0/सिविल) का निकट भविष्य में सहायक अभियन्ता (वी0 एवं यां0/सिविल) के पद पर प्रोन्नति हेतु विचारित किया जाना है।

अतः अनुरोध है कि कृपया ऐसे अवर अभियंताओं जो 8.33 प्रतिशत कोटे के अन्तर्गत प्रोन्नति का विकल्प चाहते है, उनके आवेदन निर्धारित संलग्न प्रारूप (छायाप्रति संलग्न) में हाईस्कूल/इण्टरमीडिएट/डिप्लोमा/ डिग्री अंकपत्र एवं अनुमति पत्र/ज्ञाप आदि की सत्यापित प्रति के साथ अपने नियंत्रक अधिकारी/सक्षम अधिकारी के माध्यम से इस कार्यालय को उपलब्ध कराये जाने हेतु सम्बन्धित अधिकारी को अपने स्तर से निर्देशित करने का कष्ट करें।

उक्त के सम्बन्ध में सूचनीय है कि जिन अवर अभियंताओं ने पूर्व में 8.33 प्रतिशत कोटे का विकल्प के अन्तर्गत अपनी डिग्री इस कार्यालय को उपलब्ध करायी है, वे निर्धारित प्रारूप पर नही है। तथा उनके साथ उक्त अभिलेखों की सत्यापित प्रतियॉ भी संलग्न नही है, जिन्हें पदोन्नति हेतु विचारित किया जाना नियमानुकूल नही होगा। अतः पूर्व में जिन अवर अभियंताओं ने 8.33 प्रतिशत कोटे का विकल्प के अन्तर्गत अपनी डिग्री इस कार्यालय को उपलब्ध करायी है वे निर्धारित प्रारूप पर समस्त संलग्नों सहित पुनः इस कार्यालय को उपलब्ध करायें।

''उल्लेखनीय है कि दूरस्थ शिक्षा के माध्यम से प्राप्त डिग्री मान्य नही है।''

उक्त के अतिरिक्त यह भी अनुरोध है कि कृपया अपने डिस्काम में कार्यरत ऐसे अवर अभियंता जो विकलांग कोटे के अन्तर्गत 40ः एवं 8.33ः क्षैतिज कोटे में प्रोन्नति हेतु इच्छुक है तथा 10 वर्ष की अर्हकारी सेवा पूर्ण कर चुके हो। उनके निर्धारित विकलांगता प्रमाण पत्र तथा डिग्री तथा अंक पत्र की सत्यापित प्रतिलिपि के साथ साथ इस बात का प्रमाण पत्र भी उपलब्ध कराना सुनिश्चित करें कि आप के द्वारा सूचित विकलांगजन के अलावा आपके डिस्काम में अन्य कोई भी अवर अभियंता विकलांगजन कोटे के अन्तर्गत प्रोन्नति हेतु इच्छुक नही है। उल्लेखनीय है कि उ0 प्र0 पा0 का0 लि0 के ज्ञाप संख्या–1238–पाकालि/राविप–28/10(2)पं0एण्डआर0–28/पकालि/01–टी0 सी0–01 दिनांक 16.05.2012 के अनुसार विकलांगजन प्रमाण पत्र जारी करने के लिए राज्य सरकार द्वारा विधिवत रूप से गठित मेडिकल बोर्ड सक्षम प्राधिकारी है।

संलग्नः– यथा उपरोक्त।

(उमेश सिंह यादव)
वैयक्तिक सहायक–पंचम

कृते मुख्य अभियंता (हाइड्रिल)
स0 अनु0–प्रथम/तद्दिनांकः अगस्त 2019

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः–

1. निदेशक (का0 प्रबं0 एवं प्रशा0), उ0 प्र0 पाकालि, शक्ति भवन, लखनऊ।

2. उ0 प्र0 राज्य विद्युत उत्पादन निगम लि0/उ0 प्र0 राज्य जल

विद्युत निगम लि0 को इस आशय से की अपने निगमों में प्रतिनियुक्त पर तैनात उ0 प्र0 पावर कारपोरेशन लि0 के अवर अभियंताओं के संबंध में वांछित सूचना तत्काल अवगत कराने का कष्ट करें।

3. अधिशासी अभियन्ता (वेब), उ0 प्र0 पावर कारपोरेशन लि0 शक्ति भवन विस्तार, लखनऊ को इस आशय के प्रेषित है कि इसे कारपोरेशन की वेबसाइट पर अपलोड करना सुनिश्चिम करें।

ह0 अपठनीय
07.08.19
(उमेश सिंह यादव)
वैयक्तिक सहायक–पंचम
कृते मुख्य अभियंता (हाइड्रिल)

21. The other circular is of dated 06.09.2019, which on reproduction reads as under :

कार्यालय मुख्य अभियन्ता (हाइड्रिल)
उ0 प्र0 पावर कारपोरेशन लि0
तृतीय तल, शक्ति भवन विस्तार
14– अशोक मार्ग, लखनऊ।
दूरभाष : 0522–2288656 ईमेलः बमीलकमसचबस/हउंपसण्ववउ फैक्सः 0522–2288655
संख्या 717–अनु0–प्रथम/2019 दिनांक 06 सितम्बर 2019

विषयः नियमित बी0ई0/ए0एम0आई0ई0 डिग्रीधारी अवर अभियंता (वि0 एवं यां0/सिविल) से सहायक अभियन्ता (वि0 एवं यां0/सिविल) पद पर प्रोन्नति के सम्बन्ध में वांछित बी0 ई0/ए0 एम0 आई0 ई0 डिग्री उपलब्ध कराने जाने के सम्बन्ध में।

ई–मेल
1. प्रबन्ध निदेशक,

पूर्वांचल/पश्चिमांचल/मध्यांचल/दक्षिणांचल/केस-को, वि0 वि0 नि0 लि0।
वाराणसी/मेरठ/लखनऊ/आगरा/कानपुर।

2. निदेशक (का0 प्र0 एवं प्रशा0) उ0 प्र0 पावर ट्रांसमिशन, कारपोरेशन लि0 लखनऊ।

3. समस्त कारपोरेट कार्यालय (मुख्य अभियंता–पूजा एवं लेखा), नियोजन, पी0 पी0 ए0,

ई0 टी0 आई0, विद्युत सेवा आयोग, जॉच समिति सी0 एम0 यू0 डी0, रेस्पो सामग्री प्रबन्ध कम्प्यूटराईजेशन यूनिट, अधीक्षण अभियन्ता (जानपद) मुख्यालय, संयुक्त सचिव प्रशासन।

कृपया उपरोक्त विषय इस कार्यालय के पत्र संख्या–564/अनु0–प्रथम दिनांक 07.08.2019 का सन्दर्भ ग्रहण करने का कष्ट करे जिसके द्वारा ऐसे अवर अभियन्ता जो 8.33 प्रतिशत कोटे के अन्तर्गत प्रोन्नति का विकल्प चाहते है, उनके आवेदन निर्धारित संलग्न प्रारूप (छाया प्रति संलग्न) में हाईस्कूल/इण्टरमीडिएट/डिप्लोमा/डिग्री अंकपत्र एवं अनुमति पत्र/ज्ञाप आदि की सत्यापित प्रति के साथ अपने नियंत्रक अधिकारी/सक्षम अधिकारी के माध्यम से इस कार्यालय को उपलब्ध कराये जाने हेतु सम्बन्धित अधिकारी को अपने स्तर से निर्देशित करने हेतु अनुरोध किया गया था।

अभिलेखों के परीक्षणोपरांत अवगत कराना है कि सम्बन्धित अवर अभियंताओं के जो अभिलेख प्रेषित किये जा रहे है उसमें डिग्री हेतु विभाग से प्राप्त अनुमति–पत्र संलग्न नही है।

अतः अनुरोध है कि कृपया सम्बन्धित अवर अभियंताओं के डिग्री हेतु विभाग से प्राप्त अनुमति–पत्र की सत्यापित प्रतिलिपि इस कार्यालय को उपलब्ध कराने हेतु सम्बन्धित को निर्देशित करने का कष्ट करें।

संलग्नः– यथा उपरोक्त।

(उमेश सिंह यादव)
वैयक्तिक सहायक–पंचम
कृते मुख्य अभियंता (हाइड्रिल)
स0–717–अनु0–प्रथम/तद् दिनांकः 06 सितम्बर 2019

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः–

1. निदेशक (का0 प्रबं0 एवं प्रशा0), उ0 प्र0 पाकालि, शक्ति भवन, लखनऊ।

2. उ0 प्र0 राज्य विद्युत लि0/उ0 प्र0 राज्य जल विद्युत निगम लि0 को इस आशय से की अपने निगमों में प्रतिनियुक्त पर तैनात उ0 प्र0 पावर कारपोरेशन लि0 के

अवर अभियंताओं के संबंध में वांछित सूचना तत्काल अवगत कराने का कष्ट करें।

3. अधिशासी अभियन्ता (वेब), उ0 प्र0 पावर कारपोरेशन लि0 शक्ति भवन विस्तार, लखनऊ को इस आशय के प्रेषित है कि इसे कारपोरेशन की वेबसाइट पर अपलोड करना सुनिश्चित करें।

ह0 अपठनीय
06.09.19
(उमेश सिंह यादव)
वैयक्तिक सहायक–पंचम
कृते मुख्य अभियंता (हाइड्रिल)

22. By means of the present petition, the petitioners pray for issuance of a writ, order or direction in the nature of certiorari quashing the order dated 20.03.2020 passed by the respondent no.4 and also issuance of a direction in the nature of certiorari quashing the list dated 27.05.2020 issued by the opposite party no.6. It is further prayed for a mandamus commanding the respondents to promote the petitioner as per Regulation 5(1)(d) of the "Regulations 1970' under 8.33% quota in terms of the circular dated 07.08.2019.

23. A specific averments have been made in the writ petition and the learned counsel appearing on behalf of the petitioners has vehemently submitted that the private respondents have acquired the B.Tech./AMIE Degree without taking due permission from the department, thus, forwarding of their names by the Screening Committee, are illegal and contrary to Regulation 5(1)(d) of the "Regulations 1970'.

24. The petitioners represented their case before the competent authority in pursuance to order dated 21.11.2019 passed by a coordinate Bench of this Court in Writ Petition Service Single No.32367 of 2019. The competent authority, after considering the case of the petitioners has passed the order, which is impugned in this petition. The relevant portion is quoted as under:

"उक्त आदेशों के दृष्टिगत, आप द्वारा एक संयुक्त प्रत्यावेदन दिनांक 29.11.2019 प्रस्तुत किया गया, जिसमें मूल रूप से निम्नांकित बिन्दुओं का उल्लेख करते हुये, यह अनुरोध किया गया है कि ऐसे अवर अभियन्ताओं को जिन्होनें बिना विभाग की अनुमति प्राप्त किये शिक्षा ग्रहण की है, को पदोन्नति प्रकिया से बाहर किया जाएः–

मुख्य अभियन्ता जल विद्युत के कार्यालय पत्रांक संख्या 564–अनु0–प्रथम/2019, दिनांक 07.08.2019 द्वारा जारी पत्र में 8.33ः कोटे के अन्तर्गत प्रोन्नति हेतु मांगे गये आवेदन में स्पष्ट रूप से उल्लेख किया गया था कि डिग्री धारी अवर अभियन्ताओं को अपने समस्त प्रमाण पत्रों के साथ उच्च शिक्षा हेतु विभाग द्वारा जारी अनुमति पत्र की सत्यापित प्रति संलग्न करना आवश्यक है एवं बिना अनुमति पत्र के आवेदन करने वाले आवेदकों के आवेदनों पर प्रोन्नति हेतु विचार करना नियमानुकूल नहीं होगा।

4- उक्त के अतिरिक्त, विभागीय कार्मिकों की प्रोन्नति हेतु निर्धारित की गयी प्रथम प्रकिया से सम्बन्धित कार्यालय ज्ञाप संख्या–1327, दिनांक 11.07.1996 में भी कही यह व्यवस्था नहीं है कि यदि किसी सेवक द्वारा बिना विभागीय अनुमति लिये उच्च शिक्षा प्राप्त की जाती है तो उसे विभागीय प्रोन्नति में इस शिक्षा से होने वाले किसी लाभ से वंचित रखा जायेगा।

5- तत्कालीन राज्य विद्युत परिषद के उक्त आदेश दिनांक 18.08.1982 में कहीं भी यह उल्लेख नही है कि यदि किसी अवर अभियन्ता द्वारा बिना विभागीय अनुमति के डिग्री प्राप्त की गयी है तो उसे सहायक अभियन्ता के पद पर प्रोन्नत हेतु निर्धारित 8.33 प्रतिशत कोटे के अन्तर्गत चयन हेतु अर्ह नहीं माना जायेगा अथवा उसे प्रोन्नति से वंचित रखा जायेगा।

6- मुख्य अभियन्ता (जल विद्युत) द्वारा निर्गत आदेश संख्या–564, दिनांक 07.08.2019 एवं तत्परिप्रेक्ष्य में निर्गत अनुस्मरण पत्र संख्या–717, दिनांक 06.09.2019 के साथ संलग्न किये गये प्रारूप के बिन्दु सं.–17 में निम्नांकित उल्लेख हैः–

"Whether permission from competen authority for joining BE/AMIE course accorded? If yes, indicate reference no. and enclosed a copy thereof."

अर्थात स्पष्ट है कि निर्धारित प्रारूप के बिन्दु सं0 17 के अन्तर्गत मात्र सूचना मांगी जा रही है न कि यह व्यवस्था दी जा रही है कि बिना अनुमति प्राप्त किये डिग्री धारको को चयन से वंचित रखा जायेगा।

7. उक्त के अतिरिक्त प्रस्तुत किये गये अभ्यावेदन में एक ऐसे ही प्रकरण का उल्लेख करते हुये मा. उच्च न्यायालय, इलाहाबाद में दाखिल की गयी याचिका संख्या–6544/1999 में दिये गये जिस निर्णय को सन्दर्भित किया जा रहा है, उसका प्रश्नगत प्रकरण से कोई सम्बन्ध नही है, क्योकि याचिका संख्या–6544/1999 में दिया गया निर्णय सम्बन्धित याचिका में उठाये गये बिन्दुओ के परिप्रेक्ष्य में है।

अतः उक्त के परिप्रेक्ष्य में, आप से प्राप्त प्रत्यावेदन दिनांक 05.12.2019 वर्णित परिस्थितियों में स्वीकार किये जाने योग्य नहीं पाया जाता है एवं इसे तद्नुसार निस्तारित किया जाता है।"

25. The case of the private respondents is that AMIE course is not a regular course and it is a correspondence course, therefore, the permission is not required and only intimation/information to his superior officers is to be given. The department of energy has also stated that the information was given by the private respondents for pursuing the AMIE degree course.

26. AMIE is a B.Tech level examination in engineering, recognized by all State Governments, Central Governments, AICTE, UPSC etc as equivalent to B.E/B.Tech. AMIE is that, it is a recognized Engineering Degree Course that can be studied in distance education mode. It is admitted fact that all private respondents (except respondent no.10) have obtained engineering degree through AMIE degree course and not from regular classes.

27. From the facts revealed through the instant petition and the affidavits filed by the respective parties, it is clear that the private respondents have obtained the graduation certificate in Engineering from AMIE degree course, which is a B.Tech. level examination in engineering recognized by all State Governments for which regular classes are not required.

28. If any course which is not required for regular classes for obtaining a degree, whether is it 'misconduct' committed by the private respondents?

29. The question is what is misconduct? In normal service parlance the term 'misconduct' implies a wrongful intention and not a mere error of judgment. The word 'misconduct' is to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. In usual parlance, 'misconduct' means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand. 'Misconduct' is a forbidden quality of an act and is necessarily indefinite. 'Misconduct' in office may be defined as unlawful behaviour or neglect by a public officer of his duties i.e. devotion to duty.

30. Hon'ble the Apex Court in the case of **Union of India and others vs. Harjeet Singh Sandhu; (2001) 5 SCC 593** (in para 22) held as under:

"In the context in which the term misconduct has been used in Rule 14, it is to be given a wider meaning and any wrongful act or any act of delinquency which may or may not involve moral turpitude, would be misconduct, and certainly so, if it is subversive of army discipline or high traditions of army and/or if it renders the person unworthy of being retained in service. The language of sub-rule(2) of Rule 14 employing the expression the reports on an officers misconduct uses

reports in plural and misconduct in singular. Here plural would include singular and singular would include plural. A single report on an officers misconduct may invite an action under Section 19 read with Rule 14 and there may be cases where there may be more reports than one on a singular misconduct or more misconducts than one in which case it will be the cumulative effect of such reports on misconduct or misconducts, which may lead to the formation of requisite satisfaction and opinion within the meaning of sub-rule (2) of Rule 14.

31. Hon'ble the Apex Court in the case of **Baldev Singh Gandhi vs. State of Punjab and others (2002) 3 SCC 667** has held as under:

"Misconduct' has not been defined in the Act. The word 'misconduct' is antithesis of the word 'conduct'. Thus, ordinarily the expression 'misconduct' means wrong or improper conduct, unlawlful behaviour, misfeasance, wrong conduct, misdemeanour etc. There being different meaning of the expression 'misconduct', we, therefore, have to construe the expression 'misconduct' with reference to the subject and the context wherein the said expression occurs. Regard being had to the aims and objects of the statute. The appellant herein is an elected municipal councilor to a democratic institution i.e. local body. The aim and object of the Act is to make better provisions for administration of municipalities. The municipality is a democratic institution of self governance consisting of local people and for the local people and by the local people. The prime object of the local body is to serve the local people and to provide amenities and service to the people residing within the municipality. As a representative of the public it is the duty of an elected representative to see that the public of his constituency are not burdened with excessive and arbitrary levy. No doubt, a municipal commissioner holds a statutory office in a municipal council, but no statutory code of conduct in respect of municipal councilors has been enacted. However, it is a different question whether such a law could be framed as to restrict the freedom of speech and expression of a municipal councilor. However, it must be borne in mind that the appellant was not an employee or a servant of the municipal council and also never held any office of profit in the municipal council. Every citizen, inasmuch as a municipal councilor, has a freedom of speech and expression under Article 19(1)(a) of the Constitution which includes fair criticism of the law or any executive action. Freedom of speech and expression is guaranteed in our democratic republic both in legislature as well as in local bodies and, therefore, a legislator or a municipal councilor legitimately can express his views in regard to what he thinks to be in public interest. A legitimate exercise of right of speech and expression including a fair criticism is not to be throttled"

32. The meaning of the word "misconduct" explained in ***Harjeet Singh's case (supra), Baldev Singh Gandhi's case (supra)*** had been considered and followed in M. M. Malhotra Vs Union of India and Ors (2005) SCC 351. In ***M. M. Malhotra's case (supra)*** the Hon'ble Apex Court has held as under:f

"The range of activities which may amount to acts which are inconsistent with the interest of public service and not befitting the status, position and dignity of a public servant are so varied that it would

be impossible for the employer to exhaustively enumerate such acts and treat the categories of misconduct as closed. It has, therefore, to be noted that the word "misconduct" is not capable of precise definition. But at the same time though incapable of precise definition, the word "misconduct" on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the statute and the public purpose it seeks to serve.

In Union of India V Harjeet Singh Sandhu: (2001) 5 SCC 593, in the background of Rule 14 of the Army Rules, it was held that any wrongful act or any act of delinquency which may or may not involve moral turpitude would be "misconduct" under Rule 14.

In Baldev Singh Gandhi Vs State of Punjab: (2002) 3 SCC 667 it was held that the expression "misconduct" means unlawful behaviour, misfeasance, wrong conduct, mis-demeanour, etc.

Similarly, in State of Punjab Vs Ram Singh Ex Constable: (1992) 4 SCC 54 it was held that the term "misconduct" may involve moral turpitude. It must be improper or wrong bahaviour, unlawful behaviour, willful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character.

"misconduct: as stated in Batt's Law of Master and Servant (4th Edn at p. 63) "comprised positive acts and not mere neglect or failures". The definition of the word as given in Ballentine's Law Dictionary (148th Edn.) is: "a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, it is a violation of definite law, a forbidden act. It differs from carelessness. "

It may be generally stated that the conduct rules of the government and public sector corporations constitute a code of permissible acts and behaviour of their servants."

33. The contentions of the learned counsel for the petitioners that taking admission for obtaining a degree course without the permission is a "misconduct' but it is admitted fact, as per the record available, that all the private respondents (except respondent no.10) have not taken admission in regular courses for obtaining the degree of engineering but they have obtained the degree through AMIE course which is a correspondence course where attending of classes are not required. Hence, it is clear that where regular attendance is necessary and time of classes clashes with the working hours of the official duty, prior permission is necessary from the competent authority. If any candidate is attending the classes during office hours, shall certainly be a misconduct and the said person who committed this type of mistake cannot be awarded promotion to the next higher post as he has obtained the certificate unauthorizedly.

34. In the instant case, Regulation 5(1)(d) of the "Regulations 1970' provides that by promotion from amongst the degree holder Junior Engineers/Computer who have qualified B.E./AMIE and have rendered ten years of qualified service as

Junior Engineer/Computer on 1st of July of the selection year. Therefore, there is no mention about any prior permission from the competent authority for obtaining the B.E./AMIE course. The aforesaid regulation only provides that ten years of qualified service is required as Junior Engineer possessing B.E./AMIE degree courses.

35. Learned counsel for the petitioners has also relied upon the Circular dated 25.01.1979 issued by the Board in which it is stated that for acquiring any degree while remaining in service, the prior permission is required from the appointing/competent authority. He has also relied on the order dated 18.08.1982, which was issued in furtherance of the circular dated 25.01.1979 wherein it is mentioned that if any employee of the Board has taken admission in any educational institute for acquiring any qualification without the permission of the competent authority then disciplinary proceedings will be initiated against such employee.

36. Since the petitioners have relied upon the aforesaid two circulars/orders dated 25.01.1979 and 18.08.1982, then I have to examine both the orders in terms of the degree which was obtained by the private respondents through AMIE course. I have also to examine that for obtaining the degree from AMIE, whether the employee has taken the admission in any institute for attending the classes during office hours.

37. AMIE is a recognized engineering degree course that can be studied in distance education mode. This course does not demand any classroom attendance and anyone who meets the specified eligibility criteria can become a graduate engineer in the least possible time and expense. Since AMIE course arrange Postal Classes, therefore, this course is not required any attendance in classrooms and it is especially suitable for employed person, as they can study this course without being interfering with their job. Only enrollment for the course is required and all enrolled students can appear in the examination in any centre convenient to them in all major cities in India.

38. In the present case, the petitioners have done B.E. (Part Time/Evening Classes) while in the services of the respondents department. For doing the B.E., attending of regular classes are required which are in during office hours. Therefore, as per the Circular/Order dated 25.01.1979, prior permission from the department is required. But in the case of the private respondents, they have enrolled themselves in AMIE degree course which is a correspondence course and not the regular course for which no attendance is required.

39. The U.P. State Electricity Board vide its Circular/order dated 19.12.1985 withdraw the earlier order (in part) only to the extent that no restrictions shall be imposed on authorities in granting permission for joining AMIE Engineering Course to the departmental employees and it will be obligatory on the employee concerned to intimate the Board/appointing authority through his superior officer about his joining AMIE Engineering Course.

40. A bare perusal of the Board's Circular dated 19.12.1985, it is crystal clear that in the case of the private respondents, who has obtained the engineering degree from AMIE course, it was mandatory to

inform the appointing authority through his superior officers regarding their enrollment in the AMIE course but no prior permission was required. Thus, in these circumstances, I am of the opinion that private respondents have obtained the engineering degree from AMIE course as per the Board's Circular by giving information/intimation to the competent authority and they have not committed any "misconduct'. "Regulations 1970' is also silent regarding permission or intimation for any engineering degree course. Regulations 5(1)(d) only relates to the eligibility criteria for the promotion.

41. In the case of ***Sant Ram Sharma vs. Sate of Rajasthan and others reported at AIR 1967 SC 1910*** Hon'ble the Apex Court has held that till statutory rules are framed, the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officials concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

42. In the present case, the Rules provide interalia for consideration of the promotion on the next higher post from amongst the degree holder who have qualified B.E./AMIE and have rendered ten years of qualified service but there are no provisions in the Rules for obtaining any engineering degree to the departmental employees while in service. The said Rule is silent on this point, whether the prior permission can be required for getting the B.E./AMIE degree while in service, this gap was fulfilled by the department in the circular dated 19.12.1985.

43. In view of the aforesaid discussions made hereinabove, the answer to the question no.1 & 3 as framed in para 17 of the judgment is that no prior permission is required for obtaining the AMIE degree which is a distance mode education and only intimation is required as per the Board's Circular dated 19.12.1985.

The answer of question no.2 as framed in para 17 of the judgment is that the Government cannot amend or supersede the statutory rules by administrative instructions but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. Since the rules are silent on the point that whether prior permission or only intimation is required for obtaining any degree, the Board has issued circular dated 19.12.1985 in this regard. The Circular is not contrary to the statutory Rules.

44. Therefore, I do not find any illegality or error in reasoning given by the Managing Director, U.P. Power Corporation Limited while rejecting the representations of the petitioners vide the impugned order dated 20.03.2020 (Annexure 1).

45. Having regard to the aforesaid factual and legal position, I am of the opinion that no case for interference in the present writ petition is made out. The writ petition is found to be devoid of any merit and is accordingly dismissed. No costs.

Pending applications, if any, stands disposed of.

(2021)01ILR A761
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2020

BEFORE

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

Writ-A No. 9650 of 2018
Connected with Writ-A Nos. 14320 of 2018, 15142 of 2018, 15146 of 2018, 15330 of 2018, 15794 of 2018, 17434 of 2018, 18488 of 2018, 21083 of 2018, 21592 of 2018, 21900 of 2018, 25524 of 2018, 26001 of 2018, 26442 of 2018, 3708 of 2019, 5286 of 2019, 5289 of 2019, 5291 of 2019, 5292 of 2019, 5295 of 2019, 5297 of 2019, 5299 of 2019, 5300 of 2019, 5315 of 2019, 5316 of 2019, 5317 of 2019, 5320 of 2019, 5321 of 2019, 6148 of 2019, 8488 of 2019, 13770 of 2019 and 20775 of 2018

The C/m National Inter College, Bulandshahar & Anr. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha, Sri Shivendu Ojha

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 29 and 30 – U.P. Intermediate Education Act, 1921 – Section 16-E, 16-F and 16-FF – Regulations framed under Act, 1921 – Chapter-II, Regulation-17 – U.P. Secondary Education Services Selection Board Act, 1982 – Section 30 – Applicability – Section 16-FF of Act, 1921 makes it very clear that Section 16-F will not apply to minority institutions since an overriding effect has been given by non-obstante clause and in respect of Section 16-E non obstinate clause apply to only sub-section(4) and rest Section 16-F therefore, would be applicable – Section 16-EE has been declared inapplicable to the Institutions established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution of India. (Para 21 and 22)

B. Constitution of India – Article 30 – Regulation 17 framed under Act, 1921 – G.Os. dated 20.03.2018, 06.11.2018, 18.04.2019 and 12.08.2019 – Amendments made in Regulation 17(A), (B), (C), (D), (E), (F) and (G) – West Bengal Madarsah Service Commission Act, 2008 – Ss. 8, 10, 11 and 12 – Selection and appointment of teachers – Enhancement of transparency, efficiency and standard of imparting education to the students – Introduction of holding the screening test through a private recruitment Agency – Validity – Held, Statutory provisions made by the respondent-authorities are even less regulatory than the same were in the case of West Bengal – Only an element of open test in the form of written test has been introduced, which will determine merit of the candidates – This is for bringing in transparency, impartiality, fairness and non arbitrariness in selection and it is in the interest of public at large, students' community and national interest. (Para 42 and 64)

C. Constitution of India – Article 30 – Ambit and Limitation – Minority Institution – Right of administration – State's power – National Interest – Held, any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by majority or minority – Such a limitation must necessarily be read into Article 30 – Right under Article 30(1) cannot be such as to override the national interest or to prevent Government from framing regulations in that behalf – It is, of course, true that government regulations cannot destroy the minority character of institution or make the right to establish and administer a mere illusion, but the

right under Article 30 is not so absolute so as to be above the law. (Para 46 and 61)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Re Vs Sidhajbhai Sabhai & ors. Vs St. of Bombay & anr., AIR 1963 SC 540

2. Jadunath Singh Vs St. of U.P., AIR 1971 SC 363

3. Ahmedabad St. Xavier's College Society Vs St. of Guj., AIR 1974 SC 1389

4. All Saints High School Vs Govt. of A.P., AIR 1980 SC 1042

5. N. Ammad Vs Manager, Emjay High School & ors., AIR 1999 SC 50

6. TMA Pai Foundation Vs St. of Kerala, AIR 2003 SC 356

7. Brahmo Samaj Education Society Vs St. of W.B. & ors. , AIR 2004 SC 3358

8. P.A. Inamdar Vs St. of Maharashtra, AIR 2005 SC 3799

9. Secretary Malankara Syrian Catholic College Vs T. Jose, AIR 2007 SC 570

10. Sindhi Education Society & anr.Vs Chief Secretary, Government of NCT of Delhi & ors. , (2010) 8 SCC 49

11. In Re Kerala Education Bill, 1957 AIR 1958 SC 956

12. Shainda Hasan Vs St. of U.P.& ors. , (1990) 3 SCC 48

13. Civil Appeal No. 5808 of 2017, Sk. Md. Rafique Vs Managing Committee, Contai Rahamania High Madrasah & ors. decided by Supreme Court on 06.01.2020

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

1. Heard Sri Radha Kant Ojha, Senior Advocate, assisted by Sri Shivendu Ojha, Advocate, Sri Ashok Khare, Senior Advocate, assisted by Sri Aklank Kumar Jain, Sri Anurag Shukla, Advocate, Sri Jamil Ahmad Azmi, Advocate, Sri Syed Khursheed Anwar Alvi, Advocate, Sri Shailendra, Senior Advocate, assisted by Sri S.M. Iqbal Hasan, Advocate, for petitioners, and Sri Manish Goel, Additional Advocate General assisted by Sri Subhash Rathi, Additional Chief Standing Counsel for respondents.

2. In all these 32 writ petitions, mainly filed by Committees of Management of various Secondary Educational Institutions, common questions of law and facts have been raised. Broadly, challenge is to amendment made in Regulation-17, Chapter-II of Regulations framed under U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'Act, 1921'), notified vide Notification dated 20.03.2018 published in Official Gazette dated 24.03.2018. The petitioners have also challenged Government Order dated 12.03.2018. Since relief prayed in all these writ petitions are broadly similar, the same have been heard together and are being decided by this common judgment.

3. Learned counsel for parties have agreed to treat Writ Petition (Writ- A) No. 9650 of 2018 as a leading writ petition and referred to the pleadings thereof while addressing this Court.

4. The relevant facts disclosed in the leading Writ Petition (Writ- A) No. 9650 of 2018 (hereinafter referred to as 'WP-1'), in brief, may be described as under.

5. WP-1 has been filed by Committee of Management, National Inter College, Shikarpur, Bulandshahr, stating that National Inter College, Shikarpur, Bulandshahr (hereinafter referred to as 'NIC Shikarpur'), is a minority Secondary Educational Institution, recognized by

Board of High School and Intermediate Education, U.P. (hereinafter referred to as "U.P. Board") and governed by the provisions of Act, 1921. It is imparting education upto Intermediate but aided upto High School level only. For the purpose of payment of salary to teaching and non teaching staff, upto High School, it is governed by the provisions of U.P. High Schools and Intermediate Colleges (Payment of Salaries to the Teachers and other Employees) Act, 1971 (hereinafter referred to as "Act, 1971"). It is stated that for selection of teaching staff including Principal, procedure has been provided under Section 16-E and 16-F of Act, 1921. Section 16-FF is an exception making provision for selection of teaching staff in Minority Educational Institutions and provides constitution of Selection Committee as also procedure for appointment. Regulations 10 to 17 provide procedure for appointment of Teachers and Principals in recognized Secondary Educational Institutions.

6. State Government issued an order dated 12.03.2018 stating that in exercise of powers under Section 16(2) of Act, 1921, Governor has approved amendment in Regulation-17 Chapter-II of Regulations framed under Act, 1921. Under the amended provision, selection of teaching staff is now to be made by a Private Agency through Joint Director of Education (hereinafter referred to as "JDE") or District Inspector of Schools (hereinafter referred to as "DIOS") and five names for each vacancy shall be recommended to the College, who will conduct interview and thereafter appointment will be made. It is said that this interference in the right of appointment of teaching staff is violative of Section 16-FF of Act, 1921 read with Article 29 of Constitution of India.

7. Petitioners, have prayed that Government Order dated 12.3.2018 be declared ultra vires, insofar as it relates to Regulation 17(D), Chapter-II of Regulations framed under Act, 1921, of Article 29 of Constitution of India and also Section 16-FF of Act, 1921. A mandamus has also been prayed that respondents should not implement or give effect to Government Order dated 12.03.2018 to the extent Regulation 17(D) of Chapter-II has been amended by aforesaid Government Order.

8. Respondents have contested WP-1 by filing counter affidavit sworn by Sri Radha Krishna Tiwari, DIOS, Bulandshahr, stating that NIC, Shikarpur, District Bulandshahr is a non government recognized Secondary Educational Institution. It is aided by State Government upto High School. It is also admitted that it is a minority institution but governed by Act, 1921 and Act, 1971. Appointments of teachers and employees are made in accordance with the directions contained under Government Orders, issued from time to time. It is said that only Government Order dated 12.03.2018 has been challenged though subsequently it was further amended by Government vide Government Order issued on 20.03.2018 and published in Official Gazette on 24.03.2018 publishing amendments made in Regulation 17 of Act, 1921 by exercising powers under Section 16(2) of Act, 1921. It is said that aforesaid Notification has not been challenged, therefore, writ petition is liable to be dismissed. Regulation 17, Chapter-II of Act, 1921, as has been amended, do not override authority of Management; it is not inconsistent to the rights conferred by Article 29 and 30 of Constitution of India; Managements still has right to select candidates and only for the betterment of Educational Institutions

and having competent staff, procedure for screening has been provided by conducting written test through a private agency but it does not affect rights of Management in any manner; it is only for the purpose of making selection process transparent; no absolute power of selection has been given to Educational Authorities or a private agency but power of selection still vests in the Management and the procedure is only to regulate better quality of education and to maintain transparency in selection; there is no interference by State Government in the selection of candidates; amendment does not affect authority of Management, and, instead, procedure is to make the things convenient and transparent.

9. A Supplementary Counter Affidavit has also been filed on behalf of respondents stating that Regulation 17(1)(D), Chapter-II of Regulations has further been amended by Government Orders dated 06.11.2018, 18.04.2019 and 12.08.2019 and since these Government Orders are not challenged, therefore, relief as prayed for in WP-1 cannot be granted and it has rendered infructuous.

10. Necessity to amend Regulation 17(1)(D), Chapter-II of Regulations, arose in order to maintain transparency in the procedure relating to appointment of Teachers and Principals in the Government aided Institutions and to avoid any scope of bias and personal interest on the part of Management. Government received various complaints of favoritism, partiality and other illegalities in the matter of selection and appointment of Teachers in Government aided minority institutions and to remove such eventualities and to ensure appointment of more qualified Teachers and Principals, to make the process of selection free of whims of Management, Regulation-17 has been amended, which is only regulatory in nature.

11. It is further stated that challenging Government Order dated 12.08.2019, Writ Petition No. 27342 (M/B) of 2019 has been filed at Lucknow Bench of this Court, which is pending and therein respondents have filed counter affidavit. It is said that all the writ petitions challenging Government order dated 12.03.2018, without challenging subsequent amendments, are not maintainable having rendered infructuous and deserves to be dismissed.

12. In all other writ petitions, this fact is not disputed that those Institutions are minority Institutions and basically challenge to the amendment made to Regulation 17 is founded on the similar grounds, therefore, we are not repeating the facts of those cases, but, for convenience, place on record, reliefs sought therein in the form of chart, as under :

Sl. No.	Writ Petitions.	Prayer
1	9650 of 2018 (C/M National Inter College, Shikarpur, Bulandshahr and another Vs. State of U.P. and others)	(a) An order or direction declaring the Government Order dated 12.3.2018 (Annexure-1 to the writ petition) issued by respondent no.1 so far as amendment in Regulation 17(D) of Chapter-II of the U.P. Intermediate Education Act as

		ultra-vires to the Articles 29 and 30 of the Constitution of India, as well as,also ultra-vires to the Section 16-FF of U.P. Intermediate Education Act, 1921. (b) An order or direction commanding respondents not to implement and give effect to the Government Order dated 12.3.2018 (Annexure-1 to the writ petition) issued by respondent no.1 so far as amendment in Regulation 17(D) of Chapter-II of the U.P. Intermediate Education Act,1921. (c) Order/direction in nature of mandamus commanding the respondents to permit the petitioner to make selection of staff as per rule prevailing prior to the amendment.		2018 (C/M Methodist Girls Inter College Civil Lines and another Vs. State of U.P. and others)	order or direction of suitable nature holding impugned notification dated 20.3.2018 (published in official gazette on 24.3.2018)as ultra vires to the Constitution and U.P. Intermediate Education Act (copy of the impugned Notification dated 20.3.2018 is enclosed as Annexure No.8 to this petition). (ii) to issue writ of certiorari quashing the Government Order dated 12.3.2018 (copy enclosed as Annexure No.5 to this petition). (iii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to permit the petitioners to fill all vacant posts in their College in accordance with the un-amended provisions of Regulation 17 contained in Chapter-II of the
2	14320 of	(i) to issue a writ,			

		U.P. Intermediate Education Act, 1921. **<u>Amended prayers</u>** (vi) to issue a writ, order or direction in the nature of mandamus declaring the amendment effected in Regulation 17(1)(g) contained in Chapter-II of the U.P. Intermediate Education Act, 1921 by Notification dated 20.3.2018 as published in the U.P. Gazette dated 24.3.2018 as ultra vires the Constitution and Section 16-FF of the U.P. Intermediate Education Act, 1921. (vii) to issue a writ, order or direction in the nature of certiorari quashing the impugned Government Order/Notification dated 12.3.2018 (copy of the impugned			Government Order dated 12.8.2018 is enclosed as Annexure-1 to the amendment application).
			3	**15142 of 2018** (C/M Jain Kanya Uchchatar Madhyamik Vidyalay Vs. State of U.P. and others)	(i) Issue a suitable order or direction in the nature of mandamus declaring the notification dated 20.3.2018 as published in U.P. Gazette dated 24.3.2018 to be violative of Article 30(1) of Constitution and being ultra vires. (ii) Issue a suitable writ, order or direction in the nature of certiorari quashing the Government Order dated 12.3.2018 issued by the State Govt. (Annexure No.3).
			4	**15146 of 2018** (C/M Jain Inter College Vs. State of U.P. and others)	(i) Issue a suitable order or direction in the nature of mandamus declaring the notification dated 20.3.2018 as published in U.P. Gazette dated 24.3.2018 to be violative of Article 30(1) of Constitution and

		being ultra vires. (ii) Issue a suitable writ, order or direction in the nature of certiorari quashing the Government Order dated 12.3.2018 issued by the State Govt. (Annexure No.7).
5	**15330 of 2018** (C/M Khalsa Inter College and another Vs. State of U.P. and others)	(i) a writ, order or direction in the nature of mandamus declaring the notification dated 20.3.2018, as published in U.P. Gazette dated 24.3.2018 (Annexure-5 to the writ petition) to be violative of Article 30(1) of Constitution and being ultra vires. (ii) a writ, order or direction in the nature of certiorari quashing the Government Order dated 12.3.2018 (Annexure No.4 to the writ petition).
6	**15794 of 2018** (C/M Muslim Inter College and another Vs. State of U.P. and others)	(i) issue a writ, order or direction of suitable nature declaring the impugned Government Notification dated 20.3.2018 (published in official gazette on 24.3.2018) enclosed as Annexure No.8 to this petition) as ultra-vires to the provision of Constitution of India and U.P. Intermediate Education Act, 1921. (ii) issue writ of certiorari quashing the Government Order dated 12.3.2018 (copy enclosed as Annexure No.7 to this petition). (iii) issue a writ, order or direction in the nature of mandamus commanding respondents to permit petitioners to fill all vacant posts in their College in accordance with the un-amended provisions of Regulation 17 contained in Chapter-II of the U.P. Intermediate Education Act, 1921.
7	**17434 of**	(i) to issue writ,

	2018 (C/M St. Judes Inter College Vs. State of U.P. and others	order or direction in the nature of certiorari quashing the Government Order dated 12.3.2018 followed by Gazette Notification dated 20.3.2018 issued by State Govt. (copy enclosed as Annexure No.6 to this petition). (ii) to issue a writ, order or direction in the nature of mandamus restraining respondents from giving effect to the Govt. Order dated 12.3.2018 followed by U.P. Gazette Notification dated 20.3.2018.
8	**18488 of 2018** (C/M Acharya Nami Sagar Jain Inter College and another Vs. State of U.P. and others)	(a) Issue a writ, order or direction of suitable nature holding impugned notification dated 20.3.2018 (published in official gazette on 24.3.2018) as ultra vires to the Constitution and U.P. Intermediate Education Act (copy of the impugned Notification dated 20.3.2018 is enclosed as Annexure No.3 to this petition). (b) Issue writ, order of direction in the nature of certiorari to quash Government Order dated 12.3.2018 (Annexure-1) issued by repondent no.1 and impugned orders dated 3.8.2018 and 10.8.2018 (Annexures No.8 and 10) passed by respondent no.5.
9	**21083 of 2018** (C/M Sri Shanti Sagar Digambar Jain Kanya Inter College Vs. State of U.P. & others)	(i) to issue a writ, order or direction in the nature of mandamus declaring Notification dated 20.3.2018 published in U.P. Gazette part-4 dated 24.3.2018 (Annexure-4 to the writ petition) as ultra vires to Article 30 of the Constitution and Section 16-FF of U.P. Intermediate Education Act (copy of the impugned Notification dated 20.3.2018 and to treat the same as null and void. (ii) to issue writ,

		order or direction in the nature of certiorari, quashing the Government Order dated 12.3.2018 (Annexure No.3 to the petition) issued by State Govt. (iii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to permit the petitioner to fill all vacant posts assistant teachers in the College in accordance with un-amended provisions of Regulation 17 contained in Chapter-II of the U.P. Intermediate Education Act, 1921.
10	**21592 of 2018** (C/M Jain Sthanakwasi Girls Inter College Vs. State of U.P. & others)	(i) to issue a writ, order or direction in the nature of mandamus declaring Notification dated 20.3.2018 published in U.P. Gazette part-4 dated 24.3.2018 (Annexure-6 to the writ petition) as ultra vires to Article 30 of the Constitution and Section 16-FF of U.P. Intermediate Education Act (copy of the impugned Notification dated 20.3.2018 and to treat the same as null and void. (ii) to issue writ, order or direction in the nature of certiorari, quashing the Government Order dated 12.3.2018 (Annexure No.4 to the petition) issued by State Govt. (iii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to permit the petitioner to fill all vacant posts Lecturers and L.T. Grade posts which are lying vacant in the College in accordance with un-amended provisions of Regulation 17 contained in Chapter-II of the U.P. Intermediate Education Act,

		1921.
11	**21900 of 2019** (C/M Talimuddin Higher Secondary School and another Vs. State of U.P. and others)	(i) to issue a writ, order or direction of suitable nature holding and declaring amended Regulation 17(1)(d) contained in Chapter-II of of U.P. Intermediate Education Act notified vide notification dated 20.3.2018 (published in U.P. Gazette on 24.3.2018 (Annexure-7 to the writ petition) as ultra vires to Article 30 of the Constitution and the provisions of Section 16-FF of U.P. Intermediate Education Act. (i-A) Issue writ, order or direction of suitable nature of holding and declaring the Government Order dated 12.3.2018 (Annexure No.8-A to the petition) as ultra vires to Article 30 of the Constitution and the provisions of Section 16-FF of U.P. Intermediate Education Act to the extent it amends Regulation 17 of Chapter-II of U.P. Intermediate Education Act, 1921. (ii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to permit the petitioners to fill all vacant posts in their Colleges in accordance with provisions Section 16-FF of U.P. Intermediate Education Act, 1921 and Section 16-FF of U.P. Intermediate Education Act, 1921 un-amended of various clauses of the Regulation 17(1)(d) contained in Chapter-II of U.P. Intermediate Education Act, 1921.
12	**25524 of 2018** (C/M Canossa Convent Girls Inter College and another Vs. State of U.P. & others)	(i) to issue writ, order or direction in the nature of certiorari quashing the Government Order dated 12.3.2018 followed by Gazette

		Notification dated 20.3.2018 issued by State Govt. vide letter dated 4.10.2018 by DIOS (copy enclosed as Annexure No.5 to this petition). (ii) to issue a writ, order or direction in the nature of mandamus restraining respondents from giving effect to the Govt. Order dated 12.3.2018 followed by U.P. Gazette Notification dated 20.3.2018 followed by letter dated 4.10.2018.
13	**26001 of 2018** (C/M Swami Atmdev Gopalanand Inter College, Farrukhabad, and another Vs. State of U.P. and others)	(i) to issue a writ, order or direction in the nature of certiorari quashing the impugned notification dated 20.3.2018 (Annexure-3to the writ petition) issued by State Govt.
14	**26442 of 2018** (C/M Shri Kund Kund Jain Inter College Vs. State of U.P. and others)	(i) Issue a writ, order or direction in the nature of certiorari quashing the amendments affected by notification dated 20.3.2018 as published in the U.P. Gazette dated 24.3.2018 as ultra-vires the Constitution and legally inoperative.
15	**3708 of 2019** (C/M Sajida Girls Inter College and another Vs. State of U.P. and others)	(i) to issue a writ, order or direction in the nature of certiorari quashing the impugned notification dated 20.3.2018 (Annexure-3 to the writ petition) issued by State Govt. as it is unconstitutional and ultra-vires to Article 30 of the Constitution of India.
16	**5286 of 2019** (C/M A.L. Nomani Inter College and another vs. State of U.P. and others)	(i) to issue a writ, order or direction of suitable nature holding and declaring the amended Regulation 17(1)(d) contained in Chapter-II of the U.P. Intermediate Education Act, 1921 notified vide notification dated 20.3.2018 (published in official gazette on 24.3.2018) as ultra vires to Article 30 of the

		Constitution and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 (Annexure No.7 to this petition) and to struck down the impugned amendment. (i)-A. to issue a writ, order or direction of suitable nature holding and declaring the Govt. Order dated 12.08.2019 (Annexure 7-A) as ultra vires to Article 30 of the Constitution of India and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 to the extent it amends Regulation 17 contained in Chapter-II of the U.P. Intermediate Education Act, 1921. (ii) to issue a writ, order or direction in the nature of mandamus commanding respondents to permit to fill all vacant posts in			their Colleges in accordance with the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 un-amended of various clauses of Regulation 17(1)(d) contained in Chapter-II of the U.P. Intermediate Education Act, 1921.
			17	**5289 of 2019** (C/M Mohammad Ali Purva Madhyamik Vidyalaya and another Vs. State of U.P. and others)	(i) to issue a writ, order or direction of suitable nature holding and declaring the amended Regulation 17(1)(d) contained in Chapter-II of the U.P. Intermediate Education Act, 1921 notified vide notification dated 20.3.2018 (published in official gazette on 24.3.2018) Annexure-6 as ultra vires to Article 30 of the Constitution and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 and to struck down the same. (i)-A. to issue a

		writ, order or direction of suitable nature holding and declaring the Govt. Order dated 12.08.2019 (Annexure 6-A) as ultra vires to Article 30 of the Constitution of India and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 to the extent it amends Regulation 17 contained in Chapter-II of the U.P. Intermediate Education Act, 1921. (ii) to issue a writ, order or direction in the nature of mandamus commanding respondents to permit to fill all vacant posts in their Colleges in accordance with the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 un-amended of various clauses of Regulation 17(1)(d) contained in Chapter-II of the U.P. Intermediate			Education Act, 1921 from giving effect to the Govt. Order dated 12.3.2018 in respect of petitioners college being minority institutions protected under Article 30 of the Constitution of India.
			18	**5291 of 2019** (C/M R.A. Qidwai Balika Inter College and 2 others Vs. State of U.P. and others)	(i) to issue a writ, order or direction of suitable nature holding and declaring the amended Regulation 17(1)(d) contained in Chapter-II of the U.P. Intermediate Education Act, 1921 notified vide notification dated 20.3.2018 (published in official gazette on 24.3.2018) as ultra vires to Article 30 of the Constitution and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 (Annexure-10). (i)-A. to issue a writ, order or direction of suitable nature

		holding and declaring the Govt. Order dated 12.08.2019 (Annexure 10-A) as ultra vires to Article 30 of the Constitution of India and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 to the extent it amends Regulation 17 contained in Chapter-II of the U.P. Intermediate Education Act, 1921. (ii) to issue a writ, order or direction in the nature of mandamus commanding respondents to permit petitioners to fill all vacant posts in their Colleges in accordance with the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 read with of Section 16-FF of U.P. Intermediate Education Act, 1921 un-amended of various clauses of Regulation 17(1)(d) contained in Chapter-II of the U.P. Intermediate Education Act, 1921.			
19	**5292 of 2019** (C/M Kidwai Memorial Girls Inter College Vs. State of U.P. and others)	(A) Issue writ, order or direction in the nature of mandamus declaring the impugned Government Order dated 12.3.2018 (Annexure-4) as ultra vires to the provisions of Article 30 of the Constitution of India and the provision of U.P. Intermediate Education Act, 1921. (B) Issue a writ, order or direction in the nature of mandamus commanding and directing respondent authorities to not to give effect the impugned Govt. Order dated 12.3.2018 as far as it relates to the Minority Educational Institutions (C) Issue a writ, order or direction of suitable nature holding and declaring the			

		Govt. Order dated 12.8.2019 (Annexure 4-A) as ultra vires to Article 30 of the Constitution of India and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 to the extent it amends Regulation 17 of Chapter-II of the U.P. Intermediate Education Act, 1921.
20	**5295 of 2019** (C/M M.D. Jain Uchattar Madhyamik Vidyalaya and another Vs. State of U.P. and others)	i. A writ, order or direction in the nature of certiorari quashing the impugned order dated 18.5.2018 passed by Joint Director of Education, Agra Region, Agra (Annexure-8 to the writ petition), in so far as it disapproved the selections made by the petitioners' management for appointment against teaching post. ii. A writ, order or direction in the nature of certiorari declaring the amendments affected by notification dated 20.3.2018 as published in the U.P. Gazette dated 24.3.2018 as ultra-vires the Constitution and legally inoperative. iii. A writ, order or direction of suitable nature commanding the respondents to permit the candidates selected for the two posts of Assistant Teachers in L.T. Grade and to function in their respective posts and also to sanction the disbursement emolument regularly every month.
21	**5297 of 2019** (C/M Anglo Bengali Girls Inter College and another Vs. State of U.P. and others)	i. to issue a writ, order or direction of suitable nature holding the impugned Notification dated 20.3.2018 (as published in the U.P. Gazette dated 24.3.2018) as ultra-vires to the Constitution and the U.P.

		Intermediate Education Act (copy of impugned notification dated20.3.2018 is enclosed as Annexure-5 to the writ petition). ii. to issue writ of certiorari quashing the Government Order dated 12.3.2018 (copy of Govt. Order dated 12.3.2018 is enclosed as Annexure-3 to the writ petition). iii. to issue a writ, order or direction in the nature of mandamus commanding the respondents to permit the petitioners to fill all vacant posts in their institution in accordance with the un-amended provisions of Regulation 17 contained in Chapter-II of U.P. Intermediate Education Act, 1921.
22	**5299 of 2019** (C/M Okm Inter College Lar and 2 Others Vs. State of U.P. and others)	i) Issue a writ, order or direction in the nature of certiorari declaring the amendment affected by notification dated 20.3.2018 as published in U.P. Gazette dated24.3.2018 as ultra-vires of Constitution and legally inoperative.
23	**5300 of 2019** (C/M Public Balika Inter College and another Vs. State of U.P and others)	(i) to issue a writ, order or direction of suitable nature holding and declaring the amended Regulation 17(1)(d) contained in Chapter-II of the U.P. Intermediate Education Act, 1921 notified vide notification dated 20.3.2018 (published in official gazette on 24.3.2018) as ultra vires to Article 30 of Constitution and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 (Annexure-7). (i)-A. to issue a writ, order or direction of suitable nature holding and declaring the

		Govt. Order dated 12.08.2019 (Annexure 7-A) as ultra vires to Article 30 of the Constitution of India and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 to the extent it amends Regulation 17 contained in Chapter-II of the U.P. Intermediate Education Act, 1921. (ii) to issue a writ, order or direction in the nature of mandamus commanding respondents to permit petitioners to fill all vacant posts in their Colleges in accordance with the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 read with Section 16-FF of U.P. Intermediate Education Act, 1921 un-amended of various clauses of Regulation 17(1)(d) contained in Chapter-II of the U.P. Intermediate			Education Act, 1921.
			24	**5315 of 2019** (C/M Hafiz Mohammad Siddique Islamia Inter College and another Vs. State of U.P. and others)	(i) to issue a writ, order or direction of suitable nature holding and declaring the amended Regulation 17(1)(d) contained in Chapter-II of the U.P. Intermediate Education Act, 1921 notified vide notification dated 20.3.2018 (published in official gazette on 24.3.2018) as ultra vires to Article 30(1) of the Constitution of India and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 (Annexure No.8 to this petition) and to struck down the impugned amendment. (i)-A. to issue a writ, order or direction of suitable nature holding and declaring the Govt. Order dated 12.08.2019 (Annexure 8-A) as ultra vires to

		Article 30 of the Constitution of India and to the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 to the extent it amends Regulation 17 contained in Chapter-II of the U.P. Intermediate Education Act, 1921. (ii) to issue a writ, order or direction in the nature of mandamus commanding respondents to permit to fill all vacant posts in petitioner's College in accordance with the provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 read with un-amended Regulation 17 contained in Chapter-II of the U.P. Intermediate Education Act, 1921.
25	**5316 of 2019** (C/M St. Marys Inter College and another Vs. State of U.P. and others)	(i) to issue writ, order or direction in the nature of certiorari quashing the impugned Government Order dated 12.3.2018 and Gazette Notification dated 20.3.2018 together issued by State Govt. (copy enclosed as Annexure-6 to this petition). (ii) to issue a writ, order or direction in the nature of mandamus restraining respondents from giving effect to the Govt. Order dated 12.3.2018 followed by Gazette Notification dated 20.3.2018. (iii) to issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case. (iv) to award costs of the petition to the petitioners.
26	**5317 of 2019** (C/M. St. Francis High School Vs. State of U.P. and others)	(i) to issue writ, order or direction in the nature of certiorari quashing the impugned Government Order dated 12.3.2018 and Gazette Notification dated

		20.3.2018 together issued by State Govt. (copy enclosed as Annexure-6 to this petition). (ii) to issue a writ, order or direction in the nature of mandamus restraining respondents from giving effect to the Government Order dated 12.3.2018.
27	**5320 of 2019** (C/M Of Chaman Lal Digamber Jain Kanya Inter College Rampur and 9 Others Vs. State of U.P. and others)	(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned Gazette notification dated 20.3.2018 (published in official gazette on 24.3.2018) and Government Order dated 12.3.2018 (Annexure-4) as ultra-vires to the provisions of Section 16-FF of Intermediate Education Act, 1921 as well as of Article 30 of the Constitution of India. (ii) Issue a writ, order or direction in the nature of mandamus directing respondents to permit the petitioners to fill all the vacant posts in their colleges in accordance with un-amended provisions of U.P. Intermediate Education Act, 1921 as well as Regulations framed thereunder.
28	**5321 of 2019** (C/M. Josephs Inter College and 2 others Vs. State of U.P. and others)	(i) to issue writ, order or direction in the nature of certiorari quashing the impugned Government Order dated 12.3.2018 and Gazette Notification dated 20.3.2018 together issued by State Govt. (copy enclosed as Annexure-6 to this petition). (ii) to issue a writ, order or direction in the nature of mandamus restraining respondents from giving effect to the Government Order dated 12.3.2018 followed by Gazette Notification dated

		20.3.2018.
29	**6148 of 2019** (C/M Falah E Darain Punjabi Inter College Vs. State of U.P. and others)	1. Issue a writ, order or direction of suitable nature holding the impugned Notification dated 20.3.2018 (as published in the Gazette on 24.3.2018) as ultra-vires to the Constitution of India and the U.P. Intermediate Education Act (copy of impugned notification dated 20.3.2018 is enclosed as Annexure-4 to the writ petition). 2. Issue a writ, order of direction in the nature of certiorari quashing the Government Order dated 12.3.2018 (copy enclosed as Annexure-2 to the writ petition). 3. Issue a writ, order of direction in the nature of mandamus commanding respondents to permit the petitioner to fill all vacant posts in his College in accordance with the un-amended provisions of Regulation 17 contained in Chapter-II of U.P. Intermediate Education Act, 1921.
30	**8488 of 2019** (C/M Mubarakpur Inter College and another Vs. State of U.P. and others)	(i) to issue a writ, order or direction of suitable nature holding and declaring amended Regulation 17(1)(d) contained in Chapter-II of of U.P. Intermediate Education Act notified vide notification dated 20.3.2018 (published in official gazette on 24.3.2018) (Annexure-7 to the writ petition) as ultra vires to Article 30 of the Constitution and the provisions of Section 16-FF of U.P. Intermediate Education Act. (i-A) Issue writ, order or direction of suitable nature of holding and declaring the Government Order dated 12.8.2019 (Annexure No.8-A to the petition)

		as ultra vires to Article 30 of the Constitution and the provisions of Section 16-FF of U.P. Intermediate Education Act,1921 to the extent it amends Regulation 17 of Chapter-II of U.P. Intermediate Education Act, 1921. (ii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to permit the petitioners to fill all vacant posts in their Colleges in accordance with provisions Section 16-FF of U.P. Intermediate Education Act, 1921 read with Section 16-FF of U.P. Intermediate Education Act, 1921 un-amended of various clauses of the Regulation 17(1)(d) contained in Chapter-II of U.P. Intermediate Education Act, 1921.			
31	**13770 of 2019** (C/M Nazibuddaula	A) Issue a writ, order or direction in the nature of		Girls Inter College Najibabad Bijnor Vs. State of U.P. & others)	certiorari quashing the Government Order dated 12.3.2018 (Annexure-2 to the writ petition) issued by respondent no.1 so far as amendment in Regulation 17(D) of Chapter-II of the U.P. Intermediate Education Act declaring same as ultra-vires to the Articles 29 and 30 of the Constitution of India, as well as, also ultra-vires to the Section 16-FF of U.P. Intermediate Education Act, 1921. B) Issue a writ, order or direction in the nature of mandamus commanding respondents not to implement and give effect to the Government Order dated 12.3.2018 (Annexure-2 to the writ petition) issued by respondent no.1 so far as amendment in

		Regulation 17(D) of Chapter-II of the U.P. Intermediate Education Act,1921.
32	**20775 of 2018** (C/M Swami Leela Shah Adarsh Sindhi Inter College and another Vs. State of U.P. & others)	(a) a writ, order or direction in the nature of mandamus declaring the notification dated 20.3.2018, as published in U.P. Gazette dated 24.3.2018 (Annexure-7) to be violative of Article 30(1) of Constitution and being ultra vires. (b) a suitable writ, order or direction of a suitable nature quashing Government Order dated 12.3.2018 (Annexure No.6). (c) a writ, order or direction of a suit nature commanding the respondents to permit the candidates selected for 8 posts of Assistant Teachers in L.T. Grade to function in the institution on their respective posts and also to sanction and disburse the regular monthly salary on the said post regularly every month.

13. Since the contention advanced by learned counsel for parties challenging validity of amendment made in Regulation 17 of Chapter-II are broadly common, therefore, we are dealing with the same collectively.

14. Solitary question up for consideration in these writ petitions is whether amendments made in Regulation 17, Chapter-II vide Government Orders dated 12.03.2018, 06.11.2018, 18.04.2019 and 12.08.2019, are regulatory and valid or hit by Articles 29 and 30 of the Constitution of India and Section 16-FF of Act, 1921.

15. Before coming to Act, 1921, we may place on record that for recruitment of teaching staff including Principals, Provincial Legislature enacted U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as "Act, 1982") whereunder recruitment of Teachers of Secondary Educational Institutions has to be made by U.P. Secondary Education Services Selection Board (hereinafter referred to as 'Selection Board'). Any appointment made otherwise is void by virtue of Section 16 of the said Act. However, in respect of minority institutions, Act, 1982 has been exempted by virtue of Section 30 thereof, which reads as under :

*"30. **Exemption to minority Institutions:** - Nothing in this Act shall apply to any institution established and administered by a minority referred to in clause (1) of Article 30 of the Constitution of India."*

16. In view of Section 30 of Act, 1982, recruitment and selection of Teachers and Principals of Secondary Educational Institutions, which are established and administered by Minority, are not to be made by Selection Board under Act, 1982 but it continues to be governed by the provisions as existed under Act, 1921.

17. Now we come to Act, 1921, which governs selection and appointment of Teachers and Principals of Secondary Educational Institutions in the State of U.P. established and administered by Minority. We may also notice at this stage that there are some institutions which are not in grant-in-aid or some part thereof is not in grant-in-aid. In all these writ petitions, we are concerned with such institutions which are non-Government Minority Institutions but recognized and getting grant-in-aid for payment of salary to the teaching and non teaching staff and governed by Act, 1971, therefore, they are Government aided minority institutions.

18. Under Act, 1921, Section 16-E provides procedure for selection of Teachers and Heads of Institutions and reads as under:

"16E. Procedure for selection of teachers and head of institutions*. - Subject to the provisions of this Act, the* ***Head of Institution and teachers of an institution*** *shall be appointed by the Committee of Management in the manner hereinafter provided.*

(2) Every post of Head of Institution or teacher of an institution shall except to the extent prescribed for being filled by promotion, be filled ***by direct recruitment after intimation of the vacancy to the Inspector and advertisement of the vacancy containing such particulars as may be prescribed,*** *in at least* ***two newspapers having adequate circulation in the State.***

(3) ***No person shall be appointed*** *as Head of Institution or teacher in an institution* ***unless he possesses the minimum qualification prescribed by the regulations*** *:*

Provided that a ***person who does not possess such qualification may also be appointed if he has been granted exemption by the Board*** *having regard to his education, experience and other attainments.*

(4) ***Every application for*** *appointment as Head of Institution or teacher of an institution* ***in pursuance of an advertisement published under sub-section (2) shall be made to the Inspector*** *and shall be accompanied by such fee which shall be paid in such manner as may be prescribed.*

(5) (i) After the receipt of applications under sub-section (4), the ***Inspector shall cause to be awarded,*** *in respect of each such applications****, quality-point marks in accordance with the procedure and principles prescribed, and shall thereafter, forward the applications to the Committee of Management.***

(ii) The applications shall be dealt with, the candidates shall be called for interview. and the ***meeting of the Selection Committee shall be held, in accordance with the Regulation.***

(6) The ***Selection Committee*** *shall prepare a* ***list containing*** *in order of preference the names,* ***as far as practicable****, of three candidates for* ***each post found*** *by it to* ***be suitable for appointment*** *and shall* ***communicate its-recommendations together with such list to the Committee of Management.***

(7) Subject to the provisions of sub-section (8), the Committee of Management

shall, on receipt of the recommendations of the Selection Committee under sub-section (6), first offer appointment to the candidate given the first preference by the Selection Committee, and on his failure to join the post, to the candidate next to him in the list prepared by the Selection Committee under this section, and on the failure of such candidate also, to the last candidate specified in such list.

(8) The Committee of Management shall, ***where it does not agree with the recommendations of the Selection Committee, refer the matter together with the reasons of such disagreement to the Regional Deputy Director of Education*** *in the case of appointment to the post of Head of Institution and to the Inspector in the case of appointment to the post of teacher of an Institution, and his decision shall be final.*

(9) Where no candidate approved by the Selection Committee for appointment is available, a fresh selection shall be held in the manner laid down in this section.

(10) Where the ***State Government****, in case of the appointment of Head of Institution, and the Director in the case of the appointment of teacher of an institution, is satisfied that any* ***person has been appointed as Head of Institution or teacher, as the case may be, in contravention of the provisions of this Act, the State Government or,*** *as the case may be, the Director may, after affording an opportunity of being heard to such person,* ***cancel such appointment and pass such consequential order as may be necessary.***

(11) Notwithstanding anything contained in the foregoing sub-sections, appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or by death, termination or otherwise of an incumbent occurring during an educational session, may be made by direct recruitment or promotion without reference to the Selection Committee in such manner and subject to such conditions as may be prescribed :

Provided that no appointment made under this sub-section shall, in any case, continue beyond the end of the educational session during which such appointment was made."
(Emphasis added)

19. Section 16-F of Act, 1921, provides procedure for constitution of Selection Committee and reads as under :-

*"**16-F. Selection Committees**. - (1) For the selection of candidates for appointment as Head of an Institution, there* ***shall be a Selection Committee consisting of, -***

(i) the President or any member of the Committee of Management nominated by the Committee by resolution in that behalf, who shall be the Chairman;

(ii) a ***member of the Committee of Management*** *other than the one referred to in clause (i), nominated by it in this behalf;*

(iii) ***three experts nominated by the Regional Deputy Director*** *of Education from persons not belonging to the district in which the institution is situated, out of the panel of names prepared under this section.*

(2) For the selection of candidates for appointment as teacher in an institution, there shall be a Selection Committee consisting of, -

(i) the ***President*** *or any member of the Committee of Management, nominated by the Committee by resolution in that behalf, who shall be the Chairman;*

*(ii) the **Head of such institution;***

*(iii) **three experts nominated** by the Inspector from persons not belonging to the district in which the institution is situated, out of the panel of names prepared under this section.*

(3) In respect of any institution for which Authorized Controller has been appointed under this Act, the Authorized Controller shall, in relation to such institution be deemed substituted for the person referred to in clauses (i) and (ii) of sub-section (1) or clause (i) of sub-section (2), as the case may be.

(4) A panel of experts for every region shall be drawn by the Director in such manner as may be prescribed and shall be revised once every three years.

*(5) **The business of the Selection Committee shall be conducted in such manner as may be prescribed** :*

Provided that the majority of the total membership of any Selection Committee shall form the quorum of such Committee :

Provided further that no recommendation made by the Selection Committee in respect of any candidate shall be valid, unless two of the experts referred to in clause (iii) of sub-section (1) or sub-section (2), as the case may be, have agreed to it.

(6) No proceeding of the Selection Committee shall be invalid by reason only of a defect in its constitution or vacancy among its members." (Emphasis added)

20. Applicability of Sections 16-E and 16-F to some extent has been restricted by Section 16-FF of Act, 1921 and it provides manner of selection by excluding applicability of Section 16-E(4) and Section 16-F. Section 16-FF reads as under:

***"16-FF. Minority savings as to minority institutions**. - (1) Notwithstanding anything in sub-section (4) of Section 16-E, and Section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in clause (1) of Article 30 of the Constitution shall consist of five members (including its Chairman) nominated by the Committee of Management :*

Provided that one of the members of the Selection Committee shall, -

(a) in the case of appointment of the Head of an Institution, be an expert selected by the Committee of Management from a panel of experts prepared by the Director;

(b) in the case of appointment of a teacher, be the Head of the Institution concerned.

(2) The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed.

(3) No person selected under this section shall be appointed, unless, -

(a) in the case of the Head of an Institution the proposal of appointment has been approved by the Regional Deputy Director of Education; and

(b) in the case of a teacher such proposal has been approved by the Inspector.

(4) The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualifications prescribed and is otherwise eligible.

(5) Where the Regional Deputy Director of Education or the Inspector, as the case may be. does not approve of a candidate selected under this section, the Committee of Management may, within three weeks from the date of receipt of such

disapproval, make a representation to the Director in the case of the Head of Institution, and to the Regional Deputy Director of Education in the case of a teacher.

(6) Every order passed by the Director or the Regional Deputy Director of Education on a representation under sub-section (5) shall be final." (Emphasis added)

21. Thus, Section 16-FF of Act, 1921 makes it very clear that Section 16-F will not apply to minority institutions since an overriding effect has been given by non-obstante clause and in respect of Section 16-E non obstinate clause apply to only sub-section(4) and rest Section 16-F therefore, would be applicable.

22. In order to put the things straight, we may also refer to Section 16-EE of Act, 1921, which makes provisions for absorption of retrenched employees. This Section was inserted by U.P. Act No.1 of 1981. Therein Sub-section (6) was inserted by U.P. Act No. 9 of 1981 with effect from 11.02.1981. Section 16-EE has been declared inapplicable to the Institutions established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution of India.

23. Sub-section (2) of Section 16-FF of Act, 1921 provides that procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be 'prescribed'. Section 2(c) of Act, 1921 provides that 'Prescribed' means 'prescribed by Regulations'.

24. Again 'Regulations' are defined in sub-section (e) of Section 2 of Act, 1921. It says that 'Regulation' means Regulations made by Board under Act, 1921. Power to make 'Regulations' have been conferred upon Board vide Section 15, which reads as under:

***"15. Power of Board to make Regulations**. - (1) The Board may make Regulations for the purpose of carrying into effect the provisions of this Act.*

(2) In particular and without prejudice to the generality of the foregoing power the Board may make Regulations providing for all or any of the following matters, namely, -

(a) the constitution, powers and duties of Committees;

(b) the conferment of diplomas and certificates;

(c) the conditions of recognitions of institutions for the purpose of its examinations;

(d) the course of study to be laid down for all certificates and diplomas;

(e) the conditions under which candidates shall be admitted to the examinations of the Board and shall be eligible for diplomas and certificates;

(f) the fees for admission to the examinations of the Board;

(g) the conduct of examinations;

(h) the appointment of examiners and their duties and powers in relation to the Board's examinations;

(i) the election of members to the Board under [clause (c)] of sub-section (1) of Section 3;

(j) the admission of institutions to the privileges of recognition and the withdrawal of recognition;

(k) all matters which by this Act are to be or may be provided for by Regulations;

(l) the conditions under which grants-in-aid shall be given to institutions recognized by the Board;

[(m) the formations of parent-teacher association."

25. Section 16 of Act, 1921, however, provides that Regulations under Section 15 shall be made only with the previous sanction of the State Government and shall be published in the Gazette. Sub-section (2) thereof confers power upon State Government to sanction any Regulations proposed by Board, either without modification or with such modification as may be applicable. Section 16 of Act, 1921 reads as under:

"16. Previous publication and sanction of Regulations made by Board. - *(1) Regulations under Section 15 shall be made only with the previous sanction of the State Government and shall be published in the Gazette.*

(2) The State Government may sanction any such regulation proposed by the Board either without modification or with such modification as it thinks fit."

26. Regulation have been made by Board under Section 15, which are called "Regulations under U.P. Intermediate Education Act, 1921" (hereinafter referred as the Regulations framed under Act, 1921). It starts from Part II-A and divided in four Chapters, i.e., Chapter-I, Chapter-II, Chapter-III and Chapter-IV.

27. Chapter-I deals with "Scheme of Administration" and is referable to Sections 16-A, 16-B and 16-C. Chapter-II deals with Regulations relating to appointment of Heads of the Institutions and teachers and is referable to Sections 16-E, 16-F and 16-FF. Chapter-III deals with conditions of service and is referable to Section 16-G. Chapter-IV deals with Committees of the Board. Then there is Part II-B and it contains Chapters I to XVI, but we are not going in details thereof as the same are not relevant for our purpose. Part-III contains Bye-Laws of Board made under Section 20 of Act, 1921. Part-IV of Regulations deals with Officers and Members of the Board. Part-V deals with Rules of the Board and Part-VI deals with necessary directions regarding allowances in connection with Board's duties.

28. For our purpose Part II-A, Chapter-II of the Regulations is relevant. There also controversy in question is confined to Regulation 17 which provides procedure for selection of Teachers and Principals of recognized educational Institutions by direct recruitment as contemplated in Section 16-FF.

29. Regulation 17 which is the provision in controversy in all these writ petitions, as it stood earlier and amended by Notification dated 20.03.2018 (published in Official Gazette dated 24.03.2018) and further vide Government orders (hereinafter referred to as "G.O.") dated 06.11.2018, 18.04.2019 and 12.08.2019, are placed in the form of Chart as under:

S. No	प्दपज पंस	As amended vide Notification dated 20.03.2018	As amended vide G.O. dated 06.11.2018	As amended vide G.O. dated 18.04.2019	As amended vide G.O. dated 12.08.2019
	17–धारा 16 चच में निर्दिष्ट किसी मान्यता प्राप्त संस्था में सीधी भर्ती	17–धारा 16 चच में निर्दिष्ट किसी मान्यता प्राप्त संस्था में सीधी भर्ती द्वारा संस्था के प्रधान और अध्यापकों की रिक्ति को भरने के लिए	17–धारा 16 चच में निर्दिष्ट किसी मान्यता प्राप्त संस्था में सीधी भर्ती द्वारा संस्था के प्रधान और	17–धारा 16–चच में निर्दिष्ट किसी मान्यता प्राप्त संस्था में सीधी भर्ती द्वारा संस्था के प्रधान और	17–धारा 16–चच में निर्दिष्ट किसी मान्यता प्राप्त संस्था में सीधी भर्ती द्वारा संस्था के प्रधान

	द्वारा संस्था के प्रधान और अध्यापकों की रिक्ति को भरने के लिए निम्नलिखित प्रक्रिया होगी– (क) प्रबन्धाधिकरण द्वारा सीधी भर्ती से भरी जाने वाली रिक्तियों की संख्या अवधारित किये जाने के पश्चात संस्था के प्रबन्धक द्वारा कम से कम एक हिन्दी और एक अंग्रेजी समाचार पत्र में जिसका राज्य में पर्याप्त परिचालन हो, पद विज्ञापित किये जायेंगे जिसमें रिक्तियों के प्रकार (अर्थात अस्थायी है या स्थायी) तथा रिक्तियों की संख्या पद का विवरण (अर्थात् प्रिंसिपल या प्रधानाध्यापक, प्रवक्ता या एल0टी0, सी0टी0 या जे0टी0सी0, बी0टी0सी0 श्रेणी के अध्यापक तथा ऐसे विषय जिसमें या जिनमें प्राध्यापक या	अध्यापकों की रिक्ति को भरने के लिए निम्नलिखित प्रक्रिया होगी– (क) प्रबन्धाधिकरण द्वारा सीधी भर्ती से भरी जाने वाली रिक्तियों की संख्या अवधारित किये जाने के पश्चात संस्था के प्रबन्धक द्वारा कम से कम एक हिन्दी और एक अंग्रेजी समाचार पत्र में जिसका राज्य में पर्याप्त परिचालन हो, पद विज्ञापित किये जायेंगे जिसमें रिक्तियों के प्रकार (अर्थात अस्थायी है या स्थायी) तथा रिक्तियों की संख्या पद का विवरण (अर्थात् प्रिंसिपल	अध्यापकों की रिक्ति को भरने के लिए निम्नलिखित प्रक्रिया होगीः– (क) प्रबन्धिकरण द्वारा सीधी भर्ती से भरी जाने वाली रिक्तियों की संख्या अवधारित किए जाने के पश्चात संस्था के प्रबन्धक द्वारा कम से कम एक हिन्दी और एक अंग्रजी समाचार –पत्र में जिसका राज्य में पर्याप्त परिचलन हो, पद विज्ञापित किए जायेंगे जिसमें रिक्तियों के प्रकार (अर्थात अस्थायी / स्थायी) तथा रिक्तियों की संख्या, पद का विवरण,(अर्थात प्रधानाचार्य,	और अध्यापकों की रिक्ति को भरने के लिए निम्नलिखित प्रक्रिया होगीः– (क) प्रबन्धाधिकरण द्वारा सीधी भर्ती से भरी जाने वाली रिक्तियों की संख्या अवधारित किए जाने के पश्चात संस्था के प्रबन्धक द्वारा कम से कम एक हिन्दी और एक अंग्रजी समाचार –पत्र में जिसका राज्य मे अधिक एवं पर्याप्त परिचलन हो, पद विज्ञापित किए जायेंगे, जिसमें रिक्तियों की संख्या, पद का विवरण, (अर्थात प्रधानाचार्य, प्रधानाध्यापक, प्रवक्ता,
	का राज्य में पर्याप्त परिचालन हो, पद विज्ञापित किये जायेंगे जिसमें रिक्तियों के प्रकार (अर्थात अस्थायी है या स्थायी) तथा रिक्तियों की संख्या पद का विवरण (अर्थात् प्रिंसिपल या प्रधानाध्यापक, प्रवक्ता या एल0टी0, सी0टी0 या जे0टी0सी0, बी0टी0सी0 श्रेणी के अध्यापक तथा ऐसे विषय जिसमें या जिनमें प्राध्यापक	अध्यापक की आवश्यकता हो), पद के लिए विहित वेतनमान और अन्य भत्ते, अपेक्षित अनुभव, न्यूनतम अर्हता और आयु आदि कोई हो तो उनके सम्बन्ध मे विवरण दिये जायेंगे और ऐसा दिनांक (जो साधारणतया विज्ञापन के दिनांक से दो सप्ताह से कम न होना चाहिए) जिस तक प्रबन्धक द्वारा आवेदन–पत्र लिये जायेंगे, विहित किया जायेगा। साथ ही साथ विज्ञापन की एक प्रति सम्बद्ध निरीक्षक को भेजी जायेगी।	या प्रधानाध्यापक, प्रवक्ता या एल0टी0, सी0टी0 या जे0टी0सी0, बी0टी0सी0 श्रेणी के अध्यापक तथा ऐसे विषय जिसमें या जिनमें प्रध्यापक या अध्यापक की आवश्यकता हो), पद के लिए विहित वेतनमान और अन्य भत्ते, अपेक्षित अनुभव, न्यूनतम अर्हता और आयु आदि कोई हो तो उनके सम्बन्ध मे विवरण दिये जायेंगे और ऐसा दिनांक (जो साधारण तया विज्ञापन के दिनांक से दो सप्ताह से कम न होना चाहिए) जिस तक प्रबन्धक द्वारा	प्रधानाध्यापक, प्रवक्ता, सहायक अध्यापक या सम्बद्ध प्राईमरी श्रेणी के अध्यापक) तथा ऐसे विषय जिसमें प्रधानाध्यापक या अध्यापक की आवश्यता हो, पद के लिए विहित वेतन–मान और अन्य भत्ते अपेक्षित अनुभव, न्यूनतम अर्हता और आयु आदि कोई हो तो उनके सम्बन्ध में विवरण दिए जायेंगे और ऐसा दिनांक (जो साधारण तया विज्ञापन के दिनांक से दो सप्ताह से कम न होना चाहिए) जिस तक प्रबन्धक द्वारा	सहायक अध्यापक या सम्बद्ध प्राईमरी श्रेणी के अध्यापक) तथा ऐसे विषय जिसमें प्राध्यापक या अध्यापक की आवश्यकता हो, पद के लिए विहित वेतनमान और अन्य भत्ते, अपेक्षित अनुभव, न्यूनतम अर्हता और आयु आदि कोई हो तो उनके सम्बन्ध में विवरण दिए जायेंगे और ऐसे दिनांक (जो साधारण तया विज्ञापन के दिनांक से दो सप्ताह से कम न होना चाहिए) जिस तक चयनित संस्था(राज्य सरकार द्वारा यथा–नि

	या अध्यापक की आवश्यकता हो), पद के लिए विहित वेतनमान और अन्य भत्ते, अपेक्षित अनुभव, न्यूनतम अर्हता और आयु आदि कोई हो तो उनके सम्बन्ध मे विवरण दिये जायेंगे और ऐसा दिनांक (जो साधारणतया विज्ञापन के दिनांक से दो सप्ताह से कम न होना चाहिए) जिस तक प्रबन्धक द्वारा आवेदन–प		चाहिए) जिस तक प्रबन्धक द्वारा आवेदन –पत्र लिये जायेंगे, विहित किया जायेगा। साथ ही साथ विज्ञापन की एक प्रति सम्बद्ध निरीक्षक को भेजी जायेगी।	आवेदन पत्र लिए जायेंगे, का उल्लेख होना चाहिए। प्रकाशित विज्ञापन की एक प्रति सम्बन्धित मण्डलीय संयुक्त शिक्षा निदेशक /निरीक्षक को भेजी जायेगी	दिष्ट आदेशों के कम में शिक्षा निदेशक द्वारा चयनित) के माध्यम से प्रबन्धाधिकरण ऑनलाइन आवेदन –पत्र प्राप्त करेगा का उल्लेख होना चाहिए। प्रकाशित विज्ञापन की एक प्रति सम्बन्धित मण्डलीय संयुक्त शिक्षा निदेशक /निरीक्षक को भी भेजी जायेगी।

	त्र लिये जायेंगे, विहित किया जायेगा। साथ ही साथ विज्ञापन की एक प्रति सम्बद्ध निरीक्षक को भेजी जायेगी।				
	टिप्पणी–(1) अध्यापकों और संस्था के प्रधान के पदो की समस्त रिक्तियों जो विज्ञापन के समय विद्यमान न हों, विज्ञापित की जायेगी। (2) कोई नया पद विज्ञापित नहीं किया जायेगा जब तक कि प्रबन्धाधिकरण द्वारा उसके सृजन के लिए समुचित प्राधिकारी की स्वीकृति प्राप्त कर ली जाय।	टिप्पणी–(1) अध्यापकों और संस्था के प्रधान के पदो की समस्त रिक्तियों जो विज्ञापन के समय विद्यमान हों, विज्ञापित की जायेगी। (2) कोई नया पद विज्ञापित नहीं किया जायेगा जब तक कि प्रबन्धाधिकरण द्वारा उसके सृजन के लिए समुचित प्राधिकारी की स्वीकृति	टिप्पणी–(1) अध्यापकों और संस्था के प्रधान के पदों की समस्त रिक्तियां जो विज्ञापन के समय विद्यमान हों, विज्ञापित की जायेंगी। (2) कोई नया पद विज्ञापित नहीं किया जायेगा जब तक कि प्रबन्धाधिकरण द्वारा उनके सृजन के लिए समुचित प्राधिकारी की स्वीकृति	टिप्पणी – (1) अध्यापकों और संस्था के प्रधान के पदों की समस्त रिक्तियां जो विज्ञापन के समय विद्यमान हों, विज्ञापित की जायेंगी। (2) कोई नया पद विज्ञापित नहीं किया जायेगा जब तक कि प्रबन्धाधिकरण द्वारा उनके सृजन के लिए समुचित प्राधिकारी की स्वीकृति

	तक कि प्रबन्धाधिकरण द्वारा उसके सृजन के लिए समुचित प्राधिकारी की स्वीकृति प्राप्त न कर ली जाय।		प्राप्त न कर ली जाय।	प्राप्त न कर ली जाय।	प्राप्त न कर ली गई हो।
	(ख) सभी आवेदन पत्र प्रबन्धाधिकरण द्वारा विहित प्रपत्र में दिये जायेंगे और उसमें अर्हतायें, शिक्षण अनुभव और अन्य किसी क्रिया कलापों के सम्बन्धा में समस्त आवश्यक विवरण होंगे और उसके साथ समस्त आवश्यक प्रमाण–पत्रों और प्रशंसा पत्रों की प्रमाणित प्रतियां होंगी। प्रबन्धाधिकारण आवेदन–पत्र के लिए प्रपत्र का मूल्य जो विनियम 10 के खण्ड (क) में निर्दिष्ट धनराशि से अधिक न हो, ले सकता है।	(ख) सभी आवेदन पत्र प्रबन्धाधिकरण द्वारा विहित प्रपत्र में दिये जायेंगे और उसमें अर्हतायें, शिक्षण अनुभव और अन्य किसी क्रिया कलापों के सम्बन्ध में समस्त आवश्यक विवरण होंगे और उसके साथ समस्त आवश्यक प्रमाण–पत्रों और प्रशंसा पत्रों की प्रमाणित प्रतियां होंगी। प्रबन्धाधिकारण आवेदन–पत्र के लिए प्रपत्र का मूल्य जो विनियम 10 के खण्ड (क) में निर्दिष्ट धनराशि से अधिक न हो, ले सकता है।	(ख) सभी आवेदन पत्र प्रबन्धाधिकरण द्वारा विहित प्रपत्र में दिये जायेंगे और उसमें अर्हतायें, शिक्षण अनुभव और अन्य किसी क्रिया कलापों के सम्बन्ध में समस्त आवश्यक विवरण होंगे और उसके साथ समस्त आवश्यक विवरण होंगे और	(ख) सभी आवेदन –पत्र प्रबन्धाधिकरण द्वारा विहित प्रपत्र में दिए जायेंगे और उसमें अर्हतायें, शिक्षण अनुभव और अन्य किसी क्रिया– कलापों के सम्बन्ध में समस्त आवश्यक विवरण होंगे और उसके साथ समस्त आवश्यक प्रमाण पत्रों और प्रशंसा–	(ख) प्रबन्धाधिकरण चयनित संस्था के माध्यम से सभी आवेदन –पत्र विहित प्रारूप में ऑनलाइन प्राप्त करेगा, जिसमें अर्हतायें, शिक्षण अनुभव ओर अन्य किसी क्रिया– कलापों के सम्बन्ध में समस्त आवश्यक विवरण होंगे। आवेदन –पत्र के साथ समस्त आवश्यक

	यक प्रमाण –पत्रों और प्रशंसा पत्रों की प्रमाणित प्रतियां होंगी। प्रबन्धाधिकारण आवेदन–पत्र के लिए प्रपत्र का मूल्य जो विनियम 10 के खण्ड (क) में निर्दिष्ट धनराशि से अधिक न हो, ले सकता है।	त्र के लिए प्रपत्र का मूल्य जो विनियम 10 के खण्ड (क) में निर्दिष्ट धनराशि से अधिक न हो, ले सकता है।	उसके साथ समस्त आवश्यक प्रमाण–पत्रों और प्रशंसा पत्रों की प्रमाणित प्रतियां होंगी। प्रबन्धाधिकारण आवेदन –पत्र के लिए प्रपत्र का मूल्य जो विनियम 10 के खण्ड (क) में निर्दिष्ट धनराशि से अधिक न हो, ले सकता है।	पत्रों की प्रमाणित प्रतियां होगी। प्रबन्धाधिकरण आवेदन –पत्र के लिए प्रपत्र का मूल, जो विनिमय 10 के खण्ड (क) में है और प्रशंसा– पत्रों की प्रमाणित प्रतियां होगी। प्रबन्धाधिकरण आवेदन –पत्र के लिए प्रपत्र का मूल्य जो विनिमय 10 के खण्ड (क) में निर्दिष्ट धनराशि से अधिक न हो, ले सकता है।	प्रमाण–पत्रों की प्रमाणित प्रतियां ऑनलाईन प्राप्त की जायेंगी।
	(ग) किसी संस्था में नियोजित और अन्यत्र या किसी संस्था में किसी पद के लिए आवेदन करने वाले व्यक्ति	(ग) किसी संस्था में नियोजित और अन्यत्र या उसी संस्था में किसी पद के लिए आवेदन करने वाले व्यक्ति का आवेदन–पत्र उसके नियोजक द्वारा रोका नहीं जायेगा बल्कि उसे सम्बद्ध प्राधिकारी को तुरन्त	(ग) किसी संस्था में नियोजित और अन्यत्र या उसी संस्था में किसी पद के लिए आवेदन करने वाले व्यक्ति का आवेदन –पत्र उसके नियोजक द्वारा	(ग) किसी संस्था में नियोजित और अन्यत्र या उसी संस्था में किसी पद के लिए आवेदन करने वाले व्यक्ति का आवेदन –पत्र उसके नियोजक द्वारा	(ग) किसी संस्था में नियोजित और अन्यत्र या उसी संस्था में किसी पद के लिए आवेदन करने वाले व्यक्ति का आवेदन –पत्र उसके नियोजक द्वारा

	का आवेदन–पत्र उसके नियोजक द्वारा रोका नहीं जायेगा बल्कि उसे सम्बद्ध प्राधिकारी को तुरन्त अग्रसारित किया जायेगा।	अग्रसारित किया जायेगा।	रोका नहीं जायेगा बल्कि उसे सम्बद्ध प्राधिकारी को तुरन्त अग्रसारित किया जायेगा।	रोका नहीं जायेगा बल्कि उसे सम्बद्ध प्राधिकारी को तुरन्त अग्रसारित किया जायेगा।	रोका नहीं जायेगा बल्कि उसे सम्बन्धित प्राधिकारी को तुरन्त अग्रसारित किया जायेगा।
	(घ) अभ्यर्थियों से प्राप्त समस्त आवेदन–पत्र क्रमानुसार संख्यांकित और रजिस्टर में दर्ज किये जायेंगे और अभ्यर्थियों के विवरण समुचित स्तम्भों में अंकित किये जायेंगे, प्रत्येक पद के	(घ) अभ्यर्थियों से प्राप्त समस्त आवेदन–पत्र क्रमानुसार संख्यांकित और रजिस्टर में दर्ज किये जायेंगे और अभ्यर्थियों के विवरण समुचित स्तम्भों में अंकित किये जायेंगे। उक्त आवेदन–पत्रों की संख्यात्मक विवरण सहित सूचना संस्था प्रधान हेतु सम्भागीय संयुक्त शिक्षा निदेशक को तथा शिक्षकों हेतु जिला	(घ) अभ्यर्थियों से प्राप्त समस्त आवेदन–पत्र क्रमानुसार संख्यांकित और रजिस्टर में दर्ज किए जायेंगे, और अभ्यर्थियों के विवरण समुचित स्तम्भों में अंकित किये जायेंगे। उक्त आवेदन पत्रों की संख्यात्मक विवरण सहित सूचना संस्था प्रधान हेतु	(घ) अभ्यर्थियों से प्राप्त समस्त आवेदन–पत्र क्रमानुसार संख्यांकित करने के उपरान्त रजिस्टर में तिथिवार दर्ज किये जायेंगें और अभ्यार्थियों के विवरण समुचित स्तम्भों में अंकित किये जायेंगें। प्रबन्धाधिकरण उक्त आवेदन पत्रों सहित संख्यात्म	(घ) चयनित संस्था द्वारा अभ्यर्थियों से प्राप्त ऑनलाइन समस्त आवेदन–पत्रों की सूची प्रबन्धाधिकरण को उपलब्ध करायी जायेगी। इसके अतिरिक्त संस्था प्रधान के सम्बन्ध में सम्बन्धित संयुक्त शिक्षा निदेशक एवं अध्यापकों के सम्बन्ध में

	लिए साक्षात्कार के लिए बुलाये जाने वाले अभ्यर्थियों की संख्या यदि (आवेदको की संख्या उतनी हो) सात होगी। प्रबन्धक, चयन समिति के समस्त सदस्यों तथा समस्त ऐसे अभ्यर्थियों को जो साक्षात्कार के लिए बुलाये जाये, चयन करने के कम से कम दस दिन पूर्व चयन का दिनांक, समय और स्थान की सूचना	विद्यालय निरीक्षक को उपलब्ध करायेगां सम्भागीय संयुक्त शिक्षा निदेशक तथा जिला विद्यालय निरीक्षक द्वारा शिक्षा निदेशक द्वारा निर्धारित निजी संस्था के चयन स्क्रीनिंग / लिखित परीक्षा आयोजित की जायेगी। उक्त प्राप्त आवेदन पत्रों के आधार पर सम्बन्धित चयनित संस्था द्वारा संस्था प्रधान / प्रवक्ता हेतु 90 अंकों की लिखित परीक्षा (स्क्रीनिंग टेस्ट) कराई जायेगी। साक्षात्कार 10 अंकों का होगा। सहायक अध्यापकों के चयन हेतु उक्त लिखित परीक्षा 100 अंकों की होगी तथा साक्षात्कार नहीं लिया जायेगा। उक्त स्क्रीनिंग टेस्ट में रिक्ति के	संभागीय संयुक्त शिक्षा निदेशक को तथा शिक्षकों हेतु जिला विद्यालय निरीक्षक को उपलब्ध करायेगा। संभागीय संयुक्त शिक्षा निदेशक तथा जिला विद्यालय निरीक्षक द्वारा शिक्षा निदेशक द्वारा निर्धारित निजी संस्था से चयन स्क्रीनिंग /लिखित परीक्षा आयोजित की जायेगी। उक्त प्राप्त आवेदन पत्रों के आधार पर सम्बन्धित चयनित संस्था द्वारा संस्था प्रधान/ प्रवक्ता हेतु 90 अंकों की लिखित परीक्षा (स्क्रीनिंग टेस्ट) करायी जायेगी। साक्षात्कार 10	क विवरण की सूचना संस्था प्रधान हेतु मण्डलीय संयुक्त शिक्षा निदेशक तथा शिक्षकों हेतु जिला विद्यालय निरीक्षक को उपलब्ध करायेगा। मण्डलीय संयुक्त शिक्षा निदेशक तथा जिला विद्यालय निरीक्षक द्वारा, शिक्षा निदेशक द्वारा निर्धारित संस्था के माध्यम से स्क्रीनिंग /लिखित परीक्षा आयोजित करायेगा। उक्त प्राप्त आवेदन पत्रों के आधार पर सम्बन्धित चयनित संस्था द्वारा संस्था प्रधान/ प्रवक्ता /सहाय	सम्बन्धित जिला विद्यालय निरीक्षक को भी उक्त सूची की प्रति उपलब्ध करायी जायेगी। प्रधान पद हेतु मण्डलीय संयुक्त शिक्षा निदेशक तथा शिक्षकों हेतु जिला विद्यालय निरीक्षक द्वारा स्क्रीनिंग /लिखित परीक्षा एव साक्षात्कार के सम्बन्ध में प्रबन्धाधिकरण एवं स्क्रीनिंग /लिखित परीक्षा हेतु चयनित संस्था के मध्य समन्वय /पर्यवेक्षण का कार्य किया जायेगा। उक्त प्राप्त आवेदन पत्रों के आधार पर सम्बन्धित चयनित संस्था द्वारा संस्था

	रजिस्टर्ड डाक द्वारा देगा। चयन समिति तदनुसार चयन करेगी। यदि किसी अपरिहार्य कारणवश धारा–16चच की उपधारा (1) के परन्तुक के खण्ड (क) के अधीन प्रबन्ध समिति द्वारा चयन किया गया विशेषज्ञ निर्धारित दिनांक को चयन में उपस्थित न हो सके तो चयन समिति की बैठक स्थगित कर दी जायेगी।	सापेक्ष प्रत्येक पद हेतु श्रेष्ठता के आधार पर 05 चयनित अभ्यर्थियों की सूची (पैनल) तैयार की जायेगी। चयनित संस्था उक्त सूची को संस्था प्रधान हेतु सम्भागीय संयुक्त शिक्षा निदेशक तथा शिक्षकों हेतु जिला विद्यालय निरीक्षक को उपलब्ध करायेगा। सम्भागीय संयुक्त शिक्षा निदेशक / जिला विद्यालय निरीक्षक द्वारा उक्त सूची (पैनल) को सम्बन्धित संस्था प्रबन्धक को इस आशय से उपलब्ध कराई जायेगी कि पैनल में चयनित अभ्यर्थियों के प्रमाण–पत्रों का सम्यक् परीक्षण कर सम्बन्धित चयन समिति संस्था प्रधान एवं प्रवक्ता पद हेतु	अंकों का होगा। सहायक अध्यापकों के चयन हेतु उक्त लिखित परीक्षा 100 अंकों की होगी तथा साक्षात्कार नहीं लिया जायेगा। अल्पसंख्यक संस्थाओं में सहायक अध्यापकों के चयन के सम्बन्ध में लिखित परीक्षा का परिणाम जिला विद्यालय निरीक्षक एवं विद्यालय प्रबन्धतंत्र को उपलब्ध कराया जायेगा और विद्यालय प्रबन्धतंत्र द्वारा उपरोक्त शासनादेश संख्या–2167/15–12–2017–1600(550)/2017 दिनांक 12–3–2018 में की गयी व्यवस्था	क अध्यापक तथा सम्बद्ध प्राईमरी अध्यापक हेतु 90 अंको की स्क्रीनिंग / लिखित परीक्षा करायी जायेगी। साक्षात्कार 10 अंकों का होगा। उक्त स्क्रीनिंग / लिखित परीक्षा में रिक्ति के सापेक्ष प्रत्येक पद हेतु श्रेष्ठता के आधार पर 05 अभयर्थियों की सूची (पैनल) तैयार की जायेगी। चयनित संस्था उक्त सूची को संस्था प्रधान हेतु मण्डलीय संयुक्त शिक्षा निदेशक तथा शिक्षकों हेतु सम्बन्धित जिला विद्यालय निरीक्षक को उपलब्ध करायेगा।	प्रधान / प्रवक्ता / सहायकत अध्यापक तथा सम्बद्ध प्राईमरी अध्यापक हेतु 90 अंकों की स्क्रीनिंग / लिखित परीक्षा करायी जायेगी। साक्षात्कार 10 अंकों का होगा। उक्त स्क्रीनिंग / लिखित परीक्षा में प्रत्येक रिक्ति पद के प्रति 05 अभ्यर्थियों की सूची चयनित संस्था द्वारा तैयार की जायेगी। चयनित संस्था द्वारा उक्त सूची प्रबन्धाधिकरण को उपलब्ध करायी जायेगी तथा उसकी प्रति सम्बन्धित संयुक्त शिक्षा निदेशक एवं जिला विद्यालय निरीक्षक

		चयनित अभ्यर्थियों का 10 अंकों का साक्षात्कार आयोजित करे। सहायक अध्यापकों के उपलब्ध कराये गये पैनल में चयनित अभ्यर्थियों जिसमें प्रतीक्षा सूची भी सम्मिलित होगी, के प्रमाण–पत्रों का यथावश्यक सत्यापन कराये जाने के उपरान्त श्रेष्ठता क्रम के अनुसार प्रबन्धक द्वारा जिला विद्यालय निरीक्षक के अनुमोदन के उपरान्त नियुक्ति की जायेगी। संस्था प्रधान एवं प्रवक्ता पद के प्रत्येक पद के लिए साक्षात्कार के लिए बुलाये जाने वाले अभ्यर्थियों को जो साक्षात्कार के लिए बुलाये जायें चयन करने के कम से कम 10 दिन पूर्व चयन का दिनांक, समय और स्थान की सूचना	के अनुसार नियुक्ति की कार्यवाही की जायेगीा सम्भागीय संयुक्त शिक्षा निदेशक / जिला विद्यालय निरीक्षक द्वारा उक्त सूची को सम्बन्धित संस्था प्रबन्धक को इस आशय से उपलब्ध करायी जायेगी कि सूची में चयनित अभ्यर्थियों के प्रमाण पत्रों का सम्यक परीक्षण कर, सम्बन्धित चयन समिति संस्था प्रधान एवं प्रवक्ता पद हेतु चयनित अभ्यर्थियों का 10 अंकों का साक्षात्कार आयोजित करे। सहायक अध्यापकों की उपलब्ध करायी गई सूची	मण्डलीय संयुक्त शिक्षा निदेशक / जिला विद्यालय निरीक्षक द्वारा उक्त सूची (पैनल) को सम्बन्धित संस्था प्रबन्धक को इस आशय से उपलब्ध कराया जायेगा कि पैनल में चयनित अभ्यर्थियों के प्रमाण–पत्रों का सम्यक परीक्षण कर, सम्बधित चयन समिति संस्था प्रधान / प्रवक्ता / सहायक अध्यापक / सम्बद्ध प्राईमरी अध्यापक पद हेतु चयनित अभ्यर्थियों का 10 अंकों का साक्षात्कार आयोजित करें। संस्था प्रधान / प्रवक्ता / सहायक अध्यापक / सम्बद्ध	को उपलब्ध करायी जायेगी। प्रबन्धाधिकरण द्वारा स्क्रीनिंग / लिखित परीक्षा में चयनित अभ्यर्थियों के प्रमाण–पत्रों का सम्यक परीक्षण करने के उपरान्त सम्बन्धित चयन समिति संस्था प्रधान / प्रवक्ता / सहायक अध्यापक / सम्बद्ध प्राईमरी अध्यापक पद हेतु 10 अंकों का साक्षात्कार आयोजित करेगी। संस्था प्रधान / प्रवक्ता / सहायक अध्यापक / सम्बद्ध प्राईमरी अध्यापक पद के प्रत्येक पद हेतु साक्षात्कार के लिए बुलाये जाने वाले अभ्यर्थियों को,

		रजिस्टर्ड डाक द्वारा देगा। चयन समिति तद्नुसार साक्षात्कार करायेगी। चयन समिति लिखित परीक्षा तथा साक्षात्कार में प्राप्त अंकों के आधार पर संस्था प्रधान एवं शिक्षक का चयन करेगी। यदि किसी अपरिहार्य कारणवश धारा–16 चच की उपधारा (1) के परन्तुक के खण्ड (क) के अधीन प्रबन्ध समिति द्वारा चयन किया गया विशेषज्ञ निर्धारित दिनांक को चयन में उपस्थित न हो सके तो चयन समिति की बैठक स्थगित कर दी जायेगी।	में चयनित अभ्यर्थियों, जिसमें प्रतीक्षा सूची भी सम्मिलित होगी, के प्रमाण पत्रों का यथावश्यक सत्यापन कराये जाने के उपरान्त श्रेष्ठता क्रम के अनुसार प्रबन्धक द्वारा जिला विद्यालय निरीक्षक के अनुमोदन के उपरान्त नियुक्ति की जायेगी। संस्था प्रधान एवं प्रवक्ता पद के प्रत्येक पद के लिए साक्षात्कार के लिए बुलाये जाने वाले अभ्यर्थियों को जो साक्षात्कार के लिए बुलाये जायें चयन करने के कम से कम 10 दिन पूर्व चयन का दिनांक,	प्राईमरी अध्यापक पद के प्रत्येक पद के लिए साक्षात्कार बुलाये जाने वाले अभ्यर्थियों को, साक्षात्कार तिथि से कम से कम 15 दिन पूर्व साक्षात्कार का दिनांक, समय और स्थान की सूचना रजिस्टर्ड डाक द्वारा संस्था प्रबन्धक द्वारा प्रेषित की जायेगी। निर्धारित तिथि पर चयन समिति तद्नुसार साक्षात्कार करायेगी। चयन समिति स्क्रीनिंग/लिखित परीक्षा तथा साक्षात्कार में प्राप्त अंकों के योग से श्रेष्ठता के आधार पर संस्था प्रधान	साक्षात्कार तिथि से कम से कम 15 दिन पूर्व साक्षात्कार का दिनांक, समय और स्थान की सूचना रजिस्टर्ड डाक द्वारा संस्था प्रबन्धक द्वारा प्रेषित की जायेगी। निर्धारित तिथि पर चयन समिति द्वारा तद्नुसार साक्षात्कार लिया जायेगा। चयन समिति स्क्रीनिंग/लिखित परीक्षा एवं साक्षात्कार में प्राप्त अंकों को जोडकर संस्था प्रधान एवं शिक्षक का चयन करेगी। यदि किसी अपरिहार्य कारणवश धारा–16 चच की उपधारा (1) के

			समय और स्थान की सूचना रजिस्टर्ड डाक द्वारा देगा। चयन समिति तद्नुसार साक्षात्कार करायेगी। चयन समिति लिखित परीक्षा तथा साक्षात्कार में प्राप्त अंकों के आधार पर संस्था प्रधान एवं शिक्षक का चयन करेगी। यदि किसी अपरिहार्य कारणवश धारा–16 चच की उपधारा (1) के परन्तुक के खण्ड (क) के अधीन प्रबन्ध समिति द्वारा चयन किया गया विशेषज्ञ निर्धारित दिनांक को चयन में उपस्थित न हो	एवं शिक्षक का चयन करेगी। यदि किसी अपरिहार्य कारणवश धारा–16 चच की उपधारा (1) के परन्तुक के खण्ड (क) के अधीन प्रबन्ध समिति द्वारा चयन किया गया विशेषज्ञ निर्धारित तिथि को चयन समिति की बैठक में उपस्थित न हो सके तो चयन समिति की बैठक स्थागित कर दी जायेगी।	परन्तुक के खण्ड (क) के अधीन प्रबन्ध समिति द्वारा चयन किया गया विशेषज्ञ निर्धारित तिथि को चयन समिति की बैठक में उपस्थित न हो सके तो चयन समिति की बैठक स्थागित कर दी जायेगी।

			सके तो चयन समिति की बैठक स्थगित कर दी जायेगी।		
		(ड़) विनियम 10 के खण्ड (ड़) और (च) के और विनियम 11, 12 तथा 16 के उपबन्ध आवश्यक परिवर्तन सहित, इस विनियम के अधीन किये गये चयन पर लागू होंगे।	(ड़) विनियम 10 के खण्ड (ड़) और (च) के और विनियम 11, 12 तथा 16 के उपबन्ध आवश्य क परिवर्तन सहित, इस विनियम के अधीन किये गये चयन पर लागू होंगे।	(ड) विनियम 10 के खण्ड (ड) और (च) के और विनिमय 11, 12 तथा 16 के उपबन्ध आवश्य क परिवर्तन सहित, इस विनियम के अधीन किये गये चयन पर लागू होंगे।	(ड) विनियम 10 क खण्ड (ड) और (च) के और विनियम 11,12 तथा 16 के उपबन्ध संशोधन सहित ,इस विनियम के अधीन किये गये चयन पर लागू होंगे।
		(च) प्रत्येक सम्भाग के लिए निदेशक द्वारा विशेषज्ञों की एक–एक नामिका जिसमें विनियम 14 में निर्दिष्ट प्रवर्ग (क) से चुने गये 15 या अधिक व्यक्ति होंगे, तैयार की जायेगी और उसे सम्बद्ध सम्भागीय उप शिक्षा निदेशकों के पास भेज दिया	(च) प्रत्येक सम्भाग के लिए निदेशक द्वारा विशेषज्ञों की एक–एक नामिका जिसमें विनियम 14 में निर्दिष्ट प्रवर्ग (क) से चुने गये 15 या अधिक व्यक्ति होंगे, तैयार की जायेगी और उसे सम्बद्ध	(च) प्रत्येक मण्डल के लिए निदेशक द्वारा विशेषज्ञों की एक–एक नामिका (पैनल) जिसमें विनियम 14 में निर्दिष्ट प्रवर्ग (क) से चुने गये 15 या अधिक व्यक्ति होंगे, तैयार की जायेगी और उसे	(च) प्रत्येक मण्डल के लिए निदेशक द्वारा विशेषज्ञों की एक–एक नामिका (पैनल) जिसमें विनियम 14 में निर्दिष्ट प्रवर्ग (क) से चुने गये 15 या अधिक व्यक्ति होंगे, तैयार की जायेगी और उसे

		जायेगा, सम्भागीय संयुक्त शिक्षा निदेशक प्रबन्धाधिक रण से विशेषज्ञों के नाम भेजने का अनुरोध प्राप्त होते ही उक्त नामिका में से तीन विशेषज्ञों के नाम मुहरबन्द आवरण में प्रबन्धाधिक रण को उसके प्रबन्धक के माध्यम से संसूचित करेगा। विशेषज्ञों की सम्भागीय नामिका तब तक विधिमान्य रहेगी जब तक कि उसके स्थान पर कोई नई नामिका न रखी जाय।	सम्भागी य संयुक्त शिक्षा निदेशकों के पास भेज दिया जायेगा, सम्भागी य सयुक्त शिक्षा निदेशक प्रबन्धाधि करण से विशेषज्ञों के नाम भेजने का अनुरोध प्राप्त होते ही उक्त नामिका में से तीन विशेषज्ञों के नाम मुहरबन्द आवरण में प्रबन्धाधि करण को उसके प्रबन्धक के माध्यम से संसूचित करेगा। विशेषज्ञों की सम्भागी य नामिका तब तक विधिमान्य रहेगी जब तक कि उसके स्थान पर कोई नई नामिका न रखी जाय।	सम्बन्धि त मण्डलीय संयुक्त शिक्षा निदेशकों के पास भेज दी जायेगी, मण्डलीय संयुक्त शिक्षा निदेशक प्रबन्धाधि करण से विशेषज्ञों के नाम भेजने का अनुरोध प्राप्त होते ही उक्त नामिका में से तीन विशेषज्ञों के नाम मुहरबन्द आवरण में प्रबन्धाधि करण को उसके प्रबन्धक के माध्यम से संसूचित करेगा। विशेषज्ञों की मण्डलीय नामिका (पैनल) तब तक विधिमान्य रहेगी जब तक कि उसके स्थान पर कोई नई नामिका न रखी जाय।	सम्बन्धि त मण्डलीय संयुक्त शिक्षा निदेशकों के पास भेज दी जायेगी, मण्डलीय संयुक्त शिक्षा निदेशक प्रबन्धाधि करण से विशेषज्ञों के नाम भेजने का अनुरोध प्राप्त होते ही उक्त नामिका में से तीन विशेषज्ञों के नाम मुहरबन्द आवरण में प्रबन्धाधि करण को उसके प्रबन्धक के माध्यम से संसूचित करेगा। विशेषज्ञों की मण्डलीय नामिका (पैनल) तब तक विधिमान्य रहेगी जब तक कि उसके स्थान पर कोई नई नामिका (पैनल) न रखी जाय।
		(छ) किसी	(छ)	(छ)	(छ)

		पद के लिए समस्त अभ्यर्थियों का साक्षात्कार कर लिए जाने के पश्चात् चयन समिति का सभापति किये गये चयन की कार्यवाहियों पर दो प्रतियों में एक टिप्पणी तैयार करायेगा जिसमें चुने गये अभ्यर्थियों के नाम तथा प्रतीक्षा सूची के दो अन्य अभ्यर्थियों के नाम उल्लिखित किये जायेंगे। इसी प्रकार तैयार की गयी टिप्पणी पर चयन समिति के सभापति तथा अन्य सदस्य हस्ताक्षर करेंगे और अपना–अपना पूर्णनाम, पदनाम और पता तथा दिनांक उल्लिखित करेंगे। सभापति इस टिप्पणी की एक प्रति तथा विनियम 10 के खण्ड	किसी पद के लिए समस्त अभ्यर्थियों का साक्षात्कार कर लिए जाने के पश्चात् चयन समिति का सभापति किये गये चयन की कार्यवाहियों पर दो प्रतियों में एक टिप्पणी तैयार करायेगा जिसमें चुने गये अभ्यर्थियों के नाम तथा प्रतीक्षा सूची के दो अन्य अभ्यर्थियों के नाम उल्लिखित किये जायेंगे। इसी प्रकार तैयार की गयी टिप्पणी पर चयन समिति के सभापति तथा अन्य सदस्य हस्ताक्षर करेंगे और अपना–अपना पूर्णनाम,	किसी पद के लिए समस्त अभ्यर्थियों का साक्षात्कार कर लिए जाने के पश्चात् चयन समिति का सभापति किये गये चयन की कार्यवाहियों पर दो प्रतियों में एक टिप्पणी तैयार करायेगा जिसमें चुने गये अभ्यर्थियों के नाम तथा प्रतीक्षा सूची के दो अन्य अभ्यर्थियों के नाम उल्लेखित किये जायेंगे। इसी प्रकार तैयार की गयी टिप्पणी पर चयन समिति के सभापति तथा अन्य सदस्य हस्ताक्षर करेंगे और अपना–अपना पूर्णनाम	किसी पद के सापेक्ष साक्षात्कार हेतु सूचीबद्व अभ्यर्थियों का साक्षात्कार कर लिए जाने के पश्चात चयन समिति का सभापति विनियम –17 घ में वर्णित प्रकिया के अधीन चयनित अभ्यर्थियों की सूची तैयार करायेगा जिसमें चुने गये अभ्यर्थियों के नाम तथा प्रतीक्षा सूची के दो अन्य अभ्यर्थियों के नाम उल्लेखित किये जायेंगे। इसी प्रकार तैयार की गयी सूची पर चयन समिति के सभापति तथा अन्य सदस्य हस्ताक्षर करेंगे और अपना–
		(च) में निर्दिष्ट विवरण की प्रति धारा 16–चच के अधीन यथा अपेक्षित अनुमोदन के लिए, यथास्थिति, सम्भागीय संयुक्त शिक्षा निदेशक या निरीक्षक को तुरन्त अग्रसारित करेगा। सम्बन्धित अभिलेखों के प्राप्त होने के दिनांक के छः माह के भीतर, यथास्थिति, सम्भागीय संयुक्त शिक्षा निदेशक या निरीक्षक, उन पर अपना निर्णय देंगे और ऐसा न करने पर अनुमोदन प्रदान कर दिया गया समझा जायेगा।	पदनाम और पता तथा दिनांक उल्लिखित करेंगे। सभापति इस टिप्पणी की एक प्रति तथा विनियम 10 के खण्ड (च) में निर्दिष्ट विवरण की प्रति धारा 16–चच के अधीन यथा अपेक्षित अनुमोदन के लिए, यथास्थिति, सम्भागीय संयुक्त शिक्षा निदेशक या निरीक्षक को तुरन्त अग्रसारित करेगा। सम्बन्धित अभिलेखों के प्राप्त होने के दिनांक के छः माह के भीतर, यथास्थिति, सम्भागीय संयुक्त शिक्षा निदेशक या निरीक्षक,	, पदनाम और पता तथा दिनांक उल्लिखित करेंगे। सभापति इस टिप्पणी की एक प्रति तथा विनियम 10 के खण्ड (च) में निर्दिष्ट विवरण की प्रति धारा 16–चच के अधीन यथा अपेक्षित अनुमोदन के लिए यथास्थिति, मण्डलीय संयुक्त शिक्षा निदेशक या निरीक्षक को तुरन्त अग्रसारित करेगा। सम्बन्धित अभिलेखों के प्राप्त होने के दिनांक से दो सप्ताह के भीतर यथास्थिति, मण्डलीय संयुक्त शिक्षा निदेशक या निरीक्षक,	अपना पूर्णनाम, पदनाम और पता तथा दिनांक उल्लिखित करेंगे। सभापति इस सूची की एक प्रति तथा विनियम 10 के खण्ड (च) में निर्दिष्ट विवरण की प्रति धारा 16–चच के अधीन यथा अपेक्षित अनुमोदन के लिए, यथास्थिति, मण्डलीय संयुक्त शिक्षा निदेशक या निरीक्षक को तुरन्त अग्रसारित करेगा। सम्बन्धित अभिलेखों के प्राप्त होने के दिनांक से दो सप्ताह के भीतर यथास्थिति, मण्डलीय संयुक्त शिक्षा निदेशक या

			उन पर अपना निर्णय देंगे और ऐसा न करने पर अनुमोद न प्रदान कर दिया गया समझा जायेगा।	उन पर अपना निर्णय देंगे और ऐसा न करने पर अनुमोद न प्रदान कर दिया गया समझा जायेगा।	निरीक्षक , उन पर अपना निर्णय देंगे और ऐसा न करने पर अनुमोद न प्रदान कर दिया गया समझा जायेगा।

30. The above provisions contain the manner and procedure of selection and appointment of Teachers and Head of institutions, which includes minority institutions also. Section 16-E of Act, 1921 is applicable to all the secondary institutions as they are, though some difference has been made in the procedure prescribed under Section 16-E and 16-F of Act, 1921 by Section 16-FF, in respect of Educational Institutions of minority. Sections 16-E and 16-F of Act, 1921, in brief, say:

(A) The post of Head of institution and Teachers, which is to be filled in by direct recruitment, shall be intimated to the Inspector.

(B) The advertisement of the vacancy shall be published, in at least two newspapers having adequate and wide circulation in State, giving details of post, as may be prescribed.

(C) No person shall be appointed as Head of the Institution or Teacher unless he/she possesses minimum qualification prescribed by Regulations.

(D) There is an exception i.e. with regard to exemption in qualification. Proviso to Section 16-E (3) of Act, 1921 says that if a person is granted exemption by U.P. Board having regard to his education, experience and other attainments; such a person even if does not possess prescribed qualification, may be appointed. This is an enabling provision and none has a right to claim appointment, if he does not possess minimum qualification by claiming exemption.

(E) After an advertisement has been made, prospective candidates shall submit applications for appointment to Inspector along with fee, which shall be such, as prescribed.

(F) After receiving all the applications, first process of selection commences at the level of Inspector, who shall award quality point marks to each candidate on the basis of qualifications mentioned in the application and in accordance with the procedure and principles, as prescribed, i.e., provided in the Regulations.

(G) After awarding quality point marks, Inspector shall forward all the applications to the Committee of Management.

(H) Committee of Management shall constitute a Selection Committee; constitution whereof is prescribed in Section 16-F, as under:

(a) Selection Committee of Head of Institution, i.e., Principal, shall consists of:

(i) President or any member of Committee of Management nominated by the Committee by resolution, who shall be the Chairman of Selection Committee.

(ii) A member of Committee of Management, other than nominated above, as member.

(iii) Three experts nominated by Regional Deputy Director of Education from persons not belonging to the District in which the Institution is situated, out of panel of names prepared under this Section. In other words, in respect of every District, a panel of Experts shall be prepared and when Experts are to be nominated, Regional Deputy Director or Education

shall select Experts from the panel of Districts, other than the District, in which the Institution, wherein selection is to be made, situate.

(b) For Selection of a Teacher, Selection Committee shall consists of:

(i) President or member of Committee of Management nominated by the Committee, by resolution, who shall be the Chairman.

(ii) Head of the Institution, i.e., Principal of the Institution shall be a member.

(iii) Three Experts nominated by the Inspector from a Panel of Experts prepared for this purpose but in respect of a District other than the District in which the Institution wherein the selection is to be made, situate.

(c) If there is no Committee of Management, then the Authorized Controller shall substitute the person, referred to as Chairman and member from Committee of Management, above.

(d) For the purpose of preparing Panel of Experts, Director shall prepare a list of every region in the manner prescribed and tenure of such panel, once prepared, shall be three years. It shall be revised once every three years.

(I) The procedure/business, needs to be followed by Selection Committee, shall be such as may be prescribed by Regulations.

(J) Selection Committee after interview shall prepare a list in order of preference, as far as practicable, of three names for each post found by it to be suitable for appointment.

(K) Selection Committee shall communicate its recommendations together with list of candidates prepared in order of preference to Committee of Management.

(L) Committee of Management shall offer appointment, to the candidates in first preference of the selection and on his failure to join the post, to the next one.

(M) If Committee of Management does not agree with the recommendations of Selection Committee, it shall refer the matter together with reasons of such disagreement to Regional Deputy Director of Education where the appointment relates to the post of Principal and to Inspector if the appointment relates to a Teacher. The decision of Regional Deputy Director or Inspector, as the case may be, shall be final.

(N) Where Selection Committee does not approve any candidate or finds no candidate suitable for appointment, fresh selection shall be held.

(O) The State Government shall have over all power to examine whether an appointment of a Principal of the Institution i.e. Head of the Institution made is in contravention of the provisions of Act, 1921 and after giving opportunity to such person may cancel such appointment and pass consequential order.

(P) In respect of a Teacher, whose appointment is not in accordance with the provisions of Act, 1921, similar power has been conferred upon Director, which shall also be exercised in the same manner as in respect of Head of Institution such power is exercisable by State Government.

(Q) A power of temporary appointment has been conferred without reference to Selection Committee if there is a temporary vacancy caused due to grant of leave for a period not exceeding six months or a substantive vacancy has occurred on account of death, termination or otherwise, during an educational session and procedure for such appointment would be such as prescribed by Regulations.

(M) There is a restriction that such temporary appointment which is made without reference to Selection Committee shall not continue beyond the end of

educational session, during which appointment is made, and this restriction has been given overriding effect by non-obstante clause in proviso to Section 16-E(11) of Act, 1921.

31. This is general procedure applicable for selection of a Head of the Institution and Teacher in a secondary education institution. However, a deviation/distinction has been made to some extent in respect of minority institutions by Section 16-FF of Act, 1921. It provides, where the institution is a minority institution, Selection Committee for appointment of Head of Institution or a Teacher, as the case may be, shall consists of five members, including Chairman, which shall be nominated by Committee of Management. However, out of five members, one of the member shall be an expert, selected by Committee of Management from the panel of experts prepared by Director of Education, if Selection Committee is formed for selection to the post of Head of Institution. In the case of appointment of a Teacher, one of the member of Selection Committee shall be Head of the Institution. The procedure to be followed by Selection Committee under Section 16-FF (1) shall be such as prescribed by Regulations.

32. Section 16-F also provides that any person selected shall not be appointed unless his appointment is approved by Regional Deputy Director of Education where Head of Institution is to be appointed and by Inspector in case of Teacher. In order to check any inaction or lethargy on the part of Regional Deputy Director of Education or Inspector with regard to approval, it is also provided that they shall not withhold approval for selection under Section 16-FF unless the person concerned lacks minimum qualification prescribed. Meaning thereby if the candidate possesses requisite qualification and is otherwise eligible, approval required from Regional Deputy Director of Education and Inspector shall not be withheld. In case no approval is granted by Regional Deputy Director of Education, Management has been given remedy of submitting representation to Director and where such approval is declined by Inspector, representation can be made to Regional Deputy Director of Education and their decision, i.e., decision of Director or Regional Deputy Director of Education, as the case may be, shall be final.

33. Therefore, broad outlines have been given in above provisions. Detailed procedure with regard to qualifications, preparation of panel of experts, manner in which candidate shall apply and submit fee etc. and the manner of functioning of Selection Committee is required to be provided by Regulations. Such procedure has been prescribed in Chapter-II, Part II-A of the Regulations and in respect of minority institution with reference to Section 16-FF, procedure has been prescribed in Regulation-17, therefore, we directly come to Regulation-17 which is the crux of the dispute in all these writ petitions.

34. First of all, we propose to state in brief, procedure prescribed in Regulation-17 as it was prior to amendment made by G.O. dated 20.03.2018, since that procedure was not found offending by petitioners and has been holding field since long. We shall refer this Regulation as it stood prior to amendment by G.O. dated 20.3.2018 as un-amended existing Regulation. The said regulation before amendment provided as under:

(A) Manager of the Committee of Management of the institution shall advertise vacancies required to be filled in by direct recruitment in one 'Hindi' and 'English' newspaper having wider circulation in the State.

(B) Advertisement shall contain details of nature of vacancy, whether temporary or permanent, number of vacancies, other particulars like whether Principal or Head Master, Lecturer or L.T. Grade, C.T. Grade etc.

(C) Where the vacancy is of a Teacher, subject in which appointment is to be made shall also be mentioned and it shall also mention pay-scale of vacancy, other allowances, requisite experience, minimum qualification, requisite age etc.

(D) At least two weeks time shall be given from the date of advertisement for submission of application forms. Copy of advertisement shall be forwarded to Inspector also.

(E) All the applications shall be submitted in the prescribed form as provided by Management giving all details and also appending copies of requisite certificates, testimonials, recommendation letters etc. Management may charge requisite fee for Application Form in prescribed proforma to the candidate.

(F) If the candidate is already working in any institution and apply, such Institution where he is working shall not withhold his application but forward to concerned authority forthwith.

(G) Details of all applications in serial numbers shall be entered in the register with details of candidates for respective posts etc.

(H) For every vacancy, at least 7 candidates shall be called for interview if such minimum number of candidates have applied. Intimation, date of interview shall be communicated at least 10 days before date of interview.

(I) If experts are not present or could not attend meeting of Selection Committee for any reason, Selection Committee's meeting shall be postponed.

35. This procedure under Regulation 17(d) i.e. 17(A) in respect of Minority Institutions has undergone amendments by four G.Os. dated 20.03.2018, 06.11.2018, 18.04.2019 and 12.08.2019. We find that broadly Regulation 17(A) with regard to advertisement of vacancies is maintained except that by last amendment, it has also been provided that option for submission of applications on-line shall also be given. Therefore, we are not repeating the same.

36. Similarly, Regulation 17([k) i.e. 17(B) also has no material change except that it also includes the application forms received on-line and there is no material difference.

37. Regulation 17(x) i.e. 17(C) with regard to restriction on the authority of an employer for not withholding application of a prospective candidate for employment in another Institution is also same.

38. Now the difference comes from Regulation 17(?k) i.e. 17(D). By Government order dated 20.03.2018 Regulation 17-D was materially altered and thereafter some Clauses-(³), (p) and (N) i.e. (E), (F) & (G), respectively were also inserted. We, therefore, propose to refer Regulation 17-D and subsequent inserted Clauses (E), (F) & (G) in the aforesaid G.Os. one by one.

39. **Government Order dated 20.03.2018** says that details of application

shall be registered serially in Register as it was earlier. Thereafter, the entire information in application forms shall be forwarded to the Regional Joint Director of Education, if the selection is to be made for the post of Headmaster of Institution and to the Regional Joint Director of Education and Inspector if it is to be made for teachers. Thereafter, the said educational authorities shall arrange written test (screening test) through prescribed private agency.

40. Thereafter further process has been altered. It provides that concerned Institution shall hold a written test, i.e., screening test comprising of 90 marks and 10 marks shall be kept for interview. The aforesaid screening test shall be held if the selection is to be made for the post of Head of Institution or Lecturer but where selection is to be made for Assistant Teacher there shall be no interview and screening test shall comprise of written test of 100 marks. In aforesaid screening test as per available vacancies on the basis of merit a panel of five candidates for each vacancy shall be prepared. Aforesaid panel shall be forwarded by the prescribed Recruitment Agency to the Joint Director of Education if it pertains to Head of Institution or Inspector if it pertains to teachers. Regional Joint Director of Education or Inspector, as the case may be, shall forward the aforesaid panel to the Manager of Committee of Management of Institution with purpose of verification of testimonials of selected candidates and thereafter to place it before Selection Committee. The Selection Committee then shall conduct selection by holding interview of 10 marks only. Candidates selected by Selection Committee on the basis of interview and the marks obtained in written test shall be prepared on the basis of merit and forwarded to educational authorities for their approval. Information of interview shall be given at least 10 days before through registered post and rest of provisions are similar as they were earlier.

41. In the **Government Orders dated 06.11.2018, 18.04.2019 and 12.08.2019**, there is no substantial difference but changes made by G.O. dated 12.08.2019 are the recent one, which is operating, hence, we refer here therefrom for brevity. It says that applications shall be submitted by candidates to private Recruitment Agency who shall make entry in register, prepare details, hold screening test and thereafter those candidates who are selected in written test, a merit list of five candidates per vacancy shall be prepared and forwarded for further selection by Selection Committee constituted under Section 16-FF for Minority Institutions.

42. Difference between Regulation 17, as it stood originally, is that it did not provide for any written test/screening test but contemplated only interview and entire matter of selection was within the purview of Selection Committee under Section 16-FF (1). Selection Committee has been maintained but with an introduction of a screening test. Earlier selection process is no more applicable. Now a Private Recruitment Agency has been introduced for the purpose of holding screening written test of 90 marks. It is only those candidates who are selected in such screening test, their list of five candidates per vacancy shall be prepared by Private Recruitment Agency. Scope of selection by Selection Committee is limited to those candidates and marks of interview are also reduced to 10 marks only.

43. According to counsel for petitioners these directions and restrictions caused by impugned G.Os. by introducing firstly Private Recruitment Agency; secondly introducing screening test/written test of 90 marks and thirdly by reducing the weight of interview which earlier gave wider subjective authority of assessment to Selection Committee of Minority Institution but now has been marginalized, only to the extent of 10 per cent, and has affected their right of establishment and administration of Minority Institutions, therefore amendment of Regulation 17 to this extent is ultra vires of Article 30 of the Constitution.

44. During course of arguments, it is stated that insertion of Clauses-(E), (F) and (G), is consequential which became necessary due to insertion of Private Recruitment Agency and introduction of written test/screening test in Clause-D, and hence, individually aforesaid provisions have not been addressed but it is said that since the amendment made in Regulation 17-D to this extent is bad, therefore, all consequential amendments and provisions inserted are also bad and illegal.

45. Counsel for parties individually and collectively have cited plethora of judgments and same are as follows, **Rev. Sidhajbhai Sabhai and others Vs. State of Bombay and another AIR 1963 SC 540; Jadunath Singh Vs. State of U.P. AIR 1971 SC 363; Ahmedabad St. Xavier's College Society Vs. State of Gujarat, AIR 1974 SC 1389; All Saints High School v. Govt. of A.P. AIR 1980 SC 1042; N. Ammad Vs. Manager, Emjay High School and others, AIR 1999 SC 50; TMA Pai Foundation Vs. State of Kerala, AIR 2003 SC 356; Brahmo Samaj Education Society Vs. State of West Bengal and others AIR 2004 SC 3358; P.A. Inamdar Vs. State of Maharashtra, AIR 2005 SC 3799; Secretary Malankara Syrian Catholic College Vs. T. Jose, AIR 2007 SC 570 and Sindhi Education Society and another Vs. Chief Secretary, Government of NCT of Delhi and others, 2010 (8) SCC 49.**

46. All the judgments cited are well known on various issues of minority institutions but actual issue which has come up for consideration before this Court is, "what is the power of state in making provisions for enhancement of transparency, efficiency and standard of imparting education to the students in the matter of making selection and appointment of teachers without interfering in substantial way with the authority of management to choose and select teachers of its own choice and particularly, when minority institution in question is one which is receiving aid from Government Exchequer and public funds are being utilized for all its expenses".

47. In this respect, counsel for parties have heavily relied on Supreme Court's judgment in **N. Ammad Vs. Manager, Emjay High School and others (Supra).** A two Judge Bench of Supreme Court considered the question "is the Management of a minority School free to choose and appoint any qualified person as Headmaster of the School or whether such Management is hedged by any legislative edict or executive fiat in doing so". Therein Emjay Vocational Higher Secondary School, Valliappalli Taluk, Calicut District, Kerala was a minority institution. Management sought to appoint one P.M. Aboobacker as Head Master of the institution. N. Ammad resisted the act of

Management on the ground that he is senior most teacher in the School and should be appointed as Headmaster. The claim of N. Ammad was supported by District Education Officer but the Management did not succumb. N. Ammad then filed a writ petition in Kerala High Court seeking direction to Management to appoint him as Headmaster. A Single Judge of Kerala High Court allowed writ petition and issued direction as claimed by N. Ammad. However, in appeal Division Bench reversed the judgment and dismissed the writ petition. That is how N. Ammad came in appeal to Supreme Court. While examining the facts, Supreme Court found that N. Ammad was appointed as Teacher on 03.06.1982. Post of Headmaster fell vacant in June, 1991 and N. Ammad was senior most teacher but not found qualified to be appointed as Headmaster. Under Rules, 12 years continuous graduate service was the minimum qualification for appointment to the post of Headmaster. N. Ammad had not completed 12 years in June, 1991. However, he was put In-charge Headmaster with the approval of District Education Officer. After completing required length of service in June, 1994, N. Ammad pressed his claim before Management to appoint him as regular Headmaster. Recommendation was also made by District Education Officer asking Management to permit and appoint senior most qualified teacher as Headmaster. Management, however, appointed Sri P.M. Aboobacker as Headmaster, who was a graduate teacher having longer period of service than N. Ammad in another school. A contention was raised that statutory provisions were binding, which required that appointment of Headmaster shall ordinarily be according to seniority since institution was declared minority by Government on 02.08.1994. This contention was rejected holding that Article 30 of Constitution contemplates a minority institution, which is established and administered by the Management. Supreme Court said that institution was a minority institution having been established and administered by minority community and only recognition of this fact by declaration made by Government on 02.08.1994 but it will not deprive minority character of the institution it enjoyed earlier. Declaration is only an open acceptance of a legal character which should necessarily have existed antecedent to such declaration. Then Court considered the effect of Rule 44(1) of Kerala Education Act, 1958, which provided appointment of Senior most teacher as Head Master. Court relied on seven-Judges judgment in- :in **Re Kerala Education Bill 1957 AIR 1958 SC 956**, *wherein one of the proposition was, "The right guaranteed under Article 30(1) is a right that is absolute and any law or executive direction which infringes the substance of the right is void to be extent of infringement. But the absolute character of the right will not preclude making of regulations in the true interests of efficiency or instruction, discipline, health, sanitation, morality, public order and the like as such regulations are not restrictions on the substance of the right guaranteed by the Constitution."*

48. Court also observed that the aforesaid proposition was approved by another Constitution Bench in **Sidhrajbhai Sabbai and others (supra)** and a nine-Judges Bench of Supreme Court in **Ahmedabad St. Xaviers College Society and another (Supra).** In the backdrop of aforesaid exposition of law, Court observed that selection and appointment of Headmaster in a School is of prime importance in administration of that

educational institution. Headmaster is the key post in running of school. He is the hub on which all the spokes of the school are set around whom they rotate to generate result. A school is personified through its Headmaster and he is the focal point on which outsiders look at the school. A bad Headmaster can spoil the entire institution, an efficient and honest Headmaster can improve it by leaps and bounds. The functional efficacy of a school very much depends upon the efficiency and dedication of its Headmaster. Court also referred to the observations made by nine-Judge Bench of Supreme Court in **Ahmedabad St. Xavier's College Society and another (Supra)** with regard to importance of role of Principal of a college wherein Hon'ble K.K. Mathew, J. expressing his view in support of majority, said, ***"It is upon the principal and teachers of a college that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution."***

49. Justice H.R. Khanna, has expressed a border view that even selection of teachers is of great importance in the right to manage a school. His Lordship said, ***"The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage an educational institution and the minorities can plainly be not denied such right of selection and appointment without infringing Article 30(1)".***

50. In this background Court said that considering importance of Teachers and Principal of College vis-a-vis Administration of institution, if Management is not given very wide freedom to choose the personnel for holding such a key post, subject, of course, to the restrictions regarding qualifications to be prescribed by the State, the right to administer the school would get much diminished. In paragraph-26 of the judgment, Court said:

"The management of a minority school is free to find out a qualified person either from the staff of the same school or from outside to fill up the vacancy."

51. Argument was raised on behalf of N. Ammad that if Management is anxious to find out most qualified person, post should have been advertised inviting applications from qualified persons and for this purpose two-Judges judgment of Supreme Court in ***Shainda Hasan Vs. State of Uttar Pradesh and others (1990) 3 SCC 48*** was relied but Court held that no legal proposition has been laid down therein that selection process must be through advertisement. Court said:

"According to us, it is for the management of the minority educational institution to choose the modality for selecting the qualified persons for appointment."

52. Consequently, Court answered the question formulated above, holding in para-28, as under:

"28. Thus the management's right to choose a qualified person as the Headmaster of the school is well insulated by the protective cover of Article 30(1) of

the Constitution and it cannot be chiselled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post. Any such statutory or executive fiat would be violative of the fundamental right enshrined in the aforesaid Article and would hence be void."

53. We intended to consider other cases also in detail but fortunately all these authorities and many others have been considered very recently by Supreme Court in **Sk. Md. Rafique Vs. Managing Committee, Contai Rahamania High Madrasah and others (Civil Appeal No. 5808 of 2017)** and other connected matters decided on 06.01.2020, and virtually same question as is up for consideration before us, has been considered therein by Supreme Court, hence it would be appropriate for this Court not to burden this judgment by referring earlier judgments of Supreme Court instead we find it appropriate to refer recent authority in Sk. Md. Rafique (Supra). Therein validity of Sections 8, 10, 11 and 12 of West Bengal Madrasah Service Commission Act, 2008 (hereinafter referred to as "WBMSC Act, 2008") was challenged as ultra vires of Article 30 of Constitution of India. It is contended that these provisions deprive right of selection and appointment of teachers of own choice by Management of Minority Institution and, therefore, violative of Article 30 of Constitution of India. There was a Statute namely West Bengal Board of Madrasah Education Act, 1994 (hereinafter referred to as "WBBME Act, 1994"). It was enacted to establish a Board of Madrasah Education in West Bengal to proceed for matter connected therewith and incidental therewith. There was another Statute namely West Bengal Minorities Commission Act, 1996 (hereinafter referred to as "WBMC Act, 1996") to establish Minority Commission to study and suggest additional social, economic, educational and cultural requirements of religious and linguistic minorities of West Bengal with a view to equipping them to preserve secular traditions of West Bengal and to promote national integrity. A third Statute namely West Bengal School Service Commission Act, 1997 (hereinafter referred to as "WBSSC Act, 1997") was enacted to provide for constitution of Regional School Service Commissions and a Central School Service Commission in the State and for matters connected therewith and incidental thereto. With respect to applicability of WBSSC Act, 1997 to Minority Institutions, Section 15 thereof reads as under :

"15. Act not to apply in relation to certain schools:-

The provisions of this Act shall not apply to-

(a) a school established and administered by a minority, whether based on religion or language, or

(b) a school under any trust, established and administered by a minority, whether based on religion or language, or ... ... "

54. By notification dated 12.10.2007, Government of West Bengal, Minorities Development and Welfare and Madrasah Education Department declared and granted to all recognised and aided Madrasahs under the control of the Government the status of "Minority Educational Institutions". The aforesaid Notification reads as under:-

"Government of West Bengal

Minorities Development & Welfare & Madrasah

Education Department

Writers' Buildings, Kolkata - 700001

No.1465-MD/07 Dated: 12.10.07

NOTIFICATION

WHEREAS Muslim recognised as Minority Community in the State of West Bengal and minorities have the right under Article 30 of the Constitution of India to establish and administer educational institution of their choice;

AND WHEREAS the State Government is competent to declare a particular institution as a minority institution and till such time the government issue an order declaring that it is a minority institution they can not operate as Minority Institutions;

AND WHEREAS the Supreme Court has held that the Government are the Competent Authority to verify and determine the minority status of an Educational Institution for the purpose of Article 30(1) of the Constitution of India;

AND WEHREAS the Govt. recognised Madrasahs including Hooghly Govt. Madrasah and the Calcutta Madrasah were originally established by the Muslim minority and continuously administered by the members of that minority to subserve and promote the interests of the minority community concerned;

AND WEHREAS the abovesaid Madrasahs were, in course of times, recognised alongwith liabilities by the Government for promoting educational interests of the Muslim minority and on verification it has been ascertained that more than 90% students are pursuing their studies in these institutions and these Madrasahs are functioning under supervision of the W.B. Madrasah Board constituted with member representatives of the Minority Community concerned.

AND WHEREAS the State Govt. having been satisfied about the above antecedents of all the recognised Madrasahs which are aided and guided by the Government prescribed guidelines relating to admissions, selections etc. and about their continuing and sustained functioning for promoting the interests of the concerned minority have become satisfied that these institutions are fit to enjoy minority status of an Educational Institution for the purpose of Article 30(1) of the Constitution of India.

AND WHEREAS the Govt. in the State of West Bengal have also considered expedients to declare these recognized and aided Madrasahs and those which will be so recognised and aided as such in future as Minority Educational Institution.

NOW, THEREFORE, in accordance with the above considerations and in pursuance of the Article 30 of the Constitution of India the Government is pleased, hereby, to declare that all the recognised and aided Madrasahs under control of this Government and those Madrasahs which will be recognised on similar lines in future, as Minority Educational Institutions. These institutions will also be allowed, in consequence to have the following effects as agreed upon by the State Government.

i) They will continue to get financial assistance as before from the State Government

ii) Reservation policy for employment etc. shall not apply in case of appointment of teachers and non-teaching staff in these Madrasahs.

iii) Selection of teachers may continue to be done by West Bengal School Service Commission through separate panel.

By order of the Governor (Pawan Agawal) Secretary to the Govt. of West Bengal"

55. Another Government Notification was issued on 28.12.2007 by the same department of Government of West Bengal stating that after being conferred minority status upon all recognized and aided Madrasahs, the matter of selection of teachers for recognized and aided Madrasahs of West Bengal has gone out of the purview of the existing WBSSC Act,1997. Thereafter separate body for recommending panel of teachers for appointment in Recognized Non-Government Aided Madrasahs was felt necessary and hence Madarsah Service Commission was proposed to be constituted and this resulted in enactment of WBMSC Act, 2008.

56. We straightway come to Sections 8, 10, 11 and 12 of the WBMSC Act, 2008 validity whereof was challenged before Supreme Court. The same read as under:

"8. Notwithstanding anything contained in any other law for the time being in force or in any contract, custom or usage to the contrary, it shall be the duty of the Commission to select and recommend persons to be appointed to the vacant posts of teachers in accordance with the provisions of this Act and the rules made thereunder."

"10. Notwithstanding anything contained in any other law for the time being in force or any contract, custom or usage to the contrary, the Managing Committee, the ad hoc Committee or the Administrator, as the case may be, shall be bound to appoint the candidate recommended by the Commission to the post of teacher in the Madrasah concerned as per vacancy report.

Provided that in the absence of the Managing Committee, ad hoc Committee or the Administrator, the Head Master or the Headmistress or the Teacher- In-charge is empowered to issue appointment letter to the candidate recommended by the Commission. Such matter should be ratified at the next available meeting of the Managing Committee, ad hoc Committee or by the Administrator, as the case may be:

Provided further that the Managing Committee, ad hoc Committee, the Administrator or the Headmaster or the Headmistress or the Teacher-in-charge as the case may be, shall, if any error is detected in the recommendation, immediately bring it to the notice of the Commission for removal of such error.

"11. Any appointment of a teacher made on or after the commencement of this Act in contravention of the provision of this Act shall be invalid and shall have no effect and teacher so appointed shall not be a teacher within the meaning of clause (s) of Section 2."

"12 (i) If the Managing Committee, the ad hoc Committee or the Administrator of a Madrasah, as the case may be, refuses, fails or delays to issue appointment letter to the candidate recommended by the Commission within the period stipulated in the letter of recommendation by the Commission, without any reasonable ground, the State Government may direct the Board to dissolve the Managing Committee or the ad hoc Committee, or discharge the Administrator, as the case may be, or stop all financial assistance to such Madrasah recording reasons thereof and may also issue direction upon the Board or Council, as the case be, to withdraw recognition or affiliation of such Madrasah.

(ii) In case of failure to issue appointment letter to the candidate recommended by the Commission is on the part of the Superintendent, the Headmaster,

the Headmistress or the Teacher-in-charge of a Madrasah, he shall be subject to such disciplinary proceedings as may be prescribed."

57. An amendment was made in the aforesaid Act, 2008 by West Bengal Madrasah Service Commission (Amendment) Act, 2010 by inserting certain words in Section 8 so as to cover recommendations of transfer including model transfer of teachers and non-teaching staff of Madrasah Service Commission. In exercise of power conferred by Act, 2008, Rules were also framed by West Bengal Madrasah Service Commission Recruitment (Selection and Recommendation of Persons For Appointment and Transfer to the Posts of Teaching and Non-teaching Staff) Rules, 2010 (hereinafter referred to as "WBMSCR, Rules, 2010"). Chapter-III of WBMSCR Rules, 2010 deals with "Scope, Method and Manner of Selection" and Rule 8, which is relevant, reads as under:

"8. Manner of selection - (1) Selection to any post shall be made on the basis of results of the State/Region/Area Level Selection Test, as may be decided by the Commission, which may comprise any, some or all of the following (as the case may be) -

a) Written Examination

b) Evaluation of Qualification

c) Personality Test

d) Aptitude Test of the candidates, as the case may be, in the manner as specified in Schedule III (2) The Commission may, in its discretion, fix the minimum qualifying marks to be scored/obtained by the candidates in written examination or in aggregate or in both and relax the qualifying marks on reasonable ground(s) to be recorded in writing ...."

58. The validity of aforesaid Act, 2008, and in particular Sections 8, 10, 11 and 12 etc. was challenged on the ground that Managing Committee or the Administrator of minority institution would be bound to appoint the candidates recommended by the Madrasah Service Commission and otherwise, the consequence would be recommendation for penalty and this violates the right to establish and administer an institution of their own choice conferred upon the Educational Minority and violative of Article 30 of the Constitution of India.

59. The writ petitions were opposed by West Bengal Government contending that the Commission would only select and recommend teachers and non-teaching staff of Madrasahs but appointment yet to be made by Managing committee of minority institutions; that they would exercise overall control in respect of such staffs which are not taken away. There is no difference in day to day administration of Madrasahs; these Madrasahas are expected to employ good quality teachers for imparting quality education to the students and the entire legislation is to provide qualified superior faculty to impart good quality of education to the students.

60. Learned Single Judge upheld the submissions of the learned counsel for writ petitioners and found provisions, ultra vires. He allowed writ petitions vide judgment dated 12.3.2014 whereagainst candidates selected and recommended by Minority Commission for appointment and others filed Letters Patent Appeals, which were also dismissed by a Division Bench vide judgment dated 09.12.2015 and thereafter matter came to Supreme Court. The basic issue which came up for

consideration before Supreme Court, as formulated in paragraph-16, reads as under:

(1)Whether the provisions, namely, Sections 8, 10, 11 and 12 of the Commission Act are ultra vires as held by the High Court?

(2)Whether these provisions transgress the right of minority institutions guaranteed under the Constitution of India?

61. Thereafter Supreme Court has considered the entire authorities on the subject starting from Kerala Education Bill, 1957 and has recorded its conclusions running from Para-38 to 59 of judgment. It refers to the observations made in **Sidhajbhai Sabhai (Supra)** and said that it is difficult to appreciate how the Government can be prevented from framing Regulations that are in the national interest, as it seems to be indicated in the passage quoted in earlier paragraphs of judgment. Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by majority or minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent Government from framing regulations in that behalf. It is, of course, true that government regulations cannot destroy the minority character of institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute so as to be above the law. Supreme Court recognized that right to establish and administer comprised of (a) right to admit students (b) right to appoint staff- teaching and non-teaching staff, and (c) right to have disciplinary action against staff. Having said so, it further observed that question is, "to what extent right of aided primary minority institution to administer be regulated" and it is this aspect which need be considered for the reason that a minority institution, which is getting aid from the State cannot claim right to complete absoluteness without any restriction or check, which is in the interest of Nation as a whole and student community in particular.

62. Thereafter Supreme Court noted the essence of various authorities, it considered and then in paragraphs 49 to 53 said as under:

"49. Thus, if the intent is to achieve excellence in education, would it be enough if the concerned educational institutions were to employ teachers with minimum requisite qualifications in the name of exercise of Right Under Article 30 of the Constitution, while better qualified teachers are available to impart education in the second category of institutions as stated hereinabove. For example, if the qualifying percentile index for a teacher to be appointed in an educational institution, considering his educational qualifications, experience and research, is required to be 50, and if teachers possessing qualifications far greater and higher than this basic index are available, will it be proper exercise for a minority educational institution to select teachers with lower index disregarding those who are better qualified? Will that subserve pursuit of excellence in education? One can understand if under the regulatory regime candidates who are otherwise less qualified are being nominated in the minority educational institution and the minority educational institution is forced to accept such less meritorious candidates in preference to better qualified candidates. In such cases, the minority educational

institution can certainly be within its rights to agitate the issue and claim a right to choose better teachers. But if the candidates who are selected and nominated under the regulatory regime to impart education which is purely secular in character, are better qualified, would the minority institution be within its rights to reject such nomination only in the name of exercise of a right of choice? The choice so exercised would not be in pursuit of excellence. Can such choice then be accepted?

If the right is taken to be absolute and unqualified, then certainly such choice must be recognised and accepted. But, if the right has not been accepted to be absolute and unqualified and the national interest must always permeate and apply, the excellence and merit must be the governing criteria. Any departure from the concept of merit and excellence would not make a minority educational institution an effective vehicle to achieve what has been contemplated in various decisions of this Court. Further, if merit is not the sole and governing criteria, the minority institutions may lag behind the non-minority institutions rather than keep in step with them.

Going back to the example given above, as against index of 50 i.e. the minimum qualifying index, if a candidate nominated under the regulatory regime is at an index of 85, selection by a minority educational institution of a candidate at an index 55 may certainly be above the minimum qualifying mark, but in preference to the one at the index of 85 who is otherwise available, the appointment of a person at the index level of 55, will never give the requisite impetus to achieve excellence. A meritorious candidate at the index level of 85 in the above example, if given the requisite posting will not only help in upholding the principle of merit but will in turn generate an atmosphere of qualitative progress and sense of achievement commensurate with societal objectives and ideology and such posting will, therefore, be in true national interest.

50. At the cost of repetition, it needs to be clarified that if the minority institution has a better candidate available than the one nominated under a regulatory regime, the institution would certainly be within its rights to reject the nomination made by the authorities but if the person nominated for imparting education is otherwise better qualified and suitable, any rejection of such nomination by the minority institution would never help such institution in achieving excellence and as such, any such rejection would not be within the true scope of the Right protected Under Article 30(1) of the Constitution.

51. With these basic principles in mind, we may now consider the statutory provisions under which the teachers could be nominated under the Commission Act and see whether the concerned Regulations help in achieving excellence or whether those provisions are violative of the Rights of the minority institutions.

52. In terms of Section 4 of the Commission Act, the Commission is to consist of a Chairman and four Members. The Chairman of the Commission has to be an eminent educationist having profound knowledge in Islamic Culture and must be well versed in education with teaching experience inter alia as a teacher of a University or as a Principal of a college, for a period of not less than twelve years. It is true that the latter part of Section 4(ii) speaks of an officer of the State Government not below the rank of Joint Secretary who could also be appointed as the Chairman of the Commission. But in our view, considering the nature of duties

that the Chairman is to discharge, even an officer of the State Government has to be a person with profound knowledge in Islamic Culture. Apart from the Chairman, there are four Members who are to be appointed in terms of Section 4(iii) of the Commission Act. Out of these four Members, one has to be an eminent educationist having profound knowledge in Islamic Theology and Culture, while the other two Members must have teaching experience inter alia as a teacher of a University, or a Principal of a College for a period of not less than ten years. The fourth member could be a non-educationist, but he must have held the position of eminence in public life or in Legal or Administrative Service. Predominant composition of the Commission is thus of educationists and two of them have to be persons with profound knowledge in Islamic Culture and Islamic Theology. The provisions of the Commission Act are thus specially designed for Madrasahs and Madrasah Education System in the State. Rule 8 of the 2010 Rules stipulates fair and transparent process of merit based selection and the statutory mechanism would ensure that only those teachers would be selected who would be best suited to impart education in Madrasah Education System. The State Legislature has taken care to see that the composition of the Commission would ensure compatibility of the teachers who would be selected to impart education in Madrasah Education System, which is also emphasized in the Statement of Objects and Reasons.

53. It is true that the recommendations or nominations of teachers made by the Commission are otherwise binding on the Managing Committees of concerned Madrasahs, but, in terms of second proviso to Section 10 of the Commission Act, if there be any error, it is open to the Managing Committee of the concerned Madrasah to bring it to the notice of the Commission for removal of such error. The concept of 'error' as contemplated must also include cases where the concerned Madrasah could appoint a better qualified teacher than the one nominated by the Commission. If any such error is pointed out, the Commission will certainly have to rectify and remove the error. The further protection is afforded by Section 12 of the Commission Act, under which the concerned Madrasah could be within its rights to refuse to issue appointment letter to the candidate recommended by the Commission if any better qualified candidate is otherwise available with the managing committee of the concerned Madrasah. Such refusal may also come within the expression 'any reasonable ground' as contemplated in Section 12(i) of the Act.

The legislature has thus taken due care that the interest of a minority institution will always be taken care of by ensuring that i) in normal circumstances, the best qualified and suitable candidates will be nominated by the Commission; ii) and in case there be any error on part of the Commission, the concerned Managing Committee could not only point out the error which would then be rectified by the Commission but the Managing Committee may also be within its rights in terms of Section 12(i) to refuse the nomination on a reasonable ground."

63. Supreme Court allowed the appeals upholding statutory provisions and set aside the judgments of the High Court as is evident from paragraph-57 of the judgment, which reads as under:

"57. In the premises, while allowing these appeals, we set aside the view taken

by the Single Judge and the Division Bench of the High Court and dismiss Writ Petition No.20650(W) of 2013 and other connected matters. We also hold Sections 8, 10, 11 and 12 of the Commission Act to be valid and constitutional."

64. In the present case also, we find that statutory provisions made by the respondent-authorities are even less regulatory than the same were in the case of West Bengal. Here only an element of open test in the form of written test has bee introduced, which will determine merit of the candidates. Further scope of subjective element of selection, when the selection was made only on the basis of interview, has been curtailed to a larger extent. This is for bringing in transparency, impartiality, fairness and non arbitrariness in selection and it is in the interest of public at large, students' community and national interest. In selection and appointment no Government Authority has any direct role except that it has to forward papers from one to another. Even for recruitment i.e. holding of Screening/Written Test, no Government Machinery has been given any power of interference but a private recruitment agency has to be employed. Its role is limited as it is only a written examination conducting body and has to prepare merit list on the basis of marks secured in written test and same to forward through educational authorities to the Management for holding selection in accordance with the statute. It is not in dispute that all the educational institution before this Court are 100 percent Government aided minority educational institutions and therefore, in view of aforesaid law laid down by Supreme Court, it cannot be said that statutory provision in question, in any manner, affects their right to administer minority institution and it cannot be said to be violative of Article 30 of the Constitution. We, therefore, find no merit in these writ petitions.

65. Dismissed accordingly.

66. However, there shall be no order as to costs.

(2021)01ILR A811
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Writ-A No. 9812 of 2007

Rajendra Prasad Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri O.N. Tripathi, Sri A.B. Singhal, Sri D.N. Tripathi

Counsel for the Respondents:
C.S.C., Sri Chandra Shekhar Singh, Sri Vivek Saran

A. Civil Law - U. P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 – Indian Evidence Act, 1872 – Section 108 – Service law – Compassionate Appointment – Presumption of death of employee – Employee was missing since more than seven years – Held, If a person is missing for more than 7 years, then the dependent of such person should be given appointment under the 1974 Rules – The financial condition of petitioner is such in which he is fully entitled for compassionate appointment so as to enable him to meet out the family expenses, otherwise the family of the petitioner, which is on the verge of starvation will be ruined. (Para 16 and 17)

B. Interpretation of Statute – Principle of purposeful interpretation – Applicability – The purpose of Dying-in-Harness Rules is to provide help to the family of the deceased of a Government employee by making appointment on compassionate ground – After the death of Governmnt employee in harness or in case the Government employee is not traceable on account of certain mishappenings – Appointment on compassionate ground of a dependent may save the family from dying on account of starvation and financial hardships. (Para 23)

Writ Petition partly allowed. (E-1)

Cases relied on :-

1. Amit Sharma Vs St. of U.P. & ors. , 2009 (4) ESC 2511 (All)

2. Ajay Kumar Shukla Vs St. of U.P. & ors., 2005(1) ESC 807 (All)

3. Sanjay Kumar Singh Vs St. of U.P. & ors. , 2005(3) AWC 2724 (LB)

4. Sima Devi Vs Senior Superintendnet of Police, Jhansi & ors. , 2002 (2) ESC 37 (All)

5. Writ A No. 30612 of 2008, Smt. Rama Devi & anr. Vs St. of U.P. & ors.

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This writ petition has been filed by the petitioner with the following prayers:

"a). Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 16.11.2006 passed by respondent no. 2 (Annexure No. 15 to this writ petition).

b). Issue a writ, order or direction in the nature of mandamus, commanding the respondents to consider the claim of petitioner for compassionate appointment afresh and appoint the petitioner on a suitable class IV post, under the Dying in Harness Rules within some stipulated period, as this Hon'ble Court may deem fit and proper,

c). Issue any other writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the present case.

d). Award cost to the present writ petition to the petitioner."

2. Learned counsel for the petitioner argued that the father of the petitioner who was a permanent class IV employee in the department of respondents, left his home on 01.05.1996 at about 6.00 P.M. for night duty and did not return to his home till 08.05.1996. He was searched in the office and at the homes of nears and dears but petitioner himself nor any family members could known the whereabout of father of petitioner. The petitioner then lodged a first information report at the concerned police station and also informed the police control room, Allahabad.

3. Learned counsel for the petitioner further argued that the aforesaid news (missing person) had also been given by the petitioner to Print Media for publication, which was published on 09.05.1996. The mother of the petitioner moved an application on 5.8.1996 before the respondent no.3 for granting his salary till her husband is searched by the police because she is unable to maintain her family but nothing has been paid to the mother of the petitioner. The petitioner repeatedly approached to the concerned police station to know about the progress in search of father of the petitioner. However, the police reported that they could not trace out the missing person. In this regard, the police has submitted its report dated 9.02.2004 and 26.03.2004.

4. Learned counsel for the petitioner further argued that in the instant case, the

employee was missing, leaving behind his wife, Smt. Munni Devi and son i.e. petitioner, which was duly certified by the Tehsildar Sadar, Allahabad who has issued the dependent certificate dated 26.09.2003.

5. Learned counsel further argued that after exhaustive effort of search of his father by the police as well as by the petitioner himself, when the whereabout of missing father of petitioner could not be known, the petitioner sought appointment on compassionate grounds from respondnt nos. 2 and 3 by way of application dated 18.11.2003. Upon the application of the petitioner, respondent no.3 sought directions from respondent no.2 for further proceedings in the matter of the petitioner.

6. Learned counsel has further argued that the petitioner made a request to respondent no.2 that since on 01.04.2005 concerned police station reported in writing that the search of missing father of the petitioner has now been stopped and all the efforts have gone in vain, hence his case for appointment on compassionate ground may kindly be considered. The petitioner again represented to respondent no.3, repeating his similar prayer on 01.04.2004. Consequently, respondent no.3 forwarded the application of the petitioner to respondent no.2 on 08.04.2004.

7. Learned counsel has further argued that the petitioner as well as his mother jointly submitted an Indemnity Bond before the respondent no.2. It is made clear that in order to get appointment under such circumstances, submission of indemnity bond is necessary in pursuance to the Government Orders. So far as academic qualification of the petitioner is concerned, he passed High School Examination in 1987, according to which the date of birth of the petitioner is 20.07.1970. Thus, the petitioner is duly qualified and eligible to be appointed on class IV post.

8. Learned counsel further argued that inspite of repeated representation made by the petitioner before the respondent authorities, when a most genuine claim of the petitioner was not considered at all by the authorities concerned, then having left with no option the petitioner sought shelter of this Hon'ble Court by filing a writ petition, being Civil Misc. Writ Petition No.45902 of 2006. The Hon'ble Court, after hearing the parties, was pleased to dispose of the writ petition vide its judgment and order dated 24.08.2006 and observed that dependents of a person, dying a civil death in harness are also entitled for compassionate appointment and the respondents ought to take action on the application of the petitioner. The Hon'ble Court was further pleased to issue direction to the respondent no.2 to consider the claim of the petitioner expeditiously, preferably within a period of three months from the date of submission of a certified copy of order along with an attested copy of the writ petition. The certified copy of the order dated 24.08.2006, passed by this Hon'ble Court was duly served to the respondent No.2 by the petitioner along with an application dated 31.08.2006.

9. Learned counsel for the petitioner further argued that the respondent no.2 has passed the impugned order dated 16.11.2006, rejecting the claim of the petitioner on wholly non-existent ground and even without considering the specific observations of this Hon'ble Court, contained in its order dated 24.08.2006.

10. Learned counsel next submitted that the entire family of the petitioner is on

the verge of starvation inasmuch as no source of livelihood is available to the petitioner's family. The petitioner is simply working in a private clothes shop and is getting a meagre amount of Rs.50/- per day. The mother of petitioner is also compelled by the circumstances to attend certain houses for cleaning the pots. The petitioner along with family including his mother is living in a single room, rented accommodation. Thus, in these hard days it has become very difficult for the petitioner to pull on burden of expenses of the family. The respondent No.3 has already given compassionate appointment to more than 10 candidates during the period from the year 1992 to 2006 but the petitioner is being discriminated. The petitioner has been able to find out names of the following persons who have been given appointments by respondent No.3 under Dying in Harness Rules:-

(1) Lal Chand (2) Suman (3) Shakira Begum (4) Beenu Singh (5) Manish Kumar (6) Mohd. Waseem (7) Santosh Kumar (8) Shiv Shankar (9) Anil Kumar and (10) Sujata Verma.

11. Counter Affidavit was filed by respondent Nos.2 and 3 and an averment was made in paragraph no.4 of the counter affidavit that the father of the petitioner was posted as peon/chaprasi at the office of respondent no.3 and he absented himself since 15.04.1996 without any sanctioned leaved or information. The order impugned has been passed in compliance of the order dated 24.08.2006 passed in Civil Misc. Petition No.45902 of 2006. It is submitted that State Government has categorically clarified that the benefits of the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereafter referred to as ' Rules of 1974') are not applicable in the case of petitioner as his father went missing.

12. Further the learned counsel for respondent nos.2 and 3 draw the attention of the Court towards the averment made at paragraph no.6 of counter affidavit, in which, it is submitted that the father of the petitioner, Sri Narendra Pratap Singh absented himself since 15.04.1996 without any sanctioned leave or information. As per the claim of the petitioner as his father went missing since 01.05.1996 he (Narendra Pratap Singh) should be presumed to have met a civil death. On such fiction of law the petitioner applied on 18.11.2003 for appointment under the Rules of 1974, and that a compassionate appointment is an exception to the Rule and the petitioner cannot claim the same as a right. Compassionate appointment is provided to meet the sudden financial crisis which arise due to the death of the bread earner, the Law in this regard is very clear; such an appointment cannot be claimed as a right. Moreover the State Govenment has categorically clarified that the benefit of Rules of 1974, have not been extended to dependents of such employees who are missing as such the petitioner was not entitled to be appointed under the Rules of 1974, there was no question tht the answering respondent could have given the petitioner an appointment on some post under the Rules of 1974. The order impugned suffer from no infirmity.

13. Rejoinder Affdidavit has been filed by the petitioner and he denied all the avements made in the counter affidavit and reiterated the ground taken in the writ petition.

14. Having heard the learned counsel for the parties and perused the record.

15. It is not in dispute that the father of the petitioner went missing in May, 1996 while working as a peon in the respondent organization. Even after seven years, his whereabouts could not be known and the police submitted a missing report. In view of the provisions of Section 108 of Indian Evidence Act, 1872, father of the peitioner had not been traceable, hence it is presumed that such a missing person has already died in the eyes of law after the lapse of seven years and since the father of petitioner has been acknowledged to be dead during the tenure of employment, hence dependents ought to have been given compassionate appointment. There is no lecuna in the candiature of the petitioner nor any formality is left to be completed by the petitioner in asmuch as an indemnity bond has already been submitted by the petitioner as required under the Govt. Order dated 20.03.1987 for the purpose in case the missing employee comes into picture in future, all the payments made to the family would be adjusted. Even after the directions issued by this High Court, vide its order dated 24.08.2006 in the earlier writ petition filed by the petitioner, instead of considering and allowing the legitimate claim of the petitioner for compassionate appointment, the respondent no.2 has simply rejected the representation on totally non-existent ground, without application of mind and even without considering the specific observations made by the High Court, treating the ptitioner as dependent of a person/ employee dying a civil death in harness.

16. The father of petitioner is missing from 01.05.1996 and has not yet been traceable, hence according to the provisions of section 108 of the Indian Evidence Act, it is to be presumed that such person is dead in the eye of law after the lapse of 7 years and once the father of petitioner has been acknowledged to be dead during the course of his service, the petitioner being his dependent is entitled to get employment on compassionate ground under 1974 Rules. In this regard the provisions of section 108 of the Indian Evidence Act, 1872 are being quoted hereunder:-

"108. Burden of proving that person is alive who has not been heard of for seven years:-

[provided that when] the question is whether a man is alive or dead, if it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burdedn of proving that he is alive is the person who affirms it."

17. The law is well settled that if a person is missing for more than 7 years, then the dependent of such person should be given appointment under the 1974 Rules. The financial condition of petitioner is such in which he is fully entitled for compassionate appointment so as to enable him to meet out the family expenses, otherwise the family of the petitioner, which is on the verge of starvation will be ruined.

18. In this regard, reference may be made to the law as laid down by this Court in the case of ***Amit Sharma Vs. State of U.P. And others [2009 (4) ESC2511 (All)]*** and was pleased to observe in paragraph No.11, which is being quoted herein below:-

"Standing Counsel has placed reliance upon counter affidavit in which it has been averred that the Dying-in- Harness Rules, 1974 are not applicable as the said rules do not provide for compassionate appointment

to the dependent of the employee who is claimed to have been missing from service of seven years on aforesaid rules are applicable to the Standing Counsel the notice of the aforesaid rules are applicable to the dependents of government servants who have died in harness while working. It is stated that the death of deceased Government employee has a nexus with the actual death of the Government servant in harness and not a civil death and that on presumption of civil death, only pension and other dues are payable. Reference in this regard have been made to the Government Orders dated 9.12.2008, 13.7.2006 and 21.5.2007, copy whereof is annexed as Annexures 3, 4 and 5 to the affidavit."

19. This Court further in the case of ***Ajay Kumar Shukla Vs. State of U.P. And others [2005(1)E.S.C. (All.807)*** observed in paragraph No. 8, which is being quoted herein below:-

" It may be stated here that a human being can died under various circumstances, for example, a person may died on account of natural causes, or on account of an accident, or that the person may commit suicide, or die in war, or in anti-terrorist activities, or there may be a presumptive death, namely, that a person is missing sinice long and therefore, presumed to be dead. The Rules of 1974 does not specify the manner of death that would qualify for an employment to the heirs. Therefore, in my view all kinds of death caused by every possible manner, would be included in the Dying in Harness Rules and the benefit of employment has to be given to the dependant of the person, who dies in harness."

20. This Court further take the similar view in the case of ***Sanjay Kumar Singh Vs. State of U.P. and others [2005(3) A.W.C. 2724 (LB)*** observed in paragraph Nos. 9 and 10, which are being quoted herein below:-

"And more so, according to the Section 108 of the Evidence Act when a person who is not traceable for the last 7 years from the date of his missing, shall be deemed to be dead. Section 108 of the Evidence Act is reproduced as under:-

" 108. Burden of proving that person is alive who has not been heard of for seven years.-[Provided that when) the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is (shifted to) the person who affirms it.

There may be cases where while discharging duties particularly in police force or armed force persons may be placed in the list of lost or missing employees for some unforeseen reasons and denial for appointment on compassionate ground to the dependents of such employees even after the lapse of statutory period of 7 years shall frustrate the very purpose of the Dying-in-Harness Rules. "

21. This Court in the case of ***Sima Devi Vs. Senior Superintendnet of Police, Jhansi and others (2002(2) ESC (All. 37)*** observed in paragraph no.7 which is being quoted herein below:

"In my consideration, this is not the correct understanding of provision and spirit of the 'Rule 1974'. The benefit of giving appointment on compassionate ground has to be extended to the dependent of a person who died in service and the same is to be given to a

person who is legally entitled for such benefit. The nature, manner and cause of death may be many, such death, might occur in natural course, accidental, murder, natural calamities, during war, anti-terrorist activities etc. as the manner the death likely to occur in service has not been specified in the 'Rule 1974' therefore, the death caused by every possible manner could be conceived of and has to be considered for the purpose of extending benefit for giving employment to the dependent of person died in service interference to Rule 5 of 'Rule 1974'."

In view of the above observations, the writ petition is allowed. The respondents are directd to consider to give the employment to the petitioner to the post of Class IV post/Constable in the department of Civil Police in State of Uttar Pradesh and take such decision within six weeks from the date of receipt of the order and place the petitioner at soe suitable place near her home town and previous benefits which have already been extended to her could be adjusted or reimbursed from the benefits which are to be extended to her in accordance to the law after giving fresh appointment to the petitioner."

22. This Court in the case of **Smt. Rama Devi and another Vs. State of U.P. And others, Writ A No.30612 of 2008** decided on 21.9.2010 considering the above judgments was pleased to observed as under:-

"Having heard learned counsel for the parties and keeping in view the submissions raised this issue is no longer resintegra as held by this Court in the cases referred to herein above. The executive instructions therefore cannot take away the rights of the petitioner to claim compassionate appointment after the civil death of the employee. The respondents have themselves released all post terminal benefits."

23. In view of the above discussion and the observation and direction given in the above referred case law, the principle of purposeful interpretation may be applied in the present case while considering the availability of benefits to the petitioner under Dying-in-Harness Rules. The purpose of Dying-in-Harness Rules is to provide help to the family of the deceased of a Government employee by making appointment on compassionate ground. After the death of Governmnt employee in harness or in case the Government employee is not traceable on account of certain mishappenings like happened in the present case, the appointment on compassionate ground of a dependent may save the family from dying on account of starvation and financial hardships. Hence, the writ petition deserves to be allowed. Accordingly, the impugned order dated 16.11.2006 passed by respondent No.2 (Annexure No.15 to the writ petition) is hereby quashed. The matter is remanded back to the respondent no.2 to consider the grievance of the petitioner afresh for compassionate appointment on a suitale post in the light of the observations made hereinabove within two months from the date of production of a certified/ computer generated copy of this order before him by a reasoned and speaking order.

24. Accordingly, the writ petition is **partly allowed**. Nor order as to cost.

(2021)01ILR A818
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2020

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ A No. 9927 of 2020

Chandrawati Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Lalit Chaudhary

Counsel for the Respondents:
C.S.C., Sri Awadhesh Kumar, Sri Bhupendra Kumar Tripathi

A. Constitution of India – Article 23 – Minimum Wages Act, 1948 – Remuneration – Less than minimum wage – 'Other form of Forced Labour' – Ambit and Scope – Where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words 'forced labour' under Article 23 – Rs. 1000/- paid to lady-cook in Primary School for more than 14 years – Petitioner was never in a position to bargain with the might of the State and continued to suffer the violation of a rights – Held, the State has misused its dominant position in fixing the wages as have been fixed by the two Government Orders to be paid to the cooks employed for providing mid-day-meal – General mandamus issued to remedy the ill. (Para 8, 10, 14 and 15)

B. Constitution of India – Part III – Violation of Fundamental Rights –Role of the Court – Court as custodian – Socio economic equality – Held, this Court being a custodian of the fundamental rights cannot shut its eyes to the injustice carried out against the petitioner and the persons, who are similarly placed by an act of the State, which claims to achieve *socio economic* equality as the cherished dreams of the Constitution. (Para 12)

Writ Petition allowed. (E-1)

Cases relied on :-

1. People's Union For Democratic Rights & ors. Vs U.O.I. & ors., (1982) 3 SCC 235

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The present writ petition has been filed alleging that the petitioner is continuously working as a cook for making mid-day-meal in Basic Primary School Pinesar, Basti since 2005 and petitioner is also a member of Mandhyan Bhojan Rasoiya Mazdoor Sangh. The petitioner has approached this Court alleging that despite the fact that the petitioner is working since 2005, the petitioner has been removed without any opportunity from 01.08.2019. It is also alleged that since the appointment of the petitioner was made in the year 2005, the petitioner was paid monthly wages of Rs. 1000/- per month and, despite the petitioner having worked for more than 14 years, she has been removed. The petitioner claims to be a very poor lady and has no other source of income, however, somehow she managed resources to approach this Court for highlighting the exploitation of the petitioner at the hands of the government and the authorities which are State, within the meaning of Article 12.

2. This Court had expressed its displeasure in the manner in which the amount of Rs. 1000/- was being paid to the poor lady for more than 14 years and, looking into the exploitation of the petitioner, had called the respondents to file

a counter affidavit explaining as to why and how the petitioner was being exploited for such a long time by paying a meager amount of Rs. 1000/- per month.

3. A counter affidavit has been filed before this Court on 09.12.2020, wherein in para 16 the factum of the petitioner's working since 2005 has not been denied. In respect of the amount paid to the petitioner, reliance has been placed on the Government Order dated 24th April, 2010, wherein the wages for the cook, providing mid-day-meal, is fixed as Rs. 1000/- per month, out of which 75% is to be borne by the Central Government and rest 25% is to be borne by the State Government.

4. The counsel for the respondents states that w.e.f. 09th March, 2019 the amount payable to the cooks has been enhanced from Rs. 1000/- to Rs. 1500/- per month. He has also brought on record a Government Order dated 14th August, 2019 to the effect that new incumbents are to be appointed as cook for providing mid-day-meal and preference would be given to the persons whose one of the child is studying in the school in question, and thus argues that as the petitioner's child is not studying in the school, she could not be considered for fresh appointment.

5. The present case highlights the manner in which the practice of Forced Labour is prevalent in the country even after 70 years of independence and the helpless people similar to the petitioner continue to suffer the exploitation willingly.

6. Part III of the Constitution of India provides for the freedoms to which are guaranteed to every citizen of this country . The present case is specifically concerned with Article 14, Article 21 and Article 23 of the Constitution of India, more particularly Article 23 .In the context of the facts of the present case what is to be considered is that whether the payment of wages at the rate of Rs. 1,000/- per month is an ***other form of Forced Labour*** as barred by virtue of Article 23 of the Constitution of India or not.

7. The question of "other forms of Forced Labour" as finds place in Article 23 of the Constitution of India came up for consideration before the Hon'ble Supreme Court for the first time in the case of ***People's Union For Democratic Rights and Others v. Union of India and Others; (1982) 3 SCC 235,*** wherein in the form of Public Interest Litigation, the plight of the workers engaged in the construction for the Asian Games, was highlighted before the Supreme Court. The contention before the Supreme Court was that the workers employed for constructions were being paid wages which were less than the minimum wages prescribed. The Supreme Court specifically considered the scope of Article 23 and recorded as under:-

"12. Article 23 enacts a very important fundamental right in the following terms:

"23. Prohibition of traffic in human beings and forced labour.--(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

Now many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24. We have already discussed the true scope and ambit of Article 24 in an earlier portion of this judgment and hence we do not propose to say anything more about it. So also we need not expatiate on the proper meaning and effect of the fundamental right enshrined in Article 17 since we are not concerned with that article in the present writ petition. It is Article 23 with which we are concerned and that article is clearly designed to protect the individual not only against the State but also against other private citizens. Article 23 is not limited in its application against the State but it prohibits "traffic in human being and begar and other similar forms of forced labour" practised by anyone else. The sweep of Article 23 is wide and unlimited and it strikes at "traffic in human beings and begar and other similar forms of forced labour" wherever they are found. The reason for enacting this provision in the Chapter on Fundamental Rights is to be found in the socio-economic condition of the people at the time when the Constitution came to be enacted. The Constitution-makers, when they set out to frame the Constitution, found that they had the enormous task before them of changing the socio-economic structure of the country and bringing about socio-economic regeneration with a view to reaching social and economic justice to the common man. Large masses of people, bled white by wellnigh two centuries of foreign rule, were living in abject poverty and destitution, with ignorance and illiteracy accentuating their helplessness and despair. The society had degenerated into a status-oriented hierarchical society with little respect for the dignity of the individual who was in the lower rungs of the social ladder or in an economically impoverished condition. The political revolution was completed and it had succeeded in bringing freedom to the country but freedom was not an end in itself, it was only a means to an end, the end being the raising of the people to higher levels of achievement and bringing about their total advancement and welfare. Political freedom had no meaning unless it was accompanied by social and economic freedom and it was therefore necessary to carry forward the social and economic revolution with a view to creating socio-economic conditions in which every one would be able to enjoy basic human rights and participate in the fruits of freedom and liberty in an egalitarian social and economic framework. It was with this end in view that the Constitution-makers enacted the directive principles of state policy in Part IV of the Constitution setting out the constitutional goal of a new socio-economic order. Now there was one feature of our national life which was ugly and shameful and which cried for urgent attention and that was the existence of bonded or forced labour in large parts of the country. This evil was the relic of a feudal exploitative society and it was totally incompatible with the new egalitarian socio-economic order which "we the people of India" were determined to build and constituted a gross and most revolting denial of basic human dignity. It was therefore necessary to eradicate this pernicious practice and wipe it out altogether from the national scene and this had to be done immediately because with

the advent of freedom, such practice could not be allowed to continue to blight the national life any longer. Obviously, it would not have been enough merely to include abolition of forced labour in the directive principles of state policy, because then the outlawing of this practice would not have been legally enforceable and it would have continued to plague our national life in violation of the basic constitutional norms and values until some appropriate legislation could be brought by the legislature forbidding such practice. The Constitution-makers therefore decided to give teeth to their resolve to obliterate and wipe out this evil practice by enacting constitutional prohibition against it in the Chapter on Fundamental Rights, so that the abolition of such practice may become enforceable and effective as soon as the Constitution came into force. This is the reason why the provision enacted in Article 23 was included in the Chapter on Fundamental Rights. The prohibition against "traffic in human beings and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice."

13. The question then is as to what is the true scope and meaning of the expression "traffic in human beings and begar and other similar forms of forced labour" in Article 23? ***What are the forms of "forced labour" prohibited by that article and what kind of labour provided by a person can be regarded as "forced labour" so as to fall within this prohibition?*** *When the Constitution-makers enacted Article 23 they had before them Article 4 of the Universal Declaration of Human Rights but they deliberately departed from its language and employed words which would make the reach and content of Article 23 much wider than that of Article 4 of the Universal Declaration of Human Rights. They banned "traffic in human beings" which is an expression of much larger amplitude than "slave trade" and they also interdicted "begar and other similar forms of forced labour". The question is what is the scope and ambit of the expression "begar" and other similar forms of forced labour'? Is this expression wide enough to include every conceivable form of forced labour and what is the true scope and meaning of the words "forced labour"? The word "begar" in this article is not a word of common use in English language. It is a word of Indian origin which like many other words has found its way in the English vocabulary. It is very difficult to formulate a precise definition of the word "begar", but there can be no doubt that it is a form of forced labour under which a person is compelled to work without receiving any remuneration. Molesworth describes 'begar' as "labour or service exacted by a Government or person in power without giving remuneration for it". Wilson's Glossary of Judicial and Revenue Termsgives the following meaning of the word "begar": "a forced labourer, one pressed to carry burthens for individuals or the public. Under the old system, when pressed for public service, no pay was given. The begari, though still liable to be pressed for public objects, now receives pay. Forced labour for private service is, prohibited." "Begar" may therefore be loosely described as labour or service which a person is forced to give without receiving any remuneration for it. That was the meaning of the word "begar" accepted by a Division Bench of the Bombay High Court in S. Vasudevan v. S.D. Mital [AIR 1962 Bom 53 : 63 Bom LR*

*774 : (1961-62) 21 FJR 441] . "**Begar" is thus clearly a form of forced labour. Now it is not merely "begar" which is unconstitutionally (sic) prohibited by Article 23 but also all other similar forms of forced labour. This Article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values**. The practice of forced labour is condemned in almost every international instrument dealing with human rights. It is interesting to find that as far back as 1930 long before the Universal Declaration of Human Rights came into being, International Labour Organisation adopted Convention No. 29 laying down that every member of the International Labour Organisation which ratifies this convention shall "suppress the use of forced or compulsory labour in all its forms" and this prohibition was elaborated in Convention No. 105 adopted by the International Labour Organisation in 1957. The words "forced or compulsory labour" in Convention No. 29 had of course a limited meaning but that was so on account of the restricted definition of these words given in Article 2 of the Convention. Article 4 of the European Convention of Human Rights and Article 8 of the International Covenant on Civil and Political Rights also prohibit forced or compulsory labour. Article 23 is in the same strain and it enacts a prohibition against forced labour in whatever form it may be found. The learned counsel appearing on behalf of the respondents laid some emphasis on the word "similar" and contended that it is not every form of forced labour which is prohibited by Article 23 but only such form of forced labour as is similar to "begar" and since "begar" means labour or service which a person is forced to give without receiving any remuneration for it, the interdict of Article 23 is limited only to those forms of forced labour where labour or service is exacted from a person without paying any remuneration at all and if some remuneration is paid, though it be inadequate, it would not fall within the words "other similar forms of forced labour". This contention seeks to unduly restrict the amplitude of the prohibition against forced labour enacted in Article 23 and is in our opinion not well founded. It does not accord with the principle enunciated by this Court in Maneka Gandhi v. Union of India [(1978) 1 SCC 248 : AIR 1978 SC 597 : (1978) 2 SCR 621] that when interpreting the provisions of the Constitution conferring fundamental rights, the attempt of the court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content. It is difficult to imagine that the Constitution-makers should have intended to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour. Could there be any logic or reason in enacting that if a person is forced to give labour or service to another without receiving any remuneration at all, it should be regarded as a pernicious practice sufficient to attract the condemnation of Article 23, but if some remuneration is paid for it, then it should be outside the inhibition of that article? If this were the true interpretation, Article 23 would be reduced to a mere rope of sand, for it would then be the easiest thing in an exploitative society for a person belonging to a socially or economically dominant class to exact labour or service from a person belonging to the deprived and vulnerable section of the community by*

paying a negligible amount of remuneration and thus escape the rigour of Article 23. We do not think it would be right to place on the language of Article 23 an interpretation which would emasculate its beneficent provisions and defeat the very purpose of enacting them. We are clearly of the view that Article 23 is intended to abolish every form of forced labour. The words "other similar forms of forced labour" are used in Article 23 not with a view to importing the particular characteristic of "begar" that labour or service should be exacted without payment of any remuneration but with a view to bringing within the scope and ambit of that article all other forms of forced labour and since "begar" is one form of forced labour, the Constitution-makers used the words "other similar forms of forced labour". If the requirement that labour or work should be exacted without any remuneration were imported in other forms of forced labour, they would straightaway come within the meaning of the word "begar" and in that event there would be no need to have the additional words "other similar forms of forced labour". These words would be rendered futile and meaningless and it is a well-recognised rule of interpretation that the court should avoid a construction which has the effect of rendering any words used by the legislature superfluous or redundant. The object of adding these words was clearly to expand the reach and content of Article 23 by including, in addition to "begar", other forms of forced labour within the prohibition of that article. Every form of forced labour, "begar" or otherwise, is within the inhibition of Article 23 and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by this article if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion."

8. Thereafter, the Supreme Court proceeded to consider as to whether a person is said to be providing Forced Labour if he is paid less than the minimum wages for it and recorded as under:-

"14.Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wage for it. It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wage, when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is "forced labour" that is labour or service which a person is forced to provide and "force" which would make such labour or service "forced labour" may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may

properly be regarded as "force" and if labour or service is compelled as a result of such "force", it would be "forced labour". Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly "forced labour". There is no reason why the word "forced" should be read in a narrow and restricted manner so as to be confined only to physical or legal "force" particularly when the national charter, its fundamental document has promised to build a new socialist republic where there will be socio-economic justice for all and everyone shall have the right to work, to education and to adequate means of livelihood. The Constitution-makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order and the Constitution which they have forged for us has a social purpose and an economic mission and therefore every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution. It is not unoften that in a capitalist society economic circumstances exert much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision. The word "force" must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Of course, if a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is "forced labour" because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that he would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. ***We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23. Such a person would be entitled to come to the court for enforcement of his fundamental right under Article 23 by asking the court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be "forced labour" and the breach of Article 23 is remedied****. It is therefore clear that when the petitioners alleged that minimum wage was not paid to the workmen employed by the contractors, the complaint was really in effect and substance a complaint against violation of the fundamental right of the workmen under Article 23."*

9. Thereafter, the Supreme Court considered the obligations of the State in the event of a complaint being made against violation of fundamental rights enacted under Article 17 or Article 23 or Article 24 and recorded as under:-

"15. Before leaving this subject, we may point out with all the emphasis at our command that whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. ***Of course, the person whose fundamental right is violated can always approach the court for the purpose of enforcement of his fundamental right, but that cannot absolve the State from its constitutional obligation to see that there is no violation of the fundamental right of such person, particularly when he belongs to the weaker section of humanity and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him****. The Union of India, the Delhi Administration and the Delhi Development Authority must therefore be held to be under an obligation to ensure observance of these various labour laws by the contractors and if the provisions of any of these labour laws are violated by the contractors, the petitioners vindicating the cause of the workmen are entitled to enforce this obligation against the Union of India, the Delhi Administration and the Delhi Development Authority by filing the present writ petition. The preliminary objections urged on behalf of the respondents must accordingly be rejected."*

10. Thus, following the said judgment of the Supreme Court, I am of the firm view that the payment of wages at the rate of Rs. 1,000/- per month since the year 2005 up to 2019 to the petitioner was clearly a form of Forced Labour, which is prohibited under Article 23 of the Constitution of India. The petitioner was never in a position to bargain with the might of the State and continued to suffer the violation of a rights for a period of 14 years.

11. The counsel for the petitioner has narrated the sorry State of affairs through which the petitioner is undergoing after her removal from the service in the year 2019 and in fact states that the petitioner is still ready and willing to suffer the injustice and perform her duties even if she is paid Rs. 1,500/- per month, which has been prescribed by the Government vide Government Order dated 9th March, 2019 and requests that this Court may direct the State to permit the petitioner to continue on the post of cook at whatever rates, the State may deem fit to give to the petitioner.

12. This Court being a custodian of the fundamental rights cannot shut its eyes to the injustice carried out against the petitioner and the persons, who are similarly placed by an act of the State, which claims to achieve socio economic equality as the cherished dreams of the Constitution. Despite the fact that the petitioner is ready and willing to even work at the rates prescribed by the State, if this Court allows the payment of wages as fixed by the State, that is, Rs. 1,000/- per months enhanced to Rs. 1,500/- per months in the year 2019, the Court would be clearly guilty of perpetuating the violation of the rights of the petitioner enshrined and guaranteed under Article 23 of the Constitution of India.

13. This Court can also not overlook the fact that the persons employed as cooks throughout the State of Uttar Pradesh are being paid such paltry amounts which clearly qualify as forced labour and they continue to render their services without any complaint whatsoever. This Court cannot comprehend that a person earning Rs. 1,000/- per month would be empowered to approach this Court, more particularly because of their socio economic condition, which forced them to accept the services on such conditions as have been imposed by the State.

14. I am of the firm view that the Government Orders, referred to by the Standing Counsel being the Government Order dated 24th April, 2010 prescribing Rs. 1,000/- per month as wages and the Government Order dated 9th March, 2019 prescribing the minimum wages at Rs. 1,500/- per month are clearly a form of "Forced Labour", which is specifically prohibited under Article 23 of the Constitution of India. Thus, I have no hesitation in holding that the State has misused its dominant position in fixing the wages as have been fixed by the two Government Orders to be paid to the cooks employed for providing mid-day-meal.

15. To remedy the ill, I issue a general mandamus directing the State to ensure the payment of wages calculating at the rate prescribed under the Minimum Wages Act to all the cooks employed for providing mid-day-meal in the Institutions run by the Government or Semi-Government bodies. The said cooks, including the petitioner shall be paid minimum wages calculated and payable for every month and year of services rendered by them w.e.f. 2005 till date by paying them the difference of the said amount, which is over and above Rs. 1,000/- per month.

16. The State Government and the Union of India are further directed to take steps for issuance of directions fixing the rate prescribed under the Minimum Wages Act, as the wages which would be payable to the cooks employed for providing mid-day-meal in the Institutions run by the Government or the Semi-Government bodies, the respective Governments may work out their payment obligations in consultation with each other, however, it shall be ensured that the cooks are not paid wages less than the minimum prescribed under the Minimum Wages Act, in any case. It is clarified that this order shall operate to the benefits of all the cooks employed who provide mid-day-meal whether they have approached this Court or not or whether they approach the Government by filing a separate application or not.

17. The directions given by this Court shall be carried out by the District Magistrates in respect of all the cooks, who are working for providing mid-day-meal in the Government and Semi-Government Schools within their Districts. The said exercise of payment of the difference of the amount, as directed above, shall be made within a period of four months from today.

18. As a general mandamus has been issued, the Registrar General of this Court is directed to circulate a copy of the present order to the Chief Secretary, State of U.P. and the District Magistrates throughout the State of U.P. for compliance of the directions given by this Court within the time granted and indicated hereinabove.

19. The writ petition deserves to be allowed and is consequently **allowed** in terms of the directions issued hereinabove.

20. Copy of the order downloaded from the official website of this Court shall be treated as certified copy of this order.

(2021)01ILR A827
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2020

BEFORE

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

Writ -A No. 10185 of 2020

Devendra Singh ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ravi Pratap Singh

Counsel for the Respondents:
C.S.C.

A. Service law – Termination – No Disciplinary Inquiry – TET Certificate, 2011 found to be obtained by fraud – Effect – Held, no doubt if a duly appointed employee's services that are governed by a statutory tenure are to be terminated on the ground of misconduct, disciplinary proceedings, in accordance with law, are a sine qua non – But, it may not be so in a case where the employment is secured through utter fraud – Fraud vitiates all solemn transaction – Any transaction that is the result of a fraud is a nullity – Fraud is required to be undone, wherever and whenever it is found – The petitioner's appointment found nullity. (Para 21 and 22)

Writ Petition dismissed. (E-1)

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

1. The petitioner, Devendra Singh has impugned the orders dated 02.11.2019, 15.11.2019 and 31.07.2020, all passed by the District Inspector of Schools, Basti, which, in effect, put an end to his services as an Assistant Teacher (Trained) in the attached Primary Section of Sri Desh Raj Narang Dayanand Inter College, Walterganj, Basti.

2. The impugned orders have come to be made in the background of facts and circumstances hereinafter detailed : Sri Desh Raj Narang Dayanand Inter College, Walterganj, Basti is a recognized and aided institution, teaching scholars from Class I to Class XII. The institution is governed by the provisions of the Uttar Pradesh Intermediate Education Act, 1921 and the Regulations framed thereunder. The institution aforesaid (for short, "the institution') is in receipt of a permanent grant-in-aid from the State Government. Salaries to its teachers and other employees are paid out of State fund under the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and others Employees) Act, 1971 (for short, "Act of 1971'). There is no issue about the fact that the teachers working against sanctioned posts in the attached primary section of the institution also receive their salaries from the State Exchequer, under the Act of 1971.

3. There were five sanctioned posts of Assistant Teachers in the attached primary section of the institution. Shorn of unnecessary detail, all these posts fell vacant at the relevant point of time and were advertised by the Committee of Management of the institution, after necessary permission granted for the purpose by the District Inspector of Schools, Basti by his order dated

24.07.2014. There is hardly any cavil about the validating of the selection process through which the petitioner, and the four other selectees alongside him, came to be appointed to the five posts of assistant teachers in the primary section of the institution.

4. What figures as a prominent step in the process of the petitioner's appointment is an order dated 20.08.2014, by which financial approval was granted to his appointment, besides the four other assistant teachers, about whom there is no issue here. Post approval of the petitioner's recruitment by the District Inspector of Schools, the Manager of the institution issued a letter of appointment in favour of the petitioner, also on 20.08.2014. The petitioner joined service on 21.08.2014. There is also no dispute inter partes that the petitioner, after joining with the institution as an Assistant Teacher, discharged his duties all through.

5. It appears that a complaint dated 14.04.2019 was laid against the petitioner by Mr. Sanjay Pratap Jaiswal, the Hon'ble Member, Legislative Assembly from Rudhauli, Basti to the Joint Director of Education, Basti Region, Basti, saying that four candidates appointed to the attached primary section of the institution did not possess the requisite U.P. T.E.T. (Primary Level) qualification, essential for a valid appointment. The Hon'ble Member, Legislative Assembly pointed out that one Chandrakesh Pratap Singh had repeatedly complained in the matter, but no inquiry into the validity of appointments had been made.

6. The Joint Director of Education took cognizance of the M.L.A.'s complaint. He appointed the Finance and Accounts Officer to ascertain the truth of the allegations carried in the complaint. The Inquiry Officer appointed by the Joint Director of Education, submitted a report dated 22.07.2019 to the Joint Director. It appears that the Inquiry Officer found substance in the M.L.A.'s complaint against the petitioner as well as the other teachers, about whom there is no issue here. The Joint Director of Education, considering the fact that the validity of the petitioner's qualifications was seriously in doubt, but at the same time, the inquiry before him was no more than a preliminary inquiry, directed that all testimonials relating to the petitioner - educational, vocational and others relating to eligibility, be subjected to a verification, both online and offline, and if these be found not verifiable, necessary proceedings be taken to cancel his appointment and to stop further payment of his salary, all to be done after affording the petitioner opportunity of hearing.

7. An inquiry was undertaken into the validity of the petitioner's training certificates through a formal inquiry initiated for the purpose by the District Inspector of Schools, Basti. What appears from a reading of the order of the District Inspector of Schools dated 02.11.2019 is that in the inquiry, the petitioner was put to notice a number of times, but he chose not to appear. On the basis of verification of records undertaken by the District Inspector of Schools with the Board of High School and Intermediate Education, U.P., Prayagraj (for short, "the Board'), the District Inspector of Schools recorded a finding to the effect that the U.P. Teachers Eligibility Test (Primary Level) certificate claimed by the petitioner, bearing Roll No. 09003193 related to a certain Mohd. Shamim son of Sri Sanaullah, but not to the petitioner. He concluded that the petitioner had not passed

the T.E.T. (Primary Level) Examination, relating to which he had produced a certificate issued by the Board. It was also held that the Manager/ Principal of the institution presented the papers for the petitioner's appointment to the office of the District Inspector of Schools and the then incumbent District Inspector of Schools granted approval without undertaking a verification of the petitioner's testimonials. The District Inspector of Schools, by his order dated 02.11.2019, made a recommendation that the petitioner's services be terminated. Acting on his recommendations, the District Inspector of Schools passed a separate order dated 15.11.2019, cancelling the approval earlier granted to the petitioner's appointment, vide order dated 20.08.2014.

8. Aggrieved by the order dated 02.11.2019 passed by the District Inspector of Schools and the earlier order dated 27.07.2019 passed by the Joint Director of Education, the petitioner instituted Writ - A No.2049 of 2020 before this Court, impugning those orders. One of the contentions urged in the last mentioned writ petition was that the orders, under challenge there, were passed without opportunity of hearing to the petitioner. This Court, by an order dated 10.02.2020, disposed of Writ - A No.2049 of 2020 in the following terms:

"In the facts and circumstances of the case and without entering into merits of the case, this petition is disposed of directing the concerned authorities to pass appropriate orders in the matter of petitioner strictly in accordance with law expeditiously and preferably within a period of three months from the date of production of certified copy of this order before him."

9. Now, in compliance with this Court's order dated 10.02.2020 in Writ - A No.2049 of 2020, the District Inspector of Schools undertook a wholesome inquiry, even though the petitioner did not submit a properly drawn up representation in aid of this Court's order. The District Inspector of Schools fixed dates in the matter, apparently with notice to the parties, that is to say, the Management of the institution and the petitioner, both. The dates fixed were adjourned on more than one occasion. It figures on record that on 27.06.2020, the petitioner stated his case before the District Inspector of Schools through a written statement thereof. It was made out in the representation that the petitioner's roll number was 90904646 and that he had passed the U.P. T.E.T. Examination, 2011 under the said roll number. The District Inspector of School, on an inquiry into the records, noticed that the petitioner had filed his T.E.T. (Primary Level) Certificate relating to the Examination of 2011 bearing Roll No. 09003193 (Serial No. 3133698), regarding which the District Inspector of Schools had addressed a memo dated 09.10.2019 to the Secretary of the Board for verification. The Secretary of the Board ,through his memo dated 16.10.2019, had certified that Roll No. 09003193, the serial number of which was 3133698, related to one Mohd. Shamim son of Sanaullah, an OBC scholar, who had passed the said examination in the year 2011. From this report, the District Inspector of Schools concluded that the petitioner had not passed his T.E.T. (Primary Level) Examination at all. He recorded a finding that the petitioner, Devendra Singh, had presented the T.E.T. (Primary Level) Examination Certificate, bearing Roll No. 09003193, relating to the Examination of the year 2011 at the time that he staked his

candidature for the post, which was not valid.

10. The District Inspector of Schools went on to record a finding that in Writ - A No.2049 of 2020, which the petitioner filed, he had annexed a different T.E.T. Examination Certificate for the year 2011, where the roll number indicated was 90904646, bearing Serial No. 3133698. The District Inspector of Schools has remarked that it is this different certificate which the petitioner now relies upon in support of his case. The District Inspector of Schools has recorded the fact that upon the said difference in the certificates, he had sent the certificate, now relied upon by the petitioner, for verification to the Secretary of the Board, vide his memo dated 05.07.2020. The Secretary, on the basis of the Board's records, through his memo dated 28.07.2020, had returned information to the effect that the T.E.T. Certificate, bearing Roll No. 90904646 and Serial No.3133698, had led him nowhere, inasmuch as there was no Roll No. 90904646 available on the Board's website for the relevant examination during the year concerned.

11. The District Inspector of Schools, therefore, concluded that these facts clearly show that the petitioner does not hold a valid T.E.T. Certificate. He has, particularly, remarked that the fact that the T.E.T. Examination Certificate relating to the year 2011 relied upon by the petitioner at the time he staked his candidature and the one that he has annexed to the writ petition, both bear the same serial number, that is to say, 3133698, but varying roll numbers make the incongruence irreconcilable. The District Inspector of Schools, therefore, recorded a further finding that both the T.E.T. certificates are got up documents, presented by the petitioner to secure an unfair advantage. The District Inspector of Schools, therefore, rejected the petitioner's representation by his order dated 31.07.2020.

12. Now, the petitioner challenges the last mentioned order of the District Inspector of Schools, dated 31.07.2020 as the earlier orders dated 02.11.2019 and 15.11.2019, also passed by the District Inspector of Schools.

13. When this petition came on for admission, much was made by Mr. Ravi Pratap Singh, learned Counsel for the petitioner about the fact that the petitioner had not been given due opportunity of hearing, to which he was entitled. It was urged by Mr. Singh, learned Counsel for the petitioner that the petitioner was, after all, a duly selected and appointed teacher against a sanctioned post. An inquiry, therefore, ought to have been held by issuing him a charge sheet, where evidence ought to have been led.

14. Mr. Sharad Chandra Upadhyay, learned State Law Officer appearing on behalf of respondent nos.1 to 6, on the other hand submitted that it is not a case where the petitioner's services have been terminated for some misconduct, rather it is the validity of his initial appointment that is beset by fraud vitiating the appointment at its inception. Mr. Upadhyay further submits that an appointment secured through fraud is a nullity. If there was any denial of opportunity, that has been made good under orders of this Court, when the District Inspector of Schools has undertaken a wholesome review of the short issue, whether the petitioner holds a valid Teachers Eligibility Test Certificate from

the Board. It is urged by Mr. Upadhyay that in an inquiry conforming to the principles of natural justice and fair play done in the petitioner's presence, the District Inspector of Schools, on the basis of relevant material, has held that there is absolutely no Teachers Eligibility Test Certificate ever earned by the petitioner to support his candidature. The T.E.T. Examination Certificate for the year 2011, relied upon by the petitioner - the one that was lodged by him at the time of selection and the one appended to the writ petition are both bogus and fraudulent documents, never issued by the Board. In these circumstances, Mr. Upadhyay, learned State Law Officer says that this is not a case where disciplinary proceedings are required to be undertaken. It is a case where the petitioner's initial retention in service is void.

15. Looking to the issue involved in the petition, which is all about the fact whether the petitioner did earn a Teachers Eligibility Test Certificate from the Board in the year 2011 or not at all, this Court suggested to the parties that the fact may be verified from the Board before this Court. The learned Counsel for both parties agreed to the above course of action. Accordingly, this Court has proceeded to determine this writ petition by consent of parties at the admission stage without going through the formal process of admission, exchange of affidavits and a regular hearing.

16. To the above end, a number of orders were passed by the Court, requiring the Board to disclose their stand about the validity of the petitioner's certificate in question. Each time, the Board came up with a categorical stand that the petitioner has not earned the certificate in question in the 2011 from the Board at all. Most of the orders that this Court passed, requiring the Secretary of the Board to verify the fact, were made in the face of immense confidence that the petitioner displayed during the course of proceedings about the genuineness of his T.E.T. Certificate, 2011. It would be apposite to refer various orders that were passed by this Court. On 25.11.2020, the following order was made:

"Let the Madhyamik Shiksha Parishad, U.P. at Prayagraj represented through its Secretary, respondent no. 5 submit a report whether T.E.T. Examination Certificate for the year 2011 bearing Roll No. 09003193 and Serial No. 3133698 has been issued by them in the name of Devendra Singh S/o Kalika Singh.

It will be specifically indicated in the report whether this certificate has been issued by the respondent-Board and is available in their records. The report will bear reference not just to the Board's website but their original records as well.

Let the report be submitted on or before 01.12.2020.

Lay this matter as fresh again on 01.12.2020.

Let this order be communicated to the Madhyamik Shiksha Parishad, U.P. at Prayagraj through its Secretary by the Joint Registrar (Compliance) within 24 hours."

17. Again on 01.12.2020, the following order was passed:

"It is pointed out by the learned counsel for the petitioner that in the order of this Court dated 25.11.2020, the roll number relating to the petitioner for the T.E.T. Examination and the serial number have been mentioned in error, the error being the same as led the board to earlier response incorrectly. He points out that the T.E.T. certificate for the examination of

2011 that he submitted is on record at page number 44 of the paper book. It is the said certificate that is required to be verified from the original records of the board.

The Madhyamik Shiksha Parisad, U.P. at Prayagraj represented through its Secretary, respondent no. 5 shall submit a report whether T.E.T. Examination Certificate for the U.P. Teachers Eligibility Test, 2011 (Primary Level) bearing Roll No. 90904646 (General Category) and Serial No. 3133698 has been issued by them in the name of Devendra Singh s/o Kalika Singh.

It will be specifically indicated in the report whether this certificate has been issued by the respondent-Board and is available in their records. The report will bear reference not just to the Board's website but their original records as well.

Let a report be submitted by 07.12.2020.

Lay this matter as fresh again on 07.12.2020.

Let this order be communicated to the Madhyamik Shiksha Parisad, U.P. at Prayagraj through its Secretary by the Joint Registrar (compliance) today."

18. Still again on 07.12.2020, the following order was made:

"The Secretary, Madhyamik Shiksha Parishad, U.P. Prayagraj, is directed to appear in person day after tomorrow at 02:00 pm and produce the original records relating to U.P. Teachers Eligibility Test-2011 (Primary Level), bearing Roll No.90904646 (General Category), and Serial No.3133698. A hard copy of the roll number records carrying serials of the roll numbers in the vicinity of the mentioned roll number shall also be produced. The records produced howsoever, bulky shall be a wholesome record and not some truncated part of it.

Lay as fresh again on 09.12.2020 at 02:00 pm.

Let this order be communicated to the Secretary, Madhyamik Shiksha Parishad, U.P. Prayagraj, by the Joint Registrar (Compliance) today."

19. In compliance with the order dated 07.12.2020, the Secretary of the Board appeared before the Court and took a definite stand that Roll No. 90904646 relating to the Teachers Eligibility Test, 2011 is a non-existent roll number, which is not there in the records. Mr. Ravi Pratap Singh, learned Counsel for the petitioner was equally insistent that his client did appear in the T.E.T. Certificate Examination, 2011 held by the Board under Roll No. 90904646. It was urged with much emphasis by Mr. Singh that whatever records have been produced by the Board, are not complete with Roll No. 90904646 tucked away elsewhere, deliberately hidden from the eyes of the Court. In those circumstances, this Court issued a Commission on 09.12.2020 to the learned Chief Judicial Magistrate, Allahabad to undertake a wholesome inspection of the Board's record, relating to the T.E.T. Certificate Examination, 2011 and determine, whether Roll No. 90904646 is there in the records of the Board and if it is there, the name of the candidate, to whom it relates. The personal presence of the Secretary of the Board was exempted. The order that this Court made on 09.12.2020 is eloquent and extracted below:

"The Secretary, Madhyamik Shiksha Parishad, Uttar Pradesh, Prayagraj, has appeared before the Court and he states that Roll no.90904646 relating to Teachers

Eligibility Test-2011 does not exist on the record of the Board. It is a non-existing roll number relative to the said Examination. Learned Counsel for the petitioner insists that the petitioner has appeared validly under roll no.90904646 at the examination in question and that he has been granted a TET Certificate by the Board, which the Board are wrongfully disowning. The Board have produced a tabulation register, which does not carry roll no.90904646.

Learned Counsel for the petitioner says that this is not a complete record and the said roll number may be elsewhere in the records of the Board. The Board are attempting to hide from the Court's eyes the complete record, in particular, the one that carries the petitioner's roll number, that is, 90904646.

Since this issue is one which cannot be efficaciously resolved on the basis of the affidavits, this Court considers it expedient to issue a commission to the learned Chief Judicial Magistrate, Allahabad to inspect the records of the Madhyamik Shiksha Parishad, Uttar Pradesh, Prayagraj after office hours of the Board on 11.12.2020, and submit a report to this Court doing a thorough inspection as to whether this roll no.90904646 relating to the TET-2011 is there in the records of the Board, and if there, the name of the candidate, to whom it relates.

The learned Commission/ the Chief Judicial Magistrate, Allahabad shall submit his report to this Court by 15.12.2020.

The Secretary, Madhyamik Shiksha Parishad, Uttar Pradesh, Prayagraj, who has appeared in person and produced the record, need not appear any further. His appearance is exempted.

List this matter on 15.12.2020 in the additional cause list along with the Chief Judicial Magistrate's report.

Let this order be communicated to the Chief Judicial Magistrate, Allahabad through the learned District and Sessions Judge, Allahabad and the Secretary, Madhyamik Shiksha Parishad, Uttar Pradesh, Prayagraj by the Joint Registrar (Compliance) within 24 hours."

20. In compliance with this Court's order dated 09.12.2020, Mr. Neeraj Kushwaha, the learned Chief Judicial Magistrate, Allahabad undertook a very meticulous and industrious enterprise to inspect the Board's record and bring out truth, where the stand on both sides had placed the Court to tread on unsure ground. It would be unrequited justice if Mr. Neeraj Kushwaha's report submitted along with a memo dated 14.10.2020 is not extracted for all its worth. The material part of his report reads:

"1. रिट संख्या 10106/2020 देवेन्द्र सिंह बनाम उत्तर प्रदेश राज्य एवं छः अन्य दिनाँकित 09.12.2020 में मुझे कमीशन जारी करते हुए माध्यमिक शिक्षा परिषद के अभिलेखो की जाँच इस आशय से करने हेतु निर्देशित किया गया कि **क्या अनुक्रमांक संख्या 90904646 जो टी.ई.टी. 2011 से सम्बन्धित है, बोर्ड के रिकार्ड में मौजूद है और यदि मौजूद है तो उस अभ्यार्थी का नाम जो इस अनुक्रमांक से सम्बन्धित है।**

2. उक्त तथ्यों की जांच हेतु मेरे द्वारा सर्वप्रथम टी.ई.टी. 2011 में सम्मिलित सभी अभ्यार्थियों की सूची जहाँ से प्रथम अनुक्रमांक शुरू होता है और अन्तिम अनुक्रमांक खत्म होता है, कि चाही गयी। वहाँ मौजूद सचिव माध्यमिक शिक्षा परिषद एवं अन्य कर्मियों के द्वारा मुझे रिकार्ड रूम ले जाया गया और वहाँ उक्त परीक्षा से सम्बन्धित सभी गण्डलो के अभिलेख मेरे समक्षा रखे गये। मेरे द्वारा सभी अभिलेखो की जाँच की गयी, अभिलेखो के देखने से यह पता चला कि उक्त परीक्षा के लिए प्रदेश को कुल 18 मण्डल में विभाजित किया गया था एवं प्रत्येक मण्डल के लिए दो अंको का एक कोड निर्धारित किया गया था जो 01, 02, 03 ..... 18 तक था। अनुक्रमांक के प्रथम दो अंक मण्डल को दर्शित करते थे। प्रथम मण्डल मेरट था जिसमें अनुक्रमांक संख्या 01000001 से

01098674 तक आवंटित था, द्वितीय मण्डल सहारनपुर था जिसमें अनुक्रमांक संख्या 02000001 से 02027646 तक आवंटित थे, तृतीय मण्डल आगरा था जिसमें अनुक्रमांक संख्या 03000001 से 03084880 तक आवटित था, इसी प्रकार सम्पूर्ण 18 मण्डलो में अनुक्रमांक के प्रथम दो अंक उस मण्डल के कोड से प्रारंभ होकर उस मण्डल में कुल सम्मिलित अभ्यार्थियों की संख्या के अनुसार मण्डल वार अनुक्रमांक आवंटित किये गये थे।

3. अनुक्रमांक आवंटन की उक्त व्यवस्था को देखने से ही स्पष्ट हो जाता है कि प्रश्नगत अनुक्रमांक 90904646 वास्तव में टी.ई.टी. परीक्षा 2011 में किसी भी अभ्यार्थी को आवंटित हो ही नहीं सकता था, क्योंकि 90 किसी भी मण्डल का कोड नही था। सम्पूर्ण दस्तावेजो के अवलोकन से यह स्पष्ट था कि टी.ई.टी. परीक्षा 2011 में कोई भी अनुक्रमांक 01,02,03,04,05,06, ... 18 से ही प्रारंभ हो सकता था, जो कुल 18 मण्डलो को ही प्रदर्शित करता था। प्रश्नगत अनुक्रमांक 90 से प्रारंभ हो रहा है जो माध्यमिक शिक्षा परिषद उ0प्र0 प्रयागराज में टी.ई.टी. 2011 परीक्षा से सम्बन्धित समस्त मौजद अभिलेखो में नही था न ही इन अंको से प्रारम्भ होकर कोई अनुक्रमांक टी.ई.टी. 2011 परीक्षा में किसी अभ्यार्थी को आवंटित हुआ था।

4. चूंकि यह रोल नम्बर किसी भी रजिस्टर में मौजूद नही था। अतः उक्त तथ्य की पुष्टि हेतु मेरे द्वारा इलेक्ट्रानिक अभिलेखों की भी जाँच आवश्यक समझी गयी और जाँच करवाने हेतु सचिव से कहा गया, जिस हेतु मुझे माध्यमिक शिक्षा परिषद के कम्प्यूटर रूम में ले जाया गया, जहाँ मेरे द्वारा टी.ई.टी. 2011 से सम्बन्धित साफ्ट डाटा बेस को कम्प्यूटर पर खुलवाया गया सर्वप्रथम मेरे द्वारा प्रश्नगत रोल नम्बर 90904646 को फीड करवाया गया और सर्च करने पर ज्ञात हुआ कि सम्पूर्ण टी0ई0टी0 परीक्षा 2011 के डाटाबेस में यह अनुक्रमांक मौजूद नहीं है, तदुपरान्त मेरे द्वारा माननीय उच्च न्यायालय के आदेश में वर्णित अभ्यार्थी देवेन्द्र सिंह पुत्र कालिका सिंह के नाम से सर्च करवाया गया तो उक्त नाम व पिता नाम से केवल एक अभ्यार्थी दर्शित हुआ जिसकी जन्मतिथि 15.4.1984 थी और जिसका अनुक्रमांक 11011114 था न कि 90904646. और वह उक्त परीक्षा में अनुत्तीर्ण भी था तथा उसे अभिलेख के अनुसार कोई प्रमाणपत्र भी निर्गत नहीं हुआ था।

5. उपरोक्त जॉच के क्रम में मेरे समक्ष सचिव द्वारा उनके कार्यालय में सत्यापन हेतु प्राप्त देवेन्द्र सिंह पुत्र कालिका सिंह के प्रमाणपत्र दिखाये गये जिसमें प्रमाणपत्र संख्या 3133698 था। मेरे द्वारा उक्त प्रमाणपत्र संख्या के आधार पर भी प्रश्नगत अनुक्रमांक की जॉच की गयी तो सारणीयन पंजिका टी.ई.टी. 2011 परीक्षा से यह पाया गया कि उक्त प्रमाणपत्र संख्या अनुक्रमांक संख्या 09003193 मोहम्मद शमीम पुत्र सनउल्ला को निर्गत किया गया है न कि देवेन्द्र सिंह पुत्र कालिका सिंह को। उक्त तथ्य की पुष्टि मेरे द्वारा इलेक्ट्रानिक अभिलेख से भी की गयी तो यह पाया गया उक्त प्रमाणपत्र संख्या 3133698 देवीपाटन मण्डल के अनुक्रमांक संख्या 09003193 के अभ्यार्थी मोहम्मद शमीम पुत्र सनउल्ला को निर्गत किया गया था।

उपरोक्त समस्त जॉच से स्पष्ट है कि **प्रश्नगत अनुक्रमांक संख्या 90904646 टी.ई.टी. परीक्षा 2011 में किसी अभ्यार्थी को आवंटित नही किया गया और न ही उक्त अनुक्रमांक पर कोई अभ्यार्थी टी.ई.टी. परीक्षा 2011 में सम्मिलित हुआ।"**

21. The aforesaid report that was laid before the Court by the office was shown to Mr. Ravi Pratap Singh as well as to Mr. Sharad Chandra Upadhyay. Mr. Ravi Pratap Singh, learned Counsel for the petitioner, on being asked if he had anything more to say in the matter about denial of opportunity, fell short of words. The much ado that he had made about denial of opportunity or the need to undertake disciplinary proceedings, did not figure in the day's proceeding after the learned Counsel for the petitioner had looked into the learned Commissioner's report. It can hardly be gainsaid that grant of opportunity has no particular form. It ought to meet the requirements of fair play in the given case. No doubt if a duly appointed employee's services that are governed by a statutory tenure are to be terminated on the ground of misconduct, disciplinary proceedings, in accordance with law, are a sine qua non.

But, it may not be so in a case where the employment is secured through utter fraud. It is well known that fraud vitiates all solemn transaction. Any transaction that is the result of a fraud is a nullity. Fraud is required to be undone, wherever and whenever it is found. This is not to be misunderstood and mistaken by the Authorities as a licence to label any irregularity or illegality as fraud and then short-circuit the procedure prescribed by law to support a particular action.

22. The present case, however, is definitely a case where the petitioner cannot claim that he ought to be proceeded with against in disciplinary proceedings. His is a case where it can safely be said that he was never validly appointed; his appointment is a nullity. It has rightly been undone. Also under the circumstances, the petitioner has been afforded sufficient opportunity. Before this Court, whatever ripples had been created by falsehood and confounding numericals to capitalize on the fraud, have been laid open and bare to the sunshine of truth by Mr. Neeraj Kushwaha's punctilious examination of the Board's record, which he has scripted in his report with commendable clarity.

23. In the result, this writ petition fails and is **dismissed** with costs in the sum of Rs.15,000/-. The petitioner is directed to deposit the costs awarded in the Account of the Secretary, Board of High School and Intermediate Education, U.P., Prayagraj within six weeks of date. In the event, the costs are not deposited within the time allowed, on a certification to this effect made by the Secretary, Board of High School and Intermediate Education, U.P., Prayagraj to the Collector, Basti, the Collector, Basti is ordered to recover the aforesaid sum of money from the petitioner as arrears of land revenue and credit it immediately upon recovery into the Board's Account.

(2021)01ILR A835
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2020

BEFORE

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

Writ A No. 10300 of 2017

Bhanu Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Lal Behari Yadav, Sri Kamla Kant Srivastava, Sri Kshitij Shailendra, Sri Rajesh Kumar Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law - U. P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 – Hindu Adoption and Maintenance Act, 1956 – Proviso to Section 7 – Service law – Compassionate Appointment – Adoption deed claimed – No wife's consent in Adoption deed – Effect – Proviso to Section 7 makes it imperative for a Hindu male to secure his wife's consent to an adoption that he makes, unless she 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 – There is nothing in any of these three exceptions – A wife living apart from the husband, utterly estranged, is still a wife, until the marital bond between the parties is severed by a decree of divorce or nullity of marriage – Held, the impugned order, holding the adoption not valid, does not suffer from any infirmity. (Para 21 and 26)

B. Civil Law - Hindu Adoption and Maintenance Act, 1956 – Proviso of Section 7 –Adoption – Matrimonial law – Judicial Separation – Husband's obligation – A virtual or constructive divorce, as if it were, are concepts not accepted generally in matrimonial laws – Even a judicial separation would not put an end to the husband's obligation under the proviso to Section 7 – Mere estrangement between the man and wife without disruption of the marital status, in accordance with law, that may either be by a decree for divorce or annulment or by death of the wife, would not take the case out of mischief of the proviso to Section 7, requiring the wife's consent to the adoption. (Para 21 and 25)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Vikas Jauhari Vs St. of U.P. & ors. , 2011 (10) ADJ 729

2. Kamla Rani Vs Ram Lalit Rai @ Lalak Rai (Dead) through Legal Representatives & ors. , (2018) 9 SCC 663

3. Brajendra Singh Vs St. of M.P. & anr., (2008) 13 SCC 161

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

1. In this writ petition, parties have exchanged affidavits, pending admission. These include a supplementary affidavit filed on behalf of the petitioner.

2. Admit.

3. Heard forthwith.

4. Mr. Kshitij Shailendra, Advocate, appears on behalf of the petitioner, whereas all the three respondents, who are the State and its officers, are represented by Mr. Manvendra Dixit, learned Standing Counsel.

5. The question involved in this petition is :

" Whether the words "If he has a wife living" occurring in the proviso to Section 7 of The Hindu Adoptions and Maintenance Act, 19561 include an estranged wife living apart from her husband, but not divorced ? "

6. Rajendra Singh and Raj Narayan Singh were brothers. They were both sons of one Uday Raj Singh. Both brothers were married. Rajendra Singh was married to Smt. Phulmati, whereas Raj Narayan Singh was married to Smt. Kamla Devi. Both the brothers were natives of Village - Mirzapur, Post - Kajha, District - Mau. Rajendra Singh and Smt. Phulmati were an issueless couple, whereas Rajendra Singh's brother, Raj Narayan Singh had a son, Bhanu Pratap Singh. Bhanu Pratap Singh is the petitioner here. Rajendra Singh was a Gardener, in the employment of the Forest Department. He was posted in the control of respondent no. 3. Rajendra Singh, being issueless, adopted his brother's son, Bhanu Pratap Singh, the petitioner here, on 07.02.2001. The adoption was purportedly made in accordance with Hindu rites, with all ceremonies of giving and taking being observed. A deed of adoption was, however, executed much later, on 14.12.2009. It was admitted to registration on 15.12.2009. The deed of adoption shows that parties to the adoption were Raj Narayan Singh and his wife Smt. Kamla Devi on the one hand, described as the first party, and Rajendra Singh alone on the other, described as the second party. Rajendra Singh represented himself as an unmarried man, according to the recitals carried in the adoption deed. This was done, as it appears, because Rajendra Singh and his wife Smt. Phulmati were an

estranged couple. Rajendra Singh, for obvious reasons, could not secure Smt. Phulmati's consent to the adoption. Rajendra Singh died in harness on 03.06.2016, leaving behind him his wife Smt. Phulmati, a fact acknowledged in the writ petition, and the much disputed adopted son of his, Bhanu Pratap Singh, the petitioner. Bhanu Pratap Singh obtained a succession certificate of sorts from a nondescript officer, called an Officer In-Charge (Certificates), acting for the Collector of Mau. This certificate is dated 25.10.2016.

7. It must be remarked that this certificate dated 25.10.2016 is more an expression of hesitation than certification. It says that this certificate is not valid for the purpose of any case relating to inheritance or income tax. Words to this effect are scribed at the head of the document. At the foot of it, there is a note, which says that the certificate is founded on an administrative inquiry alone. It would not apply to a case relating to succession in Court. It would have no effect under the various laws, where a requirement is there to produce a succession certificate from a Judge. It is then mentioned in the note that for claims up to the value of Rs. 5,000/-, the certificate would be valid. The last limitation indicated is that the certificate is not to be used in a foreign country.

8. This Court must make it bold to remark that the document dated 20.10.2016, purporting to be a succession certificate, or whatever it is, is the embodiment of an absolutely unauthorized act by the Collector's office. There is no provision under any law that authorizes the Collector of a district to issue a succession certificate of any kind. The learned Standing Counsel has not been able to show any law, authorizing the Collector to issue a succession certificate of any worth, relating either to movable or immovable property. This Court must deprecate the tendency of citizens to readily rush to authorities administrative, instead of approaching the Judge or Court of ordinary original civil jurisdiction, who commands wide powers in matters affecting civil rights of parties and to determine civil questions. It is well-reputed that succession certificates, letters of administration to estates of deceased and probates of Will are all matters that are specifically entrusted under the Succession Act to Judges, including this Court. The Collectors ought not issue certificates partaking the colour of succession certificates, which have a tendency of confounding rights of parties. No more is required to be said about this matter.

9. Now, the certificate dated 25.10.2016 mentions that Bhanu Pratap Singh is the adopted son of the late Rajendra Singh. It also mentions that his status is founded on a registered adoption deed. It also certifies that apart from Bhanu Pratap Singh, Rajendra Singh did not leave any other heir entitled. Acting on the certificate dated 25.10.2016, Bhanu Pratap Singh staked his claim before the respondent-Authorities, under the The Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 19742, asking to be appointed on compassionate basis, due to death of the late Rajendra Singh, his adoptive father while still in service. This application appears not to have been attended to by respondent no. 3, and remained pending for some time. Bhanu Pratap Singh preferred Writ - A No. 53860 of 2016, complaining of inaction on the third respondent's part in the matter. He sought a direction for the

consideration of his claim to a compassionate appointment. This Court, by order dated 17.11.2016 made in *Writ - A No. 53860 of 2016*, disposed of the aforesaid writ petition, ordering the Divisional Director, Social Forestry Division, Mau, respondent no. 3 to consider and decide the petitioner's claim in accordance with law, preferably within a month of the date of production of a certified copy of the order.

10. In deference to that direction made by this Court, the Divisional Director, Social Forestry Division, Mau, respondent no. 3, by his order dated 17.12.2016, rejected the petitioner's claim, holding that he was neither the sole heir nor a dependent of Rajendra Singh, within the meaning of the Rules of 1974. It was held that Smt. Phulmati was the deceased's wife and his sole heir-dependent. The petitioner, Bhanu Pratap Singh, was his brother's son, whose father and mother, Raj Narayan Singh and Smt. Kamla Devi, were alive. The adoption was not found valid on facts and in law, for the reasons indicated in the order.

11. Aggrieved, this writ petition has been preferred.

12. Notice, pending admission, was issued to the respondents on 17.03.2017, and they have filed a counter affidavit jointly on behalf of respondent nos. 2 and 3 on 22.08.2017, to which, a rejoinder affidavit has been filed on behalf of the petitioner on 05.08.2017. A supplementary affidavit dated 07.02.2019 has also been filed.

13. A perusal of the impugned order shows that the third respondent, the Divisional Director, Social Forestry Division, Mau, has disbelieved the adoption and held it to be a sham. The third respondent, while considering the petitioner's claim, also had before him, the deceased Rajendra Singh's widow Smt. Phulmati, who objected to the claim founded on adoption. She stated that she was the sole heir and dependent of the deceased. Amongst the many reasons that the third respondent has assigned to reject the petitioner's claim for a compassionate appointment under the Rules of 1974, is the compromise decree in O.S. No. 145 of 1994, passed by learned Civil Judge (Senior Division), Mau dated 06.08.1994. This decree acknowledges the fact that Smt. Phulmati is Rajendra Singh's wife. It also embodies the fact that Rajendra Singh, who was an employee of the Forest Department, had got a nomination recorded in his Service Book and Group Insurance Scheme (G.I.S.) in favour of Smt. Kamla Devi, owing to strained relations with his wife. It has been covenanted by the terms of the compromise embodied in the decree that now, the name of Smt. Phulmati, Rajendra Singh's wife, be substituted as his legal heir in the service record, in place of Smt. Kamla Devi. There is also a covenant about Smt. Kamla Devi receiving a sum of Rs. 500/- per month towards maintenance, which would be chargeable to his pension and property also.

14. This Court has looked into that decree, annexed to the counter affidavit. The impugned order further shows that the adoption has been disbelieved for other reasons as well. It has been noticed that the extract of the family register filed by the petitioner, along with his application, shows that the name of his father, indicated therein, is Raj Narayan Singh, and that of his mother, Kamla Devi, whereas Smt. Phulmati Devi's husband is shown as

Rajendra Singh. It has next been noticed in the order impugned that Rajendra Singh has described himself in the deed of adoption as unmarried, whereas his wife Smt. Phulmati Devi is alive. It has also been recorded by the third respondent that while the date of adoption deed relied upon by the petitioner is 27.11.2009 (in fact, it is 14.11.2009), the petitioner's mark-sheets relating to his B.A. degree for the first year, the second year and the third year, vis-à-vis the examinations of 2011, 2012 and 2013, show the name of the petitioner's father as Raj Narayan Singh, and that of his mother, Smt. Kamla Devi. The inference appears to be that in case the petitioner were adopted in terms of the registered adoption deed of 2009 (which, in fact, embodies an adoption of the year 2001), there was no occasion for the petitioner's father and mother's name to be mentioned in his educational records as Raj Narayan Singh and Smt. Kamla Devi, who are his natural parents. The educational documents would have borne his adoptive father's name. On these grounds, the third respondent has held the adoption to be a sham, and the petitioner not at all the adoptive son of the deceased, entitling him to compassionate appointment.

15. Mr. Kshitij Shailendra, learned counsel for the petitioner, has been at pains to assail the impugned order. He has submitted that there is nothing wrong about the adoption. He asserts that the third respondent has remarked in error that reference to the adoptee in the deed of adoption as "ek ladke ko god lena chahte hain", whereas the adoptee is Rajendra Singh's nephew, raises suspicion. Mr. Shailendra says that the exception taken by the third respondent to a reference about his nephew by Rajendra Singh as a boy, is not at all misplaced, inasmuch as it is permissible in law to take a nephew in adoption. He also submits that remarks by the third respondent that the petitioner's father and mother are alive, also inform the impugned order with irrelevant considerations, for it is no disqualification under the law that the adopted boy has both his natural parents alive. Mr. Kshitij Shailendra has placed reliance upon a decision of this Court in **Vikas Jauhari v. State of U.P. and Others3** to support his submission that an adopted son is as much a son as a natural son, for the purposes of the Rules of 1974. He has drawn the attention of this Court towards Paragraph 9 of the report in **Vikas Jauhari (Supra)**, where it is held :

"9. In view of the above, I am of the considered view that the adopted son also falls within the definition of family defined under section 2(c) of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 and entitled for the claim of compassionate appointment."

16. Mr. Kshitij Shailendra has further submitted that so far as the validity of the adoption is concerned, even in cases where the adoption is not strictly proved with the establishment of a ceremony of giving and taking, the long duration of time during which a person is treated as adopted, has to be given due weight. He submits that in this case, the petitioner was adopted way back in the year 2001, whereas the adoptive father died in the year 2016. The adoption, that was completed in the year 2001, was recorded in the deed of adoption, bearing a specific reference to the date in the year 2001, when the petitioner was adopted. This deed has been duly admitted to registration. It is the learned counsel's submission, therefore, that such long-

standing adoption, which is also natural in its choice, given the fact that the adoptee is the adopter's nephew, the third respondent has erred in holding the adoption to be sham. Mr. Shailendra has placed reliance, in support of this part of his contention, upon a decision of the Supreme Court in **Kamla Rani v. Ram Lalit Rai alias Lalak Rai (Dead) through Legal Representatives and Others4** where it was held :

"6. We cannot lose sight of the principle that though the factum of adoption and its validity has to be duly proved and formal ceremony of giving and taking is an essential ingredient for a valid adoption, long duration of time during which a person is treated as adopted cannot be ignored and by itself may in the circumstances carry a presumption in favour of adoption. In this regard, we may refer to the observations of this Court in L. Debi Prasad v. Tribeni Devi [L. Debi Prasad v.Tribeni Devi, (1970) 1 SCC 677] : (SCC pp. 681-82, para 9)

"9. There is no doubt that the burden of proving satisfactorily that he was given by his natural father and received by Gopal Das as his adoptive son is on Shyam Behari Lal. But as observed by the Judicial Committee of the Privy Council in Rajendro Nath Holdar v. Jogendro Nath Banerjee [Rajendro Nath Holdar v. Jogendro Nath Banerjee, 1871 SCC OnLine PC 11 : (1871-72) 14 Moo IA 67] ; that although the person who pleads that he had been adopted is bound to prove his title as adopted son, as a fact yet from the long period during which he had been received as an adopted son, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party, who had a right to question the legitimacy, where the defendant, in order to defend his status, is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family; that in the case of a Hindu, long recognition as an adopted son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family. In Rup Narain v. Gopal Devi [Rup Narain v. Gopal Devi, 1909 SCC OnLine PC 3 : (1908-09) 36 IA 103] the Judicial Committee observed that in the absence of direct evidence much value has to be attached to the fact that the alleged adopted son had without controversy succeeded to his adoptive father's estate and enjoyed till his death and that documents during his life and after his death were framed upon the basis of the adoption. A Division Bench of the Orissa High Court in Balinki Padhano v. Gopakrishna Padhano [Balinki Padhano v. Gopakrishna Padhano, 1963 SCC OnLine Ori 33 : AIR 1964 Ori 117] ; held that in the case of an ancient adoption evidence showing that the boy was treated for a long time as the adopted son at a time when there was no controversy is sufficient to prove the adoption although evidence of actual giving and taking is not forthcoming. We are in agreement with the views expressed in the decisions referred to above."

17. Mr. Dixit, on the other hand, submits that the adoption in this case is sham to its face. He has emphasized that post adoption, which is said to have taken place in the year 2001, the petitioner's name has nowhere figured, in any records,

as the Late Rajendra Singh's son. In the family register also, there is nothing to show that the adoption was ever given effect to. In the mark-sheets relating to the three-year B.A. course pursued by the petitioner, names of the petitioner's parents mentioned are those of his natural parents, Raj Narayan Singh and Smt. Kamla Devi. These do not mention Rajendra Singh or his wife, Smt. Phulmati. Mr. Dixit, therefore, says that there is no evidence at all here to conclude that over a long period of time, the petitioner has been treated as Rajendra Singh's son. He also emphasized the fact that deed of adoption was executed and registered in the year 2009 about an antecedent adoption that took place eight years ago. In his submission , this also raises suspicions about it. All the aforesaid contentions aside, Mr. Dixit says that the fact that consent of Smt. Phulmati was not taken before the petitioner was adopted, renders the adoption bad in law, in view of the proviso to Section 7 of the Act of 1956. To the last contention advanced by Mr. Dixit, the Court asked Mr. Shailendra if there was still doubt about Smt. Phulmati being the Late Rajendra Singh's wife. Mr. Shailendra has urged that for a fact it cannot be denied that Rajendra Singh was married, and that Smt. Phulmati was his wife. He further submits that so far as the issue about the proviso to Section 7 of the Act of 1956 is concerned, the same ought not be applied in a case where the husband and wife are separated and living apart, so much so, that the two have turned strangers, though not formally divorced. He submits that the proviso to Section 7 must be read in a purposive manner and an estranged wife, who has no connection with the affairs of her husband, ought not be regarded as a wife obliging the man as a married Hindu, to secure his wife's consent before he adopts.

18. This Court has given a thoughtful consideration to the submissions variably made on both sides. So far as the objection to the impugned order based on the fact that an adopted son may not be regarded as a son within the meaning of Section 2 (c) of the Rules of 1974, this Court does not think that there is any other issue about it. The impugned order does not decline the petitioner's claim, because the petitioner is an adopted son, and not a natural son. Rather, the adoption has been held invalid. Therefore, in the opinion of this Court, that a part of Mr. Kshitij Shailendra's submissions, where he has emphasized that the adopted son is also entitled to be treated as the deceased's son, is not a point that arises for consideration at all. The impugned order, read as a whole, disbelieves the factum of adoption, mostly on relevant grounds. The fact that the adoption is shown to have been made with the necessary ceremonies done way back on 07.02.2001, but the deed of adoption executed as late as 14.12.2009, has justifiably raised suspicion with the third respondent. There is no ostensible reason why the petitioner's adoptive father or his natural parents should have waited all this while in executing a deed and seeking its registration, if they had to execute one. In the opinion of this Court, it does show that the deed is a document brought up for the purpose of creating evidence about the adoption, which may not be there at all. The impugned order does not show that the third respondent has jumped to a conclusion against the validity of the adoption, for the reason alone of this time lag between the claimed adoption and execution of the deed. He has carefully looked into evidence about the family register of parties, who are close kindred, as also the educational documents of the petitioner, post adoption, to record his

conclusions. The family register and the petitioner's mark-sheets during the three years of his graduate studies, show that these carried names of his natural parents - both father and mother, which find record. There is no mention of the adoptive father's name anywhere. Putting all these pieces of evidence together, the third respondent has drawn a plausible conclusion, declining to accept the adoption.

19. There is one very relevant fact also, which the third respondent has noticed in the order impugned, that is, that in the deed of adoption, Rajendra Singh has described himself as an unmarried man, whereas he is admittedly married to Smt. Phulmati. This mis-description about his marital status by the petitioner's claimed adoptive father, Rajendra Singh, appears to have been designedly made in order to get around the proviso to Section 7 of the Act of 1956. If Rajendra Singh had disclosed that he was a married man, the adoption would require his wife's consent, which is not there in this case. In fact, he excluded the requirement of consent by introducing a false recital in the deed of adoption, describing his status as an unmarried man. This mis-description seriously hits the petitioner's case of a valid adoption. In the opinion of this Court, the third respondent has rightly taken this brazenly false statement in the deed of adoption into account as a factor to discard the petitioner's case.

20. This takes us to the last and the purely legal submission that Mr. Kshitij Shailendra has advanced. He has submitted that the proviso to Section 7 would not be attracted at all in the case of a wife so estranged that she has ceased to be a wife, for all practical purposes. Section 7 of the Act of 1956 is extracted infra :

"**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."

21. To the understanding of this Court, the language of the proviso to Section 7 is plain, and there is no such compelling reason to read something else into it. The proviso makes it imperative for a Hindu male to secure his wife's consent to an adoption that he makes, unless she 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. There is nothing in any of these three exceptions, which may prompt the Court to read into the statute, a fourth exception of an estranged wife. A wife living apart from the husband, utterly estranged, is still a wife, until the marital bond between the parties is severed by a decree of divorce or nullity of marriage. It is hard to read into the plain words of the Statute, something like a virtual or constructive divorce, to relieve the male Hindu adopter of his obligations under the proviso. Even otherwise, a virtual or constructive divorce, as if it were, are concepts not accepted generally in matrimonial laws. To this

Court's understanding, even a judicial separation would not put an end to the husband's obligation under the proviso to Section 7. This Court may further hasten to add that the remark about judicial separation is one made in the passing, as it does not arise on facts here. It is a matter that may be considered in an appropriate case, where it arises.

22. This Court must notice, in this connection, the decision of the Supreme Court in **Brajendra Singh v. State of Madhya Pradesh and Another**5 which is about a Hindu female's rights to take in adoption. The case arose in the context of the pre-amended provisions of Section 8 of the Act of 1956. It arose in the background of facts that one Mishri Bai had married, in namesake, one Padam Singh. She had taken in adoption one Brajendra Singh as her son, and in answer to a notice under Section 10 of the M.P. Ceiling on Agricultural Holdings Act, 1960 pleaded that adoption, so that she could retain 54 acres of agricultural land that was given to her by her father. The Ceiling Authorities had disbelieved the claimed adoption. Mishri Bai instituted a suit, seeking a declaration that Brajendra Singh is her adopted son. Pending suit, she executed a registered deed bequeathing all her properties to Brajendra Singh, who prosecuted the suit against the State, until its culmination in an appeal before the Supreme Court. The facts are set out in the decision of their Lordships in some detail, which read thus :

"3. Background facts sans unnecessary details are as follows:

Sometime in 1948, one Mishri Bai, a crippled lady having practically no legs was given in marriage to one Padam Singh. The aforesaid marriage appears to have been solemnised because under the village custom, it was imperative for a virgin girl to get married. Evidence on record shows that Padam Singh had left Mishri Bai soon after the marriage and since then she was living with her parents at Village Kolinja. Seeing her plight, her parents had given her a piece of land measuring 32 acres out of their agricultural holdings for her maintenance.

4. In 1970, Mishri Bai claims to have adopted appellant Brajendra Singh. Padam Singh died in the year 1974. The Sub-Divisional Officer, Vidisha served a notice on Mishri Bai under Section 10 of the M.P. Ceiling on Agricultural Holdings Act, 1960 indicating that her holding of agricultural land was more than the prescribed limit. Mishri Bai filed a reply contending that Brajendra Singh is her adopted son and both of them constituted a joint family and therefore are entitled to retain 54 acres of land.

5. On 28-12-1981, the Sub-Divisional Officer by order dated 27-12-1981 disbelieved the claim of adoption on the ground inter alia that in the entries in educational institutions adoptive father's name was not recorded.

6. On 10-1-1982, Mishri Bai filed Civil Suit No. SA/82 seeking a declaration that Brajendra Singh is her adopted son. On 19-7-1989, she executed a registered will bequeathing all her properties in favour of Brajendra Singh. Shortly thereafter, she breathed her last on 8-11-1989.

7. The trial court by judgment and order dated 3-9-1993 decreed the suit of Mishri Bai. The same was challenged by the State. The first appellate court dismissed the appeal and affirmed the judgment and decree of the trial court. It was held concurring with the view of the trial court that Mishri Bai had taken Brajendra Singh in adoption and in the will executed by Mishri Bai the factum of adoption has been mentioned.

8. The respondents filed Second Appeal No. 482 of 1996 before the High Court. A point was raised that the adoption was not valid in the absence of the consent of Mishri Bai's husband. The High Court allowed the appeal holding that in view of Section 8(c) of the Hindu Adoptions and Maintenance Act, 1956 (in short "the Act") stipulated that so far as a female Hindu is concerned, only those falling within the enumerated categories can adopt a son.

9. The High Court noted that there was a great deal of difference between a female Hindu who is divorced and one who is leading life like a divorced woman. Accordingly the High Court held that the claimed adoption is not an adoption and had no sanctity in law. The suit filed by Mishri Bai was to be dismissed."

23. Their Lordships considered the pre-amended provisions of the Act of 1956, where a Hindu female had no right to take in adoption so long as the husband was alive, or her marriage was not dissolved by divorce or annulment. She could not adopt even by her husband's consent. As the facts would show that the husband had never lived with Mishri Bai, and the marriage was but ceremonial and one solemnized to gratify a village custom. It was further mooted before Their Lordships that for the purpose of Section 8 of the Act of 1956, as it then stood, Mishri Bai was living like a divorced woman. As such, she could not be regarded as disabled for taking in adoption, Brajendra Singh. The provisions of pre-amended Section 8 of the Act of 1956 that were amended vide Act 30 of 2010 w.e.f. 31.08.2010 are extracted in their Lordships' judgment in **Brajendra Singh (supra)**, and, as such, are not being quoted. The contention about Mishri Bai living virtually like a divorced woman, in the peculiar facts of the case, and, therefore, not disabled from taking in adoption, was answered in **Brajendra Singh** thus :

"10. In support of the appeal learned counsel for the appellant submitted that as the factual position which is almost undisputed goes to show, there was in fact no consummation of marriage as the parties were living separately for a very long period practically from the date of marriage. That being so, an inference that Mishri Bai ceased to be a married woman, has been rightly recorded by the trial court and the first appellate court. It was also pointed out that the question of law framed proceeded on a wrong footing as if the consent of husband was necessary. There was no such stipulation in law. It is contended that the question as was considered by the High Court was not specifically dealt with by the trial court or the first appellate court. Strong reliance has been placed on a decision of this Court in Jolly Das v. Tapan Ranjan Das [(1994) 4 SCC 363] to highlight the concept of "sham marriage".

11. It was also submitted that the case of invalid adoption was specifically urged and taken note of by the trial court. **Nevertheless the trial court analysed the material and evidence on record and came to the conclusion that Mishri Bai was living like a divorced woman.**

12. Learned counsel for the respondents on the other hand submitted that admittedly Mishri Bai did not fall into any of the enumerated categories contained in Section 8 of the Act and, therefore, she could not have validly taken Brajendra Singh in adoption.

13. It is to be noted that in the suit there was no declaration sought for by Mishri Bai either to the effect that she was not married or that the marriage was sham or that there was any divorce. The stand

was that Mishri Bai and her husband were living separately for a very long period.

14. Section 8 of the Act reads as follows:

"8. Capacity of a female Hindu to take in adoption.--Any female Hindu--

(a) who is of sound mind,

(b) who is not minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or 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, has capacity to take a son or daughter in adoption."

15. We are concerned in the present case with clause (c) of Section 8. The section brings about a very important and far-reaching change in the law of adoption as used to apply earlier in case of Hindus. It is now permissible for a female Hindu who is of sound mind and has completed the age of 18 years to take a son or daughter in adoption to herself in her own right provided that (a) she is not married; (b) or is a widow; (c) or is a divorcee or after marriage her husband has finally renounced the world or is ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect. It follows from clause (c) of Section 8 that Hindu wife cannot adopt a son or daughter to herself even with the consent of her husband because the section expressly provides for cases in which she can adopt a son or daughter to herself during the lifetime of the husband. She can only make an adoption in the cases indicated in clause (c).

16. It is important to note that Section 6(i) of the Act requires that the person who wants to adopt a son or a daughter must have the capacity and also the right to take in adoption. Section 8 speaks of what is described as "capacity". Section 11 which lays down the condition for a valid adoption requires that in case of adoption of a son, the mother by whom the adoption is made must not have a Hindu son or son's son or grandson by legitimate blood relationship or by adoption living at the time of adoption. It follows from the language of Section 8 read with clauses (i) and (ii) of Section 11 that the female Hindu has the capacity and right to have both adopted son and adopted daughter provided there is compliance with the requirements and conditions of such adoption laid down in the Act. Any adoption made by a female Hindu who does not have requisite capacity to take in adoption or the right to take in adoption is null and void.

17. It is clear that only a female Hindu who is married and whose marriage has been dissolved i.e. who is a divorcee has the capacity to adopt. Admittedly in the instant case there is no dissolution of the marriage. All that the evidence led points out is that the husband and wife were staying separately for a very long period and Mishri Bai was living a life like a divorced woman. **There is conceptual and contextual difference between a divorced woman and one who is leading life like a divorced woman. Both cannot be equated. Therefore in law Mishri Bai was not entitled to the declaration** sought for. Here comes the social issue. A lady because of her physical deformity lived separately from her husband and that too for a very long period right from the date of marriage. But in the eye of the law they continued to be husband and wife because there was no dissolution of marriage or a divorce in the eye of the law. Brajendra Singh was adopted by Mishri Bai so that he can look after her. There is no dispute that

Brajendra Singh was in fact doing so. There is no dispute that the property given to him by the will executed by Mishri Bai is to be retained by him. It is only the other portion of the land originally held by Mishri Bai which is the bone of contention.

19. A married woman cannot adopt at all during the subsistence of the marriage except when the husband 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. If the husband is not under such disqualification, the wife cannot adopt even with the consent of the husband whereas the husband can adopt with the consent of the wife. This is clear from Section 7 of the Act. **Proviso thereof makes it clear that a male Hindu cannot adopt except with the consent of the 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**. It is relevant to note that in the case of a male Hindu the consent of the wife is necessary unless the other contingency exists. Though Section 8 is almost identical, the consent of the husband is not provided for. The proviso to Section 7 imposes a restriction in the right of male Hindu to take in adoption. In this respect the Act radically depicts (sicdeparts) from the old law where no such bar was laid down to the exercise of the right of a male Hindu to adopt oneself, unless he dispossesses the requisite capacity. As per the proviso to Section 7 the wife's consent must be obtained prior to adoption and cannot be subsequent to the act of adoption. The proviso lays down consent as a condition precedent to an adoption which is mandatory and adoption without wife's consent would be void. Both proviso to Sections 7 and 8(c) refer to certain circumstances which have effect on the capacity to make an adoption."
(emphasis by Court)

24. The decision of their Lordships in **Brajendra Singh**, though one that is about the rights of a Hindu woman to take in adoption, based on the pre-amended provisions of Section 8 of the Act of 1956, nevertheless clearly spells out the principle that would apply the same way to a married Hindu man post amendment, insofar as the requirement of consent to an adoption by his wife is concerned. The restriction on a married Hindu woman's rights to take in adoption absolutely, so long as her husband was alive or the marriage subsisted, is no longer there. Post amendment of Section 8 by Act No. 30 of 2010, the position of a married Hindu man and a woman is at par. Both can take in adoption, but with the consent of the other, unless the other spouse can be placed in one of the three exceptions postulated by proviso to Section 7 or the proviso to Section 8, as the case may be. There is absolutely no scope to read into those provisions, contrary to the plain words of the Statute, any other kind of exception where a man may take in adoption, so long as his marriage subsists.

25. Here, there is no doubt that Smt. Phulmati was a wife living until the death of the late Rajendra Singh. The two were never divorced, howsoever estranged they might have been. A mere estrangement between the man and wife without disruption of the martial status, in accordance with law, that may either be by a decree for divorce or annulment or by death of the wife, would not take the case out of mischief of the proviso to Section 7, requiring the wife's consent to the adoption.

26. In the circumstances, the question formulated is **answered in the negative**.

The other issues raised by the petitioner have already been dealt with, and it is held, that the impugned order does not suffer from any infirmity, so as to call for interference by this Court in the exercise of our jurisdiction under Article 226 of the Constitution.

27. In the result, this petition fails and stands **dismissed.**

28. Costs shall go easy.

(2021)01ILR A847
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2020

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ A No. 11079 of 2020
connected with
Writ A Nos. 4193 of 2020, 8343 of 2020, 10317 of 2020, 11072 of 2020, 11170 of 2020, 11402 of 2020, 11632 of 2020 and 11643 of 2020

Pawan Kumar & Ors. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Akhilesh Kumar Pandey, Sri Radha Kant Ojha (Senior Adv.), Sri Shatrughan Sonwal, Sri Shivendu Ojha

Counsel for the Respondents:
C.S.C., Sri Arun Kumar

A. Service Law-U.P. Basic Education (Teachers) Service Rules, 1981 – Rule 14 – G.O. dated 04.12.2020 – Assistant Teacher Recruitment Examination – Online application forms – Filing – Mistake – Right to rectify – There was an adequate disclosure and notice to the candidates that the data gathered at an earlier stage would be utilised to take the entire selection process to its logical conclusion – Held, the process adopted by the respondents not in violation of Rule 14 – A permission to rectify and amend entries made in the online applications would be clearly impermissible in light of the caveats carried in the advertisements and notices issued by the respondents as well as the declarations made by the candidates themselves while participating in the recruitment process. (Para 25 and 50)

B. Constitution of India – Article 14 – G.O. dated 04.12.2020 – Assistant Teacher Recruitment Examination – Two class of candidates – One class of candidate entered information of less obtained-marks than original or high total marks than original under Para no. 1 and 2, while another class of candidates entered more obtained-marks than original or less total marks than original under Para no. 3 and 4 – Selection of later class of candidates is made liable to be cancelled – Held, there is a reasonable and germane classification between the two classes of candidates – While candidates falling under paragraphs 1 and 2 stand at a disadvantage, those who fall under paragraphs 3 and 4 have gained undue advantage on account of the nature of the disclosures that were made by them in the online application forms – The plea of discrimination found not sustainable. (Para 27, 35 and 36)

Writ Petition disposed of. (E-1)

Cases relied on :-

1. Civil Appeal No. 3707 of 2020 (arising out of Special Leave Petition (Civil) No. 6841 of 2020), Ram Sharan Maurya & ors. Vs St. of U.P. & ors.

2. Ran Vijay Singh Vs St. of U.P. (2018) 2 SCC 357

3. Vikesh Kumar Gupta Vs St. of Raj. , 2020 SCC Online SC 997

4. Special Appeal Defective No. 123 of 2014, Arti Verma Vs St. of U.P decided on 5.2.2014

5. Special Appeal No. 90 of 2018, Jai Karan Singh & 52 ors. Vs St. of U.P decided on 25.4.2018

6. Writ A No. 4653 of 2020, Soni Prajapti Vs St. of U.P. & 2 ors. decided on 30.7.2020

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

1. This batch of writ petitions relates to the selection and recruitment of Assistant Teachers under an exercise initiated by the Department of Basic Education in the State of U.P. The process of selection and appointment can be viewed as comprising of two stages- the first being the Assistant Teacher Recruitment Examination1 conducted by the Examination Regulatory Authority; the second being the process of inviting candidates who had successfully passed the ATRE to participate in a counselling process and their ultimate appointment in accordance with merit.

2. The petitioners in this batch are aggrieved by the decision of the respondents in not permitting them to rectify information entered by them in the online application forms submitted in the ATRE. The petitioners appear to have incorrectly declared the marks obtained by them in the High School, Intermediate, Graduation or Training examinations resultantly impacting the declarations made in respect of their quality point marks. While some petitioners have ascribed a lesser value to the actual or aggregate marks of an examination, some have declared a higher numerical value. The petitioners also assail the action of the respondents in the context of the data collected by the respondents at the stage of the ATRE being utilised further for the purposes of completion of the recruitment of Assistant Teachers.

3. It becomes relevant to note that a successful passing of the ATRE is one of the essential prerequisites for appointment as an Assistant Teacher in terms of the **U.P. Basic Education (Teachers) Service Rules, 19812**. In the second phase, candidates who had cleared the ATRE were invited by the respondents to participate in a counselling process and ultimately upon drawl of a merit list based on the quality point marks obtained by each candidate and invitation of options in respect of preferred districts, appointments were to be offered.

4. It may at the outset itself be noticed that this Court has negatived similar prayers for permission to rectify information comprised in the online application forms in terms of its decision rendered in **Dharmendra Kumar v. State of U.P. and Others3 and Hari Nath Yadav v. Sate of U.P. and Others**4. While dismissing those writ petitions the Court in **Dharmendra Kumar** observed: -

"..... Following the principles enunciated in the Full Bench decision of the Court in Rajendra Patel Vs. State of U.P. 2015 (8) ADJ 219 and the decision of the Division Bench in Km. Pooja Yadav Vs. State of U.P. [Special Appeal Defective No. 582 of 2016] the Court finds no ground to issue the writs as prayed for. In both the decisions noted above, the sanctity of a last date have been duly emphasized.

In Km. Pooja Yadav, the Division Bench had negatived an identical submission of a candidate being permitted to rectify the details set forth in the online form after conclusion of the selection process and held as under: -

"We note that the appellant does not dispute the fact that she had incorrectly filled in the column pertaining the marks obtained by her in the High School Examination in her online application form.

She does not appear to have taken any steps for rectification of the said mistake till she was refused permission to participate in the medical tests which were held on 11 July 2016. The respondents assert that the recruitment process initiated for the purposes of filling up as many as 5,800 vacancies is complete and that they are presently engaged in the preparation of the final result. A direction issued at this stage would clearly result in hindering the process of finalization of the result in respect of a recruitment exercise which had commenced in December 2015. Any interference by this Court at this stage may also lead to further complicating the steps presently being taken by the respondents and not brooking a situation where similar complaints and prayers for rectification may come to be made. This Court, therefore, comes to the conclusion that no effective relief can be granted to the appellant at this stage of the proceedings.

Accordingly and for reasons assigned therein, the Court finds no ground to issue the writs as prayed for. This petition is dismissed. "

5. While dealing with the petition of **Hari Nath Yadav**, the Court held:-

".....Any direction issued at this stage permitting rectifications in the original application forms which may have the effect of disturbing the inter se merit as framed and embodied in the result dated 12 May 2020 would be not only wholly unfair to the thousands of selected candidates who have been awaiting closure but also adversely impact teaching work in primary educational institutions throughout the State.

The Court must also necessarily bear in mind the imperative of enabling a completion of a recruitment exercise undertaken by the State and set at rest all uncertainties. Permitting the rectification of forms originally submitted more than a year ago and at this belated stage would clearly be detrimental to public interest.

Accordingly and for reasons assigned hereinabove, the Court finds no ground to issue the writs as prayed for. This petition is **dismissed**. "

6. However and subsequent to the aforementioned two petitions being decided and since several similar petitions were coming before the Court, the respondents were directed to collate a list of all matters pertaining to ATRE. While hearing respective counsels in Writ A 5008 of 2020, the Court classified matters under four broad heads and indicated that all matters pertaining to correction of marks in the online applications would be put down for hearing. It is in the above backdrop that this batch was taken up for final disposal.

7. The Court has heard Sri H.N. Singh, Sri R.K. Ojha learned senior counsels, Sri Seemant Singh and other counsels appearing for the petitioners. Submissions on behalf of the State respondents were advanced by Sri M.C. Chaturvedi the learned Additional Advocate General assisted by Sri Bipin Behari Pandey the Chief Standing Counsel and Sri P.D. Tripathi who represented the Basic Education Officer in some of the matters. Sri M.C. Chaturvedi learned Additional Advocate General assisted by Sri Bipin Behari Pandey learned Chief Standing Counsel have placed a compilation of documents and judgments which have been duly circulated. They have also along with an affidavit filed in connected Writ A 5008 of 2020 brought on record the Government Order of 4 December 2020 a copy of which has also

been provided to counsels for petitioners. The said Government Order comprises the decision of the State to deal with the question of inadvertent errors and other allied issues relating to the recruitment exercise in question.

8. Before proceeding to enter the merits of the dispute and since the selection itself has had a history of litigation, it would be appropriate to briefly recapitulate significant events surrounding ATRE and the recruitment exercise in question. The same are detailed hereinbelow in the form of a chronology of events :-

S. NO.	DATE	EVENT
1.	01.12.18	State Government issues an order formulating Guidelines for the conduct of the Assistant Teacher Recruitment Examination 2019 for filling up 69000 posts of Assistant Teachers. The Guidelines apart from setting out the detailed procedure to be followed for the examination also set out a time schedule for completion of the entire process commencing from 5 December 2018 and concluding on 22 January 2019.
2.	05.12.2018	Public notice is issued inviting applications. Registration was opened from 06.12.18 till 20.12.18. Detailed guidelines in respect of the entire selection process were also uploaded and a dedicated weblink indicated.
3.	20.12.2018	Registration date was extended till 22.12.18 to enable freshly passed TET 2019 candidates to also apply and participate.
4.	-	Upon due scrutiny of documents 4,31,066 persons were found eligible to participate in the examination.
5.	06.01.2019	Exams were successfully held across the State. 4,09,530 candidates participated in the same
6.	07.01.2019	By a G.O. of the said date, cut off marks were declared. General = 97/150 i.e. 65 % Reserved = 90/150 i.e.60 %
7.	08.01.201	Answer keys for all four series of question papers were uploaded on the website. Objections invited till 11.1.2019.
8.	11.01.2019	20557 objections to 142/150 questions received.
9.	18.01.2019	Committee of teachers/ experts gave their opinion on the queries
10.	07.01.2019	Petitions against the final answer key were

		filed before the Lucknow Bench of the Court. These petitions were clubbed with Writ Petition No. 1188/2019 Mohd. Rizwan v. UP.
11.	29.03.2019	Judgment was delivered on the aforesaid petition quashing the cut off marks declared on 7.1.2019. This order declared the marks to be kept at par with the 2018 cut-off i.e. 45/40 % for general/reserved categories respectively).
12.		A Special Appeal was filed against the above order of 29.3.2019. This special appeal was clubbed with 16 other special appeals leading being Special Appeal No. 156/2019 Raghvendra Pratap Singh v. UP.
13.	06.05.2020	Special Appeals were allowed and directions issued for declaration of results in terms of the cut off prescribed in the order of 7.1.2019. The challenge to the cut off fixed by Shiksha Mitras was negatived.
14.	08.05.2020	Government Order was issued for declaration of results
15.	-	Based on the consultations held till 18.01.2019 by the expert committee, 3 questions were found to be out of syllabus. Challenges to the rest of the questions were declared to be without any merit. The answers in respect of these questions as declared on 08.01.2019 were held to be the correct answers by the committee.
16.	08.05.2020	Final answer key was published.
17.	12.05.2020	Results were declared. 1,46,060 out of 431466 passed the exam.
18.	16.05.2020	Government Order was issued for taking further steps for appointment of Assistant Teachers including inviting of district wise options for 69,000 vacant positions. Note: This order informed all candidates that the data already captured during the ATRE in respect of educational qualifications would be utilized and candidates would have to fill the online application from the stage of district wise preferences.
19.	21.05.2020	SLP filed by Ram Sharan Maurya against

		the judgment rendered by the Division Bench at Lucknow in the matter of Raghvendra Pratap Singh and others comes up for hearing before the Supreme Court where interim directions were issued restraining the State from disturbing the working of Shiksha Mitras while permitting filling up of remaining vacancies.
20.	01.06.2020	A district wise allotment list for 69000 posts was published by the Secretary of the Board in terms of the online applications received. Secretary also ordered the counselling process to begin from 03.06.2020.
21.	03.06.2020	Petitions challenging the final answer key came to be filed before the Lucknow Bench. These petitions were clubbed with Service Single 8056/2020 Rishabh Mishra v. UP. An order was passed by the Bench staying the notification of 08.05.2020 and all further proceedings pursuant thereto.
22.	09.06.2020	In view of the aforesaid order, the ongoing counselling process was adjourned until further orders by the Secretary.
23.	09.06.2020	In SLP 6687/2020 Subedar Singh v. UP taken against the judgment rendered by the Division Bench on 6.5.2020, Supreme Court permitted the State Government to complete the appointment process in respect of all vacancies except 37,339 positions which represented the number of Shiksha Mitras who had participated and were declared successful in the ATRE.
24.	12.06.2020	Special Appeal 154/2020 Pariksha Nyamak Adhikari, UP v. Rishabh Mishra is filed before the Lucknow Bench. In this appeal the order of 03.06.2020 passed in Rishabh Mishra v. UP (8056/2020) is stayed. The Court further directs the State to complete the appointment process in compliance with the Supreme Court interim orders in Ram Sharan and Subedar Singh
25.	11.10.2020	In compliance of the above direction, all except 37339 i.e. 31661 out of 69000 positions were to be filled in the first phase. Finally and after

		implementation of reservation provisions, a list for selection of 31227 position was issued by the Secretary along with a direction for counselling and issuance of appointment letters in the allotted districts.
26.	18.11.2020	The Supreme Court upholds the judgment rendered by the Division Bench in Raghvendra Pratap Singh and dismisses the SLP of Ram Sharan Maurya and other connected matters. The cut off as prescribed for ATRE was upheld. The challenge laid by Shiksha Mitras was negatived. SLP filed by B.Ed. candidates also disposed of. The State held entitled to fill all posts in terms of the result declared on 12.05.2020 and in accordance with law.
27.	28.11.2020	Secretary issues directions for filling up the remainder 37,339 posts and for completion of the second round of counselling between 2.12.2020 to 4.12.2020.

9. Before proceeding to set out the submissions addressed, it becomes pertinent to note that none of the petitions impugn the notification issued on 16 May 2020 or the subsequent instructions issued to facilitate conclusion of the selection process. This assumes significance since these notifications did clarify that the data collected at the stage of submission of online applications for the ATRE would be utilised for completing the selection process. The Court also notes that though this notification was issued as far back as May 2020, it was never challenged by any of the petitioners prior to submission of their online applications or even thereafter. The procedure adopted by the respondents was questioned for the first time only during the course of oral submissions. While these two reasons would have been sufficient to negate a challenge on that score, since learned senior counsel laid considerable emphasis on the issue and sought to underline the importance of the challenge, the Court deems it expedient in the interest of justice to deal with the challenge on merits rather than shutting out the petitioners for reasons aforenoted. The Court also deems it expedient to lend a quietus to these and other questions raised at this stage of the selection where proceedings have virtually reached the end and appointments already made.

10. From the submissions addressed by respective counsels, the Court deems it appropriate to formulate the following seminal issues which fall for determination: -

A. Government Order of 4 December 2020 being in violation of the procedure laid forth in Rule 14 of the Rules

B. Whether the Government Order of 4 December 2020 can be said to be discriminatory or unfair?

C. Whether the petitioners are entitled to the permission to carry out

corrections and rectifications of entries made in the online application forms?

A. CHALLENGE TO THE GOVERNMENT ORDER OF 4 DECEMBER 2020

11. The Government Order aforenoted was challenged on two grounds- firstly on the ground of it being in violation of the procedure prescribed by Rule 14 and secondly on the plank of it being discriminatory and unfair.

12. Sri H.N. Singh learned senior counsel who sought permission to address the Court on behalf of the various petitioners was invited to make submissions. Sri Singh principally assailed the notifications issued post the completion of the ATRE on the ground of them being in violation of Rule 14 as it stood after the 24th Amendment to the Rules. It was contended that these notifications deprived the petitioners of their right to rectify the mistakes inadvertently made while filling their online applications for the ATRE.

13. Taking the Court through Rule 14 Sri Singh submitted that the provision clearly mandated the respondents inviting all applicants who had successfully cleared the ARTE to submit their online application forms thus affording them an opportunity to provide all particulars including relating to the computation of marks as per Appendix I and II of the Rules. According to Sri Singh if this procedure had been adhered to the applicants who may have committed inadvertent mistakes while filling their online application forms for the ATRE would have had an opportunity to rectify the same. Sri Singh would submit that the original application form which was submitted by candidates was only for the purpose of the ATRE which in any case was merely a qualifying examination enabling candidates to ultimately seek appointment as Assistant Teachers based on the scores obtained in that examination and other factors as contemplated under the Appendices.

14. Sri Singh apprised the Court that at the second stage of the recruitment process, the candidates were not afforded the option of filling particulars relating to their High School, Intermediate, Graduation or Training Qualification examinations since that data was automatically collected from the original online application form submitted in connection with the ATRE upon a candidate registering for participating in the counselling process.

15. Sri Singh contended that there was no occasion for the computation of quality points in accordance with the Appendices at any stage prior to the second stage since the ATRE was only a qualifying examination concerning the eligibility of candidates to be appointed. It was in that context that it was contended the necessity of obtaining particulars relating to High School, Intermediate, Graduation and Training examination marks afresh and at this stage. This according to Sri Singh is the clear intent of Rule 14(3) where the merit list is ultimately drawn on the basis of the quality points and weightage as specified in Appendix I.

16. In order to appreciate the aforenoted submissions it would be apposite to extract Rule 14 which reads thus: -

[14. Procedure of Selection. - (1) Determination of vacancies. - In respect

of appointment, by direct recruitment to the post of Assistant Master of Junior Basic Schools under clause (a) of Rule 5, the appointing authority shall determine the number of vacancies as also the number vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes and other categories under Rule 9 and forward to the Secretary, Uttar Pradesh Basic Education Board, Prayagraj. Information of compiled vacancies as per reservation shall be provided by the Secretary, Uttar Pradesh Basic Education Board, Prayagraj to the Examination Body. For the notified vacancies an Assistant Teacher Recruitment Examination shall be conducted by the Examination Body authorised as such by the Government and result, according to reservation, shall be provided to Secretary, Uttar Pradesh Basic Education Board, Prayagraj.

Thereafter, an advertisement for recruitment will be published in at least two leading daily newspapers having adequate circulation in the State by the Secretary, Uttar Pradesh Basic Education Board, Prayagraj inviting online applications from candidates possessing prescribed educational and trainings qualification and passed teacher eligibility test, conducted by the Government or by the Government of India and passed Assistant Teacher Recruitment Examination conducted by the Government, in which cadre wise district option will be filled by the candidates.

(2) The Secretary, Uttar Pradesh Basic Education Board, Prayagraj shall scrutinise the applications received in pursuance of the advertisement under clause (a) sub-rule (1) of Rule 14 and prepare a list of such persons who possess the prescribed academic qualifications and passed Assistant Teacher Recruitment Examination and be eligible for appointment.

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

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

Provided that a person working as Shiksha Mitra in Junior Basic Schools run by Basic Shiksha Parishad shall be given weightage in the recruitment of Assistant Teacher, only in two consecutive Assistant Teacher recruitment conducted by the Government after July 25, 2017.

Thereafter, cadre wise district will be allotted to the candidates as per their quality points and options by the Secretary, Uttar Pradesh Basic Education Board, Prayagraj and list will be sent to the appointing authority.

(4) No person shall be eligible for appointment unless his or her name is included in the list prepared under sub-rule (3).

(5) The list prepared under sub-rule (2) and received in accordance with sub-rule (3) of Rule 14 from the Secretary, Uttar Pradesh Basic Education Board, Prayagraj, shall be forwarded by the appointing authority to the Selection Committee.]

17. A careful reading of the aforesaid provision establishes the following procedure to be adopted for appointment of Assistant Teachers. The first preparatory step contemplated under Rule 14(1) is the determination of vacancies by the appointing authority which is then forwarded to the Secretary of the Board. The information so collected from the various appointing authorities is then forwarded by the Secretary to the

Examining Body with a request to conduct the ATRE. The Rule then contemplates the Examining Body conducting the ATRE and providing the final results thereof to the Secretary. It is thereafter that an advertisement for recruitment comes to be published inviting online applications from candidates who apart from possessing the essential qualifications prescribed under the Rules have successfully passed the ATRE. It becomes pertinent to note that in this online application form candidates are required to indicate their district wise options.

18. In terms of Rule 14(2) the Secretary upon due scrutiny of the applications so received then proceeds to draw a list of persons who are found to possess the stipulated essential qualifications and have passed the ATRE. Sub Rule (3) requires the Board to arrange the names of candidates in accordance with the quality points and weightage as specified in Appendix I. This constitutes the merit list for the ultimate appointment of Assistant Teachers. Upon completion of these processes the Secretary proceeds with the allocation of cadre wise districts to candidates. Sub Rule (4) enjoins that no person shall be eligible for appointment unless the name of that individual finds place in the list prepared under sub rule (3).

19. Having noticed the broad scheme of Rule 14 the stage is now set to evaluate the submissions of Sri Singh. The Court finds itself unable to accept the contention of the respondents having violated Rule 14 for reasons which stand recorded hereinafter.

20. At the very outset the Court fails to find any fundamental or inherent illegality in the respondents having collated data which stood captured in the original online applications submitted by candidates in the ATRE. Rule 14 does not engraft any such express or implicit prohibition. 4,31,466 candidates had registered with the Examining Body to participate in the ATRE. A total of 4,09,530 candidates ultimately participated in that examination. The particulars of 4,09,530 candidates including their details in connection with Items 1, 2, 3, and 4 of Appendix I [Quality Points computation based on High School, Intermediate, Graduation and Training exam results] came to be collected at this stage. Upon culmination of ATRE, 1,46,060 candidates were declared qualified. Their essential and preparatory data thus stood captured and collated by the respondents. The submission of a duplication of this data or the creation of a fresh database in respect of the above information already existing neither appeals to logic nor is it established to be expedient considering the magnitude of the exercise that would have had to be undertaken bearing in mind the size of the pool of successful candidates, the scrutiny and verification of testimonials and other factors. It would have clearly amounted to placing an immense administrative burden on the respondents.

21. On a more fundamental plane, the Court fails to discern any such mandatory requirement placed by Rule 14. Regard may be had to the fact that the only specific information which Rule 14(1) speaks of is *".....inviting online applications from candidates possessing prescribed educational and training qualifications..... and passed Assistant Teacher Recruitment Examination conducted by the Government, in which cadre wise district option will be filled by the candidates."*

22. This Court thus upon a holistic reading of Rule 14 fails to find any statutory imperative, explicit or implicit, commanding the respondents to gather data and information on subjects set out in Appendix I afresh even though the same may have already stood created and stored for access, albeit gathered during an ancillary yet indispensable component of the selection process- the ATRE.

23. The Court also bears in consideration the contents of the notice dated 16 May 2020 which clearly put all candidates to notice of the data collected earlier being utilised to complete the selection process and take it to its culmination.

24. The relevant extracts of that notice are set out hereunder:

"ऑनलाइन ई आवेदन पत्र का प्रारूप, आवश्यक दिशा निर्देश एवं जनपदवार रिक्तियों का विवरण वेबसाइट https://upbasiceduboard.gov.in/ पर दिनांक 18.5.2020 के अपरान्ह से दिनांक 06.6.2020 साय 6 बजे तक उपलब्ध रहेगा । अभ्यर्थी द्वारा दिनांक 18.5.2020 के अपरान्ह से दिनांक 26.5.2020 की रात्रि 12 बजे तक निर्धारित वेबसाइट पर ऑनलाइन आवेदन पत्र भरा जा सकेगा । अभ्यर्थी को 69000 सहायक अध्यापको की भर्ती हेतु आयोजित भर्ती परीक्षा के लिए निर्गत किया गया अनुक्रमांक, जन्मतिथि तथा मोबाइल संख्या को निर्धारित वेबसाइट पर भरना होगा, जिसके उपरान्त अभ्यर्थी की उक्त मोबाइल पर ओ टी पी (वन टाइम पॉसवर्ड) प्राप्त होगा, जिसे भरने पर ही यह आवेदन पत्र में वांछित प्रविष्टियों को पूर्ण कर सकेगा । विशेष रूप से उल्लेखनीय है कि सहायक अध्यापक पद पर नियुक्ति हेतु अभ्यर्थी को भर्ती परीक्षा हेतु भरे गये आवेदन पत्र कि प्रविष्टिया प्रदर्शित हो जायेगी जिसमे किसी प्रकार का परिवर्तन नहीं किया जा सकेगा । उक्त के अतिरिक्त कतिपय अन्य वांछित प्रविष्टियों को अभ्यर्थियों द्वारा भरते हुए आवेदन पत्र को पूर्ण करना होगा । एक बार आवेदन पत्र पूर्ण करने के उपरान्त उसमे किसी प्रकार का संशोधन नहीं किया जा सकेगा ।

उपर्युक्त सहायक अध्यापक भर्ती परीक्षा-2019 में उत्तीर्ण अभ्यर्थियों द्वारा मात्र एक ऑनलाइन आवेदन पत्र भरा जायेगा जिसमे अभ्यर्थी द्वारा प्रदेश के समस्त 75 जनपदों का विकल्प अपनी इच्छानुसार वरीयताक्रम में भरा जाना अनिवार्य होगा तथा वह अपने गुणांक /भारांक एवं वरीयता तथा जनपद हेतु निर्धारित वर्गवार/ श्रेणीवार रिक्तियों के अनुरूप आवंटित जनपद में दिनांक 03.06.2020 से 06.06.2020 के मध्य सायोजित कॉउन्सिलिंग में प्रतिभाग कर सकेगा । कॉउन्सिलिंग में प्रतिभाग करने का तात्पर्य यह कदापि नहीं है कि वह नियुक्ति हेतु पात्र है । वांछित अनिवार्य शैक्षिक /प्रशिक्षण योग्यताओं /वर्ग श्रेणी के सत्यापनोपरांत अर्ह पाये जाने पर अभ्यर्थी को उनके आवंटित जनपद में नियुक्ति प्रदान कि जायेगी । सकारी/अर्धसरकारी /बेसिक शिक्षा परिषद् के अधीन पूर्व से कार्यरत अभ्यर्थियों को कॉउन्सिलिंग के समय सक्षम प्राधिकारी से एन0 ओ0 सी0 प्राप्त कर प्रस्तुत करना अनिवार्य होगा ।

25. There was thus an adequate disclosure and notice to the candidates that the data gathered at an earlier stage would be utilised to take the entire selection process to its logical conclusion. The process adopted by the respondents is not found to be in violation of Rule 14. Quite apart from the above the Court bears in mind the mammoth exercise that would have had to be undertaken by the respondents if the submission advanced by the petitioners were accepted. The Court also fails to find any prejudice caused to the candidates in light of the caveats which unambigously placed them on caution to ensure that the entries

entered in the online applications were accurate and that no further amendments would be permitted once the form was saved and locked. This aspect will be further evident from the discussion that follows.

26. On a consideration of the aforesaid the Court is of the firm view that the challenge to the Government Order on this score must necessarily fail. It accordingly stands negatived.

B. THE GOVERNMENT ORDER OF 4 DECEMBER BEING DISCRIMINATORY AND UNFAIR

27. While the aforesaid Government Order deals with various issues relating to ATRE, since this batch is concerned only with the prohibition to rectify online application forms insofar as they relate to the marks obtained by candidates in the High School, Intermediate, Graduation and Training examinations, it would be pertinent to extract hereinbelow the decision of the State Government as comprised in the aforesaid order insofar as this aspect is concerned: -

"बिन्दु संख्या -2 : अभ्यर्थियों द्वारा प्रस्तुत हाईस्कूल , इण्टरमीडिएट, स्नातक, प्रशिक्षण के प्राप्तांक एवं पूर्णांक तथा प्राप्त एक्सेल सीट के पूर्णांक व प्राप्तांक में भिन्नता--

उपर्युक्त प्रकार के विसंगतियों के सम्बन्ध में निम्नानुसार कार्यवाही किये जाने का निर्णय लिया गया है:--

(1) यदि अभ्यर्थी द्वारा मूल अंकपत्र के सापेक्ष प्राप्तांक कम भरा गया है तो ऐसे अभ्यर्थी से कम अंक भरने का समुचित अभिलेखीय आधार प्राप्त कर लिया जाय । समुचित आधार पाये जाने पर अभ्यर्थी से इस आशय का शपथ पत्र अनिवार्य रूप से लेकर कि वह अपनी भरे हुए कम अंक के आधार पर चयन से सहमत है तथा भविष्य में अधिक प्राप्तांक के आधार पर मेरिट परिवर्तन की मांग नहीं करेगा । चूंकि मेरिट में कोई परिवर्तन नहीं होना है, इस कारण उसको नियुक्ति पत्र निर्गत कर दिया जाय ।

(2) यदि अभ्यर्थी द्वारा मूल अंकपत्र के सापेक्ष पूर्णांक अधिक भरा गया है तो ऐसे अभ्यर्थी से अधिक पूर्णांक भरने का समुचित अभिलेखीय आधार प्राप्त कर लिया जाय । समुचित आधार पाये जाने पर अभ्यर्थी से इस आशय का शपथ पत्र लेकर कि वह अपने भरे हुए अधिक पूर्णांक के आधार पर चयन से सहमत है तथा भविष्य में मूल/कम पूर्णांक के आधार पर मेरिट परिवर्तन की मांग नहीं करेगा । चूंकि मेरिट में कोई परिवर्तन नहीं होना है, इस कारण उसको नियुक्ति पत्र निर्गत कर दिया जाय ।

(3) ऐसे अभ्यर्थी जो आवेदन पत्र में शैक्षिक अहर्ता में प्राप्त वास्तविक अंक से अधिक प्राप्तांक भरें हैं, के सम्बन्ध में उल्लेखनीय है कि चूंकि मेरिट अभ्यथी द्वारा अंकित प्राप्तांक के आधार पर निर्धारित होता है अतः यदि उनको वास्तविक कम प्राप्तांक के आधार पर चयन किया जाता है तो मेरिट परिवर्तित हो जाएगी । इससे पूरी चयन सूची परिवर्तित हो जाएगी । वास्तविक प्राप्तांक से अधिक अंक भरने का उद्देश्य येन-केन प्रकारेण चयनित होने का भी हो सकता है, उक्त के अतिरिक्त मा0 उच्चतम न्यायलय के आदेश दिनांक 18.11.2020 द्वारा पूर्व में प्रकाशित की गयी मेरिट सूची (चयन सूची) के आधार पर नियुक्ति की प्रक्रिया पूर्ण करने के निर्देश दिये गये हैं । उक्त के आलोक में चयन सूची/ मेरिट लिस्ट में किसी प्रकार का परिवर्तन किया जाना उचित नहीं है । इस कारण ऐसे अभ्यर्थियों का चयन निरस्त कर दिया जाय ।

(4) ऐसे अभ्यर्थी जो आवेदन पत्र में शैक्षिक अहर्ता के पूर्णांक को वास्तविक पूर्णांक से कम भरें है, के सम्बन्ध में उल्लेखनीय है कि चूंकि

मेरिट अभ्यर्थी द्वारा अंकित प्राप्तांक के आधार पर निर्धारित होता है अतः यदि उनको वास्तविक अधिक पूर्णांक के आधार पर चयन किया जाता है तो मेरिट परिवर्तित हो जाएगी एवं इससे पूरी चयन सूची परिवर्तित हो जायेगी । वास्तविक पूर्णांक से कम अंक भरने का उद्देश्य येन-केन प्रकारेण चयनित होने का भी हो सकता है । उक्त के अतिरिक्त मा0 उच्चतम न्यायलय के आदेश दिनांक 18.11.2020 द्वारा पूर्व में प्रकाशित की गयी मेरिट सूची (चयन सूची) के आधार पर नियुक्ति की प्रक्रिया पूर्ण करने के निर्देश दिये गये हैं । उक्त के आलोक में चयन सूची/ मेरिट लिस्ट में किसी प्रकार का परिवर्तन किया जाना उचित नहीं है । इस कारण ऐसे अभ्यर्थियों का चयन निरस्त कर दिया जाय।"

28. Before proceeding to analyse the decision taken, it would be pertinent to bear in mind that Issue No. 2 and its various sub paragraphs use the expression 'प्राप्तांक' and 'पूर्णांक'. It is not disputed inter partes that the word 'प्राप्तांक' would mean the actual total marks obtained by a candidate in a particular examination while the expression 'पूर्णांक' would mean the total aggregate marks assigned for all papers/subjects in that particular examination and against which marks would have been given. To explain it a little differently, while the first expression thus means the total marks in fact awarded to the candidate across all units comprised in that examination, the second means the combined, overall or composite total of the various units against which marks have been awarded. This issue assumes significance since Appendix I requires quality point marks to be computed on the basis of a formula of which "percentage of marks" obtained at the High School, Intermediate, Graduation and Training Examination is a component.

29. Paragraph-1 deals with a situation where the candidate has inadvertently filled in a figure in respect of total marks lower than those disclosed in the original marksheet. In respect of such cases the Government Order stipulates that subject to the candidate giving an undertaking that he would not raise any claim on the basis of the higher marks shown in the original marksheet, appointment may be offered to him. Paragraph-2 then contemplates a situation where a candidate has by mistake ascribed a higher value to the composite or overall marks of that particular examination when compared with the original marksheet. For this category of mistake also the State has taken a decision to permit such candidates to seek appointment subject to an undertaking being given that they would not raise any claim in future for change of their merit position based on the total composite or aggregate marks as shown in the original marksheet.

30. In terms of the provisions made in Paragraph-3 the State has taken a conscious decision to disqualify all such candidates who have filled in the total marks in excess of that mentioned in the original marksheet. A similar decision has been taken in respect of that category of candidates who have in their online application forms placed the total composite or aggregate marks of a particular examination at a value lower than that disclosed in the original marksheet. As is evident from a reading of Paragraph-4 these candidates also stand disqualified.

31. In light of the aforesaid decision taken, while all those petitioners and candidates who fall within paragraphs-1 and 2 would be entitled to seek appointment subject to the furnishing of an undertaking as contemplated, those who

fall within the ambit of paragraphs 3 and 4 stand excluded and they shall not be considered further for appointment. The principal dispute which is raised is in respect of those petitioners and candidates who would fall within the ambit of paragraphs 3 and 4.

32. Upon a holistic reading of paragraphs 1 to 4, it appears that the primary intent of the State Government appears to have been to ensure that the merit list and the final results which were ultimately published on 12 May 2020 need not be revised, amended or reopened. It is pertinent to note that candidates who fall within the scope of paragraphs-1 and 2 would have, if permitted to rectify their mistakes, gained an advantage since the marks disclosed by them in the online application forms stood lower than the marks as shown in the original marksheet. It is in view thereof that the State Government appears to have taken a decision that while such candidates would be permitted to seek appointment, their candidature would be liable to be considered based upon the disclosures made in the online application forms alone. Insofar as candidates who fall within the corners of paragraphs 3 and 4 that concerns itself with a situation where candidates by virtue of the disclosures have gained an advantage in the computation of quality point marks than would actually obtain as per their original marksheets. Where a candidate has either inflated the total actual marks obtained by him or deflates the composite total of that examination, in both situations his quality points would stand increased thus being unfair to the other candidates in the fray. In both situations the quality points obtained by such a candidate would stand disclosed at a value higher than when computed correctly as per the entries appearing in the original marksheets. In respect of both these categories the State appears to have taken into consideration the directions issued by the Supreme Court in **Ram Sharan Maurya & Others v. State of U.P. and Others5** to proceed with the making of appointments in accordance with the results declared on 12 May 2020 as well as the fact that in permitting such rectifications the entire merit list itself would have to be recomputed and reopened.

33. Sri Ojha, learned Senior Counsel, assailing these conditions submitted that on a plain reading of paragraphs-1 to 4, it is manifest that the State admits and recognises the existence of a situation of inadvertent errors and mistakes having been committed by candidates across the spectrum. He, therefore, submits that the decision taken insofar as it permits candidates falling within the ambit of paragraphs-1 and 2 to continue to be a part of the selection process is clearly discriminatory. He submits that candidates falling within the scope of paragraphs-1 and 2 have been permitted and afforded the chance to seek appointment notwithstanding the incorrectness of the disclosures made in the online application forms. According to Sri Ojha the decision so taken is clearly violative of Article 14 of the Constitution. He submits that while one particular class of candidates who have made mistakes while filling the online application forms have been permitted to seek appointment, another class standing on equal footing have been denied that right.

34. It becomes pertinent at the outset to note that candidates falling within the ambit of paragraphs-1 and 2 have not been permitted to affect any rectification in their

application forms. In fact, no category or class of candidates have been permitted to effect rectifications. The State has merely taken a decision to permit those falling within paragraphs 1 and 2 to seek appointment solely on the basis of the disclosures as existing in their application forms notwithstanding their incorrect computation of quality points and thus their merit position being adversely affected on account of their own mistake. Even this class of candidates have not been permitted to seek a betterment of their merit position since the marks disclosed by them in their forms stood at a level lower than that which would actually obtain as per their marksheets. It is in that context that the State has chosen to take a decision to call upon those candidates to submit undertakings to the effect that they would not seek any change in their merit position.

35. Insofar as candidates falling with the ambit of paragraphs 3 and 4 are concerned, they are those whose merit position is placed higher than would actually obtain on account of entries made in the application forms. It is thus manifest that candidates falling within the scope of paragraphs-1 and 2 on the one hand and paragraphs-3 and 4 do not constitute a singular class. While candidates falling under paragraphs 1 and 2 stand at a disadvantage, those who fall under paragraphs-3 and 4 have gained undue advantage on account of the nature of the disclosures that were made by them in the online application forms. The plea of discrimination therefore, does not sustain.

36. Regard must also be had to the fact that the State appears to have taken a conscious decision to ensure that incorrect disclosures which may impact the merit list as drawn or enable candidates to claim undue advantage over others are not countenanced. This appears to be the principle underlying paragraphs 3 and 4. Candidates falling within the ambit of paragraphs 1 and 2 already stand disadvantaged since their position in the merit list stands lowered on account of their own action, albeit due to inadvertence. Even this class of candidates have been commanded to submit undertakings that they shall not claim any change in their merit position in the future. There is thus a reasonable and germane classification between the two classes of candidates. The decision taken clearly appears to be reasonable since as long as the merit list does not contain candidates who have taken undue advantage on account of the disclosures made by them, it results in no unfairness. In fact the removal of this aberration was imperative in order to maintain the sanctity of the merit list. This issue thus stands answered against the petitioners.

C. WHETHER THE PETITIONERS SHOULD BE PERMITTED TO RECTIFY THEIR FORMS AT THIS STAGE

37. The Court while weighing the soundness of the submissions noticed above cannot shut its eyes to the crucial caveats which were set out at multiple stages of the entire selection process placing candidates on notice in unambiguous terms of the imperative need to ensure that the information being filled out in the online applications was accurate. Candidates were informed at all stages that since no amendments or rectifications would be permitted at later stages and after the online applications were digitally locked and stored, they should take adequate care to ensure the correctness of

the entries made. In the original ATRE Government Order of 1 December 2018, Paragraph 17 in clear and unambiguous terms underlined the importance of this stage of the online application process in the following terms: -

17. **<u>ऑन लाइन आवेदन</u>**-

(1) सहायक अध्यापक भर्ती परीक्षा के लिए सचिव परीक्षा नियामक प्राधिकारी, उ० प्र० प्रयागराज द्वारा एन0 आई0 सी0 लखनऊ के सहयोग से ऑन लाइन आवेदन आमंत्रित किये जायेंगेI ऑन लाइन आवेदन हेतु सॉफ्टवेयर का निर्माण एन0 आई० सी० लखनऊ द्वारा कराया जायेगाI

(2) ऑन लाइन आवेदन करने के लिए तकनीकी एवं परिचालन समबंधी निर्देश वेबसाइट पर उपलब्ध कराये जायेंगे। अभ्यर्थीयों को यह सलाह दी जाती है कि वह निर्धारित वेबसाइट पर ऑन लाइन आवेदन करने से पूर्व अनुदेशों को सावधानीपूर्वक पढ़ लें।

(3) <u>अभ्यर्थीयों को अपने ऑनलाइन आवेदन की अंकित प्रविष्टियों में शंसोधन का कोई अवसर देय नही होगा।इसके लिए अनिवार्य है कि अभ्यर्थी रेजिस्ट्रेशन को सब्मिट (Submit)/ फाइनल सेव (Final Save) करने से पूर्व उसका प्रिंट लेकर ऑनलाइन अंकित प्रविष्टियों का अभिलेखों से मिलान अवश्य कर लें।</u>

(4) <u>अभ्यर्थीयों से रेजिस्ट्रेशन सब्मिट (Submit)/ फाइनल सेव (Final Save) करने से पूर्व इस आशय के घोषणा पत्र को चयन करना अनिवार्य होगा कि - "मैने ऑनलाइन आवेदन के अंतर्गत किए गये रेजिस्ट्रेशन का प्रिंट निकालकर उसमें की गयी प्रविष्टियों का मिलान मूल अभिलेखों से कर लिया है एवं उसे सही पाया है तथा मैं अपने रेजिस्ट्रेशन को फाइनल सेव करने हेतु पूर्णतः सहमत हूँ फाइनल सेव होने के उपरांत मुझे अपने आवेदन में संशोधन करने का कोई अवसर देय नहीं होगा"।</u>

(5) उक्त घोषणा पत्र को चयन करने के उपरान्त अभ्यर्थी के मोबाइल पर भेजे गये OTP को Verify करके अभ्यर्थी को अपना आवेदन पूर्ण करना होगा इसके लिए अनिवार्य है की अभ्यर्थी आवेदन के समय अपने सही मोबाइल नं0 का अंकन करें।

(6) <u>अभ्यर्थी द्वारा ऑनलाइन पंजीकरण सब्मिट (Submit)/फाइनल सेव (Final Save) करने के उपरांत किसी व्योरे में परिवर्तन/सुधार के लिए अनुरोध को किसी भी परिस्थिति में स्वीकार नहीं किया जाएगा। किसी भी कारण से पुष्टिकरण पृष्ठ में अभ्यर्थी द्वारा भरे गये किसी त्रुटिपूर्ण व्यौरे से उत्पन्न किसी भी परिणाम के लिए परीक्षा संस्था उत्तरदायी नही होगा। अभ्यर्थी द्वारा ऑनलाइन भरा गया संशोधित विवरण ही अंतिम होगा और भविष्य में ऑनलाइन कोई बदलाव नही किया जायेगा।</u>

38. As is evident from paragraph 17(3), candidates were placed on caution that once the application had been finally saved and submitted, no corrections or rectifications would be possible. It was in that context that it required them to take a printout of the online application and verify its contents with original testimonials. Of seminal significance is the declaration given by candidates at the time of final submission and which is set forth in paragraph 17(4).

39. The caveat and word of caution set out in paragraph 17 was again reiterated in the advertisement of 5 December 2018, the relevant part of which is extracted hereinbelow:

सहायक अध्यापक भर्ती परीक्षा 2019 में सम्मिलित होने हेतु इच्छुक एवं अर्ह अभ्यर्थीयों से ऑनलाइन आवेदन पत्र आमंत्रित करते हुए निम्वत निर्देशित किया जाता है -

1. अभ्यर्थीयों को अपने ऑनलाइन आवेदन की अंकित प्रविष्टियों में शंसोधन का कोई अवसर देय नही होगा। इसके लिए अनिवार्य है क़ि अभ्यर्थी रेजिस्ट्रेशन को सब्मिट/फाइनल सेव करने से पूर्व ऑनलाइन अंकित प्रविष्टियों का अभिलेखों से मिलान अवश्य कर लें।

2. अभ्यर्थीयों से रेजिस्ट्रेशन को सब्मिट/फाइनल सेव करने से पूर्व इस आशय के घोषणा पत्र की चयन करना अनिवार्य होगा कि - "मैने ऑनलाइन आवेदन के अंतर्गत किए गये रेजिस्ट्रेशन का प्रिंट निकाल कर उसमें की गयी प्रविष्टियों का मिलान मूल अभिलेखों से कर लिया है एवं उसे सही पाया है तथा मैं अपने रेजिस्ट्रेशन को सब्मिट/फाइनल सेव करने हेतु पूर्णतः सहमत हूँ सब्मिट/फाइनल सेव होने के उपरांत मुझे अपने आवेदन में संशोधन करने का कोई अवसर देय नहीं होगा"।

3. अभ्यर्थीयों को निर्देश दिया जाता है कि अभ्यर्थी एक से अधिक ऑनलाइन आवेदन न करें। अभ्यर्थी द्वारा एक से अधिक ऑनलाइन आवेदन किए जाने की स्थिति में आवेदन शुल्क जमा किए गये अंतिम ऑनलाइन आवेदन को मान्य करते हुए पूर्व के समस्त आवेदन निरस्त कर दिए जायेंगे जिसका संपूर्ण उत्तरदायित्व अभ्यर्थी का होगा I

40. It becomes pertinent to note that the online application itself carried a declaration made by the candidate which was in the following terms: -

घोषणा : मै शपथ पूर्वक अभिकथन करता हूँ कि नियुक्ति हेतु ऑनलाइन आवेदन पत्र मे भरी गयी समस्त प्रविष्टियाँ मेरे सहायक अध्यापक भर्ती परीक्षा 2019 हेतु आवेदन मे की गयी प्रविष्टियों एवं मूल अभिलेखों पर आधारित है एवं मेरे संज्ञान में सही एवं सत्य है मुझे विगयापन में दी गई समस्त शर्तें मान्य I है मै प्राथमिक स्तर की अध्यापक पात्रता परीक्षा एवं सहायक अध्यापक भर्ती परीक्षा उत्तीर्ण हूँ I यदि चयन के पूर्व अथवा बाद में जाचोपरान्त कोई विवरण असत्य तथा ग़लत पाया जाता है तो सम्बन्धित अधिकारी को मेरा अभ्यर्थन निरस्त करने तथा मेरे विरुद्ध वैधानिक कार्यवाही करने का अधिकार होगा I आवेदन पत्र में अंकित सूचनाओं से संबंधित सभी मूल प्रमाण पत्र/अंकपत्र, जाति प्रमाण, निवास प्रमाण पत्र, विशेष आरक्षण प्रमाण पत्र आवेदन करने की तिथि के पूर्व से मेरे पास उपलब्ध है I जनपद नियुक्ति के सापेक्ष मेरे ऑनलाइन आवेदन में दिए गये जनपद की वरीयता मुझे स्वीकार है, जिसमे परिवर्तन हेतु मेरे द्वारा किसी भी प्रकार का प्रत्यावेदन प्रस्तुत नही किया जाएगाI सहायक अध्यापक भर्ती परीक्षा 2019 ऑनलाइन आवेदन के समय मेरे द्वारा की गयी प्रविष्टियों को नियुक्ति हेतु आवेदन मे विचार किए जाने पर मेरे द्वारा पूर्ण सहमति प्रदान की जाती हैI यदि कोई भी सूचना ग़लत पाई गई तो उसका उत्तरदायित्व मेरा होगाI

41. This was therefore not a case where candidates were either unaware of the sanctity attached to the disclosures made in online applications or were not apprised of the consequences of mistakes and inadvertent errors being incapable of being rectified once the forms were ultimately saved and locked.

42. The Court while thus upholding the procedure adopted by the respondents also necessarily takes into consideration that the selection process was not one catering to the young and the adolescent who would certainly deserve a degree of latitude. The selection process in question is for the appointment of Assistant Teachers who will be tasked with the obligation and duty to instill in and impress upon minor school going children the virtues of discipline and exactitude.

43. While the denial of an opportunity to rectify an unwitting or unintentional error may on the face of it appear to be overly inequitable and harsh especially in cases where the mistake may be apparently borne out from the accompanying record, Courts in these situations cannot be unmindful of the mammoth effort and preparation that precede the convening of a public examination in which lakhs participate and compete amongst each other. The present recruitment itself saw 4,09,530 persons competing in the ATRE. However a pall of uncertainty and the veritable sword of Damocles continues to hover over the fate of the 1,46,060 successful candidates. This position of uncertainty cannot be permitted to perpetuate and linger endlessly. It not only causes grave injustice to the selected candidates but more importantly and in most cases negates and undermines public interest- in this case the efficiencies of thousands of primary educational institutions, the education of minor school going children itself hangs in the balance. It is these issues of vital consequences which must weigh and be accorded due consideration.

44. It is these very considerations of import and critical essence which impel a closure being accorded to challenges to public examinations with swiftness and certainty. While this is not to suggest that all challenges to selections and public examinations must be perfunctorily rejected or swept aside, at the same time it is the obligation of the Court to ensure that a selection process undertaken for employment under the State is stalled only in the face of a substantial challenge or where the process is established to suffer from manifest illegalities. It would be pertinent to remember the word of caution in this regard entered by the Supreme Court in **Ran Vijay Singh Vs. State of U.P**.6 where it observed: -

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination -- whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger

impact of all this is that public interest suffers."

45. The aforesaid considerations which must necessarily guide the evaluation of challenges to selection and recruitment were reiterated recently by the Supreme Court in **Vikesh Kumar Gupta Vs. State of Rajasthan**7.

46. Dealing with a similar claim for rectification in application forms submitted in the course of a selection process for Shiksha Nideshaks, a Division Bench of the Court in **Arti Verma Vs. State of U.P**.8 observed:-

"In the present case, the appellant claimed the benefit of Freedom Fighters category. The contention that this was as a result of an error committed by the Computer Operator cannot simply be accepted for the reason that the appellant would necessarily be responsible for any statement which he made on line. If the Courts were to accept such a plea of the appellant, that would result in a situation where the appellant would get the benefit of a wrong category if the wrong claim went unnoticed and if noticed, the appellant could always turn around and claim that this was as a result of human error. Each candidate necessarily must bear the consequences of his failure to fill up the application form correctly. No fault can, therefore, be found in rejecting the application for correction when the candidate himself has failed to make a proper disclosure or where, as in the present case, the application is submitted under a wrong category. Interference of the High Court under Article 226 of the Constitution is clearly not warranted in such matters as it creates grave uncertainty since the selection process cannot be finally completed."

47. In **Jai Karan Singh and 52 others Vs. State of U.P**9., another Division Bench of the Court reiterated the aforesaid position observing:-

To examine the issue that have been raised before the Court by the candidates more by way of sympathy then on any legal principle it needs to be remembered that the Examining Body had informed the candidates time and again the necessity of filling the information accurately in the OMR Answer Sheets with a clear instruction that their OMR Answer Sheet would not be evaluated if any mistake is committed. At the cost of repetition, we reiterate that the candidates had been informed when the advertisement was issued on 21 August 2017 that they should visit the Website of the Board for the ascertaining procedure that was required to be followed for filling up the information in the OMR Answer Sheet. We have referred to the relevant provisions contained in the guidelines uploaded on the Website and we have no manner of doubt that complete information was provided to the candidates for filling the OMR Answer Sheet, particularly with regard to the entries relating to Registration Number, Roll Number, Question Booklet Series and the Language attempted. The candidates were made aware that in case there was any mistake in the information provided by them, the OMR Answer Sheet would not be evaluated and no representation in this regard would be accepted. Not only this, detailed information was also contained in the Admit Card which the candidates had to download. The information contained in the Admit Card has been reproduced above. The candidates were clearly informed that

the OMR Answer Sheet would be evaluated through an electronic scanning process and incorrect entries in the OMR Answer Sheet would render the answer sheet invalid. Candidates were also informed that if they darkened more than one circle the, answer would be treated as wrong and that the candidate must also indicate Roll Number, Registration Number, Question Booklet Series at the space provided in the OMR Answer Sheet. This apart, the question booklet that was provided to the candidates also contained important instructions on the first page and the lase page. These instructions have been reproduced above. The last page also provided in detail the manner of filling the entries relating to Registration Number, Roll Number, Question Booklet Series and the language attempted. In fact, a sample registration number was indicated to highlight the manner in which the entries were required to be filled. The same set of instructions were contained in the OMR Answer Sheets. Thus, instructions were repeatedly given to the candidates during the process of filling the application form ONLINE in the Admit Card and at the time of examination regarding the manner in which the entries were required to be filled in the OMR Answer Sheet.

It is keeping in mind the aforesaid information provided to the candidates that the Court has to examine whether the candidates can insist, even if they have not accurately filled the Roll Number, Registration Number, Question Booklet Series and Language attempted that the mistakes should be ignored and the Examining Body should conduct a manual check of their OMR Answer Sheet with the information provided by them earlier so that the results can be declared.

48. Dealing with an identical challenge in respect of this very recruitment a learned Judge of the Court in **Soni Prajapti Vs. State of U.P. and 2 others**10 held:-

"The instructions provided to the candidates were clear and specific. Even if there was a human error, but since the examination was taken OMR sheet and the information regarding Question Booklet Series was to be provided by darkening the corresponding circle on the OMR sheet and having regard to the fact that evaluation of answer sheets was to be done by electronic scanning device, which was duly communicated to the candidate in advance, the grievance now raised could not be considered. There would be large number of other candidates having same or similar grievances, in which also same relief would have to be granted thereby derailing the entire process. In such view of the matter, this Court does not find it a fit case to interfere at this stage in exercise of power under Article 226 of the Constitution."

49. It is thus manifest that a whole body of precedent on this oft repeated prayer of rectification in online forms has come to govern the field. The principal considerations which appear to have weighed with the Court in deciding against the petitioners in those matters were the caveats and notes of caution which placed candidates on prior notice of such a plea not being liable to be entertained, the specter of the entire selection process being stalled or even derailed. But Courts laid equal if not far greater emphasis on the need to ensure certainty and closure being accorded to selection proceedings in respect of posts under the State. That is exactly the sentiment voiced in **Ran Vijay Singh** and **Vikesh Kumar Gupta** by the Supreme Court.

50. On an overall conspectus of the aforesaid discussion the Court comes to the following conclusions. A permission to rectify and amend entries made in the online applications would be clearly

impermissible in light of the caveats carried in the advertisements and notices issued by the respondents as well as the declarations made by the candidates themselves while participating in the recruitment process. It would not only be iniquitous but also detrimental to public interest to command the respondents to permit rectifications at the fag end of a recruitment exercise which commenced in December 2018. The stipulations contained in the advertisements and notices issued were never assailed by the petitioners prior to participating in the recruitment process. It would be unfair not just to the respondents but to the other selected candidates to now accord them such permission which would necessarily result in the selection process being stalled and derailed. This Court as well as the Supreme Court has consistently taken the view that such a course being tread would be wholly unfair and unwarranted. The Court repels the challenge to the Government Order of 4 December 2020 being contrary to the mandate of Rule 14. It also negatives its challenge on the ground of being discriminatory or unfair.

51. These petitions shall consequently stand **disposed of** with liberty to the State respondents to evaluate the case of each of the petitioners before this Court in light of the Government Order dated 4 December 2020.

(2021)01ILR A867
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2020

BEFORE

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

Writ-A No. 12055 of 2017

Ashish Kumar Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava, Sri Ashok Kumar Dubey, Sri Shiv Kumar Pal, Sri Sushil Kumar Pal

Counsel for the Respondents:
C.S.C.

A. Civil Law - U.P. Government Servant (Discipline and Appeal) Rules, 1999 – Rule 7 – Service law – Departmental Inquiry – Major Penalty – Chargesheet not in conformity with the Rules – No intimation of date, time and venue of inquiry – Effect – Procedural Safeguard – Held, Imposition of a major penalty on a Government servant is a serious matter, and no matter how serious the charge is, procedural safeguards have to be strictly ensured – Obligation to intimate the date, time and venue of inquiry is of seminal importance – A Government servant, who does not file a reply to the charge sheet, is entitled to appear at the inquiry and cross-examine witnesses for the establishment and make his submissions. (Para 14 and 18)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Syed Nazir Abbas Naqvi Vs St. of U.P. & ors. , 2003 (6) AWC 4996

2. Dukh Haran Prasad Vs St. of U.P. & ors. , 2015 (3) AWC 2227

3. Kaptan Singh Vs St. of U.P., 2014 (5) AWC 5171

4. St. of Uttar Pradesh & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

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

1. This writ petition is directed against an order passed by Ms. Monika Rani, the then Collector, Chitrakoot, dated 03.02.2017, dismissing the petitioner from Government service. It has further been ordered that a sum of Rs.86,74,600/- held

embezzled by the petitioner be recovered from him.

2. The petitioner was a Deputy Cashier (उप रोकड़िया), posted at the Sub-Treasury Mau, District Chitrakoot. Shorn of details, that are unnecessary to determine the short point that arises for consideration here, the petitioner was charge sheeted through two separate charge sheets dated 06.04.2016 and 26.05.2016, on the foundation of which, disciplinary proceedings were drawn against him. The substance of the charges against the petitioner is that he had embezzled Government moneys in the sum of Rs.86,74,600/- by manipulating figures in the deposit challans, relating to sums of money, collected at the Treasury and deposited by him at the Allahabad Bank, Branch Mau, District Chitrakoot on 69 days between 08.04.2015 to 06.02.2016.

3. Parties have exchanged affidavits, whereafter this petition was formally admitted to hearing on 01.12.2020. It was heard on that date and thereafter, adjourned on a few instances. Parties have concluded their submissions today.

4. Heard Mr. Arvind Srivastava, learned Counsel for the petitioner, along with Mr. Ashok Kumar Dubey, Mr. Shree Prakash Singh and Dr. Amar Nath Singh, learned Standing Counsel appearing on behalf of the State.

5. No doubt, the charges against the petitioner are serious, but Mr. Arvind Srivastava says that the impugned order has been passed in utter violation of principles of natural justice. During hearing, he has canvassed a number of points to assail the entire disciplinary proceedings, including those relating to non-supply of documents, that have been produced against him, apart from personal bias that he has alleged against Kamlesh Kumar, the Senior Treasury Officer, District Treasury, Chitrakoot.

6. This Court is not minded to examine the other contentions raised by Mr. Srivastava, which may not be treated to be decided either way by this judgment, except the one that this Court proceeds to consider now. Mr. Srivastava submits that during the course of the departmental inquiry, as a part of the disciplinary proceedings, no date, time or place for holding the inquiry was determined nor any such date, time or place was intimated to the petitioner. He further submits that the respondents have not proved the charges before the Inquiry Officer by examining witnesses in support of the same. No oral evidence has been recorded on behalf of the establishment. The Inquiry Officer has proceeded to evaluate papers before him, without any evidence being led by the establishment to prove the charges. The Inquiry Officer, on the basis of an evaluation of documents on record done of his own, has held the charges proved. This, according to Mr. Srivastava, is a manifest illegality, which vitiates the inquiry report and the consequential order of dismissal from service founded on it.

7. Learned Counsel for the petitioner has, in particular, invited the Court's attention to paragraph no.43 of the writ petition, where it is averred to the following effect:

"43. That it is pertinent to state here that nothing has been done pursuant to the said letter dated 22.11.2016 by the Enquiry Officer. Neither any alleged charge sheet, material evidence or permission to cross

examine the alleged witnesses has been provided nor any date or time or place has been disclosed/ fixed by the Inquiry Officer for hearing of the petitioner in the alleged departmental enquiry being conducted against him, and thus the said act and conduct of the inquiry officer not only violates the U.P. Government Servant (Discipline and Appeal) Rules, 1999 and the Government Order dated 22.4.2015 but also violates the Principles of Natural Justice of law."

8. Paragraph no.43 of the writ petition has been answered in paragraph no.44 of the counter affidavit, which reads to the following effect:

"44. यह कि रिट याचिका के प्रस्तर-43 का कथन जिस प्रकार वर्णित है, स्वीकार नहीं है। उपयुक्त एवं विस्तृत उत्तर पूर्ववर्ती प्रस्तरों में दिया जा चुका है।"

9. The only paragraph of consequence in the counter affidavit, where any material averment with regard to the petitioner's stand carried in paragraph no.43 of the writ petition can be found, is paragraph no.40 of the writ petition, which reads:

"40. यह कि, रिट याचिका के प्रस्तर-39 का कथन जिस प्रकार वर्णित है, स्वीकार नहीं है। जांच अधिकारी द्वारा याची को आरोप पत्र दिनांक 07-11-16, समस्त साक्ष्यों/ संलग्नकों सहित अनेक बार उपलब्ध करायी गयी। किन्तु याची ने आरोप पत्र में इंगित किसी भी आरोप का उत्तर न देकर मात्र जांच में व्यवधान डालने/ विलम्ब कराने की नीयत से अनावश्यक पत्राचार किये और उपर्युक्त पत्रजात उसे प्राप्त न होने का कथन किया। उक्त के साक्ष्य स्वरूप जांच अधिकारी द्वारा याची को प्राप्त कराया गया पत्र दिनांक 19-11-16 अवलोकनीय है जिसमें स्पष्ट उल्लेख है कि *"..... आप द्वारा मात्र पेशबन्दी किये जाने की नीयत से शासन को अनावश्यक व झूठे तथ्यों पर आधारित पत्राचार कर भ्रमित किये जाने का कुत्सित प्रयास किया गया है। यद्यपि आप द्वारा जानबूझकर अपने विरुद्ध प्रचलित विभागीय कार्यवाही को अधिकतम समय तक विलम्बित करने की नीयत से ऐसे कृत्य किये जा रहे हैं तथापि यदि कथित तौर पर सादे कागज प्राप्त होने का कथन आप द्वारा किया जा रहा है तो आपको निर्देशित किया जाता है कि आप अपने विरूद्ध प्रचलित विभागीय कार्यवाही से सम्बन्धित आरोप पत्र समस्त संलग्नकों सहित, जो पूर्व में आपको हस्तगत् कराये जा चुके हैं, पुनः अधोहस्ताक्षरी कार्यालय में तत्काल उपस्थित होकर अधोहस्ताक्षरी के समक्ष प्राप्त करना सुनिश्चित करें। ....."* पुनः जिलाधिकारी द्वारा याची को प्राप्त कराया गया आदेश दिनांक 07-12-16 अवलोकनीय है जिसमें स्पष्ट उल्लेख है कि मा0 उच्च न्यायालय द्वारा रिट याचिका संख्या 24929/2016 में पारित आदेश दिनांक 06-09-16 के अन्तर्गत जांच कार्यवाही दिनांक 31-12-16 तक पूर्ण किये जाने के निर्देश दिये गये हैं किन्तु याची द्वारा जानबूझकर अपने विरूद्ध प्रचलित विभागीय कार्यवाही को अधिकतम् समय तक लम्बित रखने की नीयत से सर्वथा गलत, भ्रामक व निराधार पत्राचार बारम्बार करते हुए जांच में अपेक्षित सहयोग नहीं दिया जा रहा है। यद्यपि याची को आरोप पत्र मय समस्त सम्बन्धित अभिलेख/ छायाप्रतियां अनेक बार सीधे/ पंजीकृत डाक से प्राप्त कराये जा चुके हैं फिर भी याची विभागीय कार्यवाही से सम्बन्धित प्रपत्र पुनः सीधे प्राप्त करके अपना पक्ष जांच अधिकारी के समक्ष प्रस्तुत करे। पत्र दिनांक 19.11.2016 एवं आदेश दिनांक 07.12.2016 की छायाप्रति **संलग्नक सं0-6 व 7** के रूप में संलग्न है।"

10. It appears that the specific stand of the petitioner, that a date, time and place to hold the inquiry were never communicated to him, was canvassed before this Court earlier as well, when this petition was still at the stage of motion of hearing. There is a very detailed order on this issue passed on 28.02.2019, which reads:

"Heard Sri Arvind Srivastava learned counsel for the petitioner and Sri Vikram Bahadur Yadav learned Standing Counsel.

Pursuant to the earlier orders passed, Sri Vikram Bahadur Yadav learned Standing Counsel has produced the record. From the records which have been produced before the Court it appears that the respondents had placed the petitioner upon notice to file a reply to the charge sheet which had been served. According to them however despite time having been granted, the petitioner did not furnish any

reply. Sri Yadav has then, after going through the entire record, submitted that no oral evidence was recorded in the course of the disciplinary proceedings since the respondents were of the considered view that the charges were liable to be tested and established on the basis of the documentary evidence which was made part of the enquiry. Sri Yadav has then, drawing the attention of the Court to the enquiry report, submitted that the enquiry officer has independently evaluated the documentary evidence and has thereafter proceeded to record his detailed conclusions with respect to the charges levelled.

Sri Arvind Srivastava learned counsel for the petitioner has additionally drawn the attention of the Court to the pleadings taken in paragraph-43 of the writ petition to contend that no notice indicating the date, time or place of enquiry was communicated to the petitioner by the enquiry officer.

Sri Yadav with the aid of the record has sought to rebut this assertion and has submitted that notices had in fact been issued. He prays for time to file a supplementary counter affidavit bringing those notices on record.

Although Sri Srivastava learned counsel for the petitioner in his preliminary submissions advanced on this writ petition sought to make certain allegations against the fourth respondent and to submit that the entire action taken against the petitioner was tainted with mala fides, on being asked to point out the averments made against the said respondent so as to justify issuance of notice, all that was pleaded was the averments made in paragraph-59 of the writ petition.

Presently and on evaluation of the averments so made, this Court finds no ground to issue notice to the private respondent No.4.

List this petition again after three week by which time the supplementary counter affidavit may be filed by the State."

11. At the hearing before this Court, no supplementary counter affidavit has been filed on behalf of the State, in terms prayed on 28.02.2019. This Court, therefore, has no option but to proceed on the assumption that the averments in the paragraph no.43 of the writ petition are true, as these remain unrebutted. The conclusion on facts, therefore, would be that no date, time and place of the inquiry scheduled was intimated to the petitioner. The consequence of this failure in law will be shortly examined. Apart from it, it has also been urged that no oral evidence during the course of inquiry was recorded on behalf of the establishment, which was necessary in the case, which involved a charge entailing a major penalty. Here also, there is hardly any dispute on facts that no oral evidence was led on behalf of the establishment to prove the charges. This fact has figured in this Court's order dated 28.02.2019, where Mr. Vikram Bahadur Singh, learned Standing Counsel, on going through the record, did not dispute the fact that during the course of the disciplinary proceedings, no oral evidence was recorded. No material to the contrary has been shown to this Court during the hearing today or earlier on 1st December, 2020. This Court, therefore, also has to pronounce upon the legal effect of the respondents' failure to lead oral evidence in support of the charges, held proved against the petitioner at the inquiry.

12. Learned Standing Counsel submits that the present case is one which

does not require any oral evidence at all, for the petitioner's guilt is established by documents that are on record. He submits that there is ample evidence on record to show that the petitioner did not submit replies to the charge sheets or led evidence, despite being granted ample opportunity to do so. The Inquiry Officer, therefore, on a perusal of the documents on record, rightly and justly concluded that the petitioner was guilty of tampering the various treasury challans and by doing that, embezzled Government moneys in the sum of Rs.86,74,600/-.

13. This Court has carefully considered the rival submissions advanced by parties. The procedure for imposition of major penalties is laid down in the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (for short, "the Rules'). Rule 7 of the Rules read as follows:

"7. Procedure for imposing major penalties.- Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner :

(i) The disciplinary authority may himself inquire into the charges or appoint an authority subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the disciplinary authority :

Provided that where the appointing authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary; as the case may be, of the concerned department.

(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidence and the name of the witnesses proposed to prove the same alongwith oral evidence, if any, shall be mentioned in the charge-sheet.

(iv) The charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and Inquiry Officer shall proceed to complete the inquiry ex parte.

(v) The charge-sheet, alongwith the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records. In case the charge-sheet could not be served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation :

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his

report to the disciplinary authority on the basis of such admission.

(vii) Where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence :

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) The disciplinary authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner of the disciplinary authority having regard to the circumstances of the case so permits :

Provided that this rule shall not apply in following cases :

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the disciplinary authority is satisfied that for reason to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules."

(Emphasis by Court)

14. It must be remarked that the imposition of a major penalty on a Government servant is a serious matter, and no matter how serious the charge is, procedural safeguards have to be strictly ensured. The procedure for holding an inquiry is laid down in Rule 7 of the Rules, extracted above. A perusal of the record of the writ petition and facts that have been established do not show whether a charge sheet conforming to Rule 7(iii) of the Rules was ever issued to the petitioner. There is a mention of two charge sheets in the impugned order 03.02.2017, but all that this Court has been shown is the inquiry report

dated 31.12.2016, annexed to the counter affidavit, carrying a summary of the charges. This report is annexed as Annexure no.4 to the counter affidavit. In fact, this document carries the entire record of disciplinary proceedings and the manner these have been gone about. This Court is convinced that a charge sheet conforming to Rule 7 of the Rules was never issued to the petitioner, carrying with it a summary of the documentary evidence and the witnesses, by which distinct charges indicated and framed, in precise and clear terms against the petitioner, were proposed to be proved.

15. It must also be said that the inquiry proceedings as well as the order of the Disciplinary Authority betray an impression that the respondents have confounded the two distinct roles of the Investigator and the Adjudicator. So long as the respondents were holding a preliminary inquiry and discovered evidence, which they believe to inculpate the petitioner, they could go about the exercise in the manner they found feasible. But, in the next step, when the stage came to establish the charges in disciplinary proceedings, the Inquiry Officer appears to have forgotten his role as an impartial arbiter and so also the respondents, their obligation to establish, by evidence, charges against the petitioner before their Domestic Inquiry Tribunal. The Inquiry Officer and the respondent Authorities mixed up both roles, virtually putting onus on the petitioner to establish his innocence. Even if it be that not bad, the Inquiry Officer acted on mere papers that were before him, without evidence being led at the inquiry by the establishment.

16. It hardly need be gainsaid that in a case where a delinquent employee does not appear or does not file a reply to the charge sheet, Rule 7 of the Rules mandates ex parte proceedings. Ex parte proceedings postulate that the establishment have to prove the charges against the delinquent by leading evidence, both documentary and oral. The Inquiry Officer acted on papers that were filed in support of the charges, mistaking them for evidence. In a domestic inquiry, the provisions of the Evidence Act certainly do not apply. But that does not mean that their quintessence about basic principles relating to proof and evidence are to be cast aside.

17. The Inquiry Officer in this case acted on a volume of papers, that were before him, without those papers being systematically proved as evidence in the inquiry. This could be done by the Presenting Officer by examining relevant witnesses. In the process, the Inquiry Officer forgot the distinction between idle papers and evidence, on which he could act. The documents on record had to be proved by the establishment through appropriate means, which would then be properly galvanized into documentary evidence. This Court must remark that looking to the nature of the charges, which relate to tampering allegedly done by the petitioner in various documents, such as deposit challans tendered to the Bank, besides the Bank scroll, oral evidence of other functionaries at the Treasury and the Bank connected to the transaction, would be essential to bring home the charges. No relevant witness has been examined to establish that it was the petitioner, who tampered the figures in the documents and embezzled Government money. An Investigator's plea, howsoever strongly found on the material collected, cannot be an Adjudicator's determination.

18. Likewise, the obligation to intimate the date, time and venue of inquiry is of seminal importance. A Government servant, who does not file a reply to the charge sheet, which may not be the case here, is still entitled to appear at the inquiry and cross-examine witnesses for the establishment and make his submissions. In this case, it has been found for a fact that the date, time and venue of inquiry were not communicated to the petitioner. The failure of the respondents to do so, vitiates the proceedings albeit on a procedural facet. It would be profitable in this connection to refer to a decision of this Court in **Syed Nazir Abbas Naqvi vs. State of U.P. and Ors., 2003 (6) AWC 4996**. It has been held in the context of an ex parte inquiry where the delinquent employee appeared before the Inquiry, Officer and said that he had nothing to offer in his defence, that the employee's stand does not absolve the establishment to prove the charges by examining witnesses. It was held in **Syed Nazir Abbas Naqvi (supra):**

"9. ..... Even if it is accepted that petitioner made any statement before the Inquiry Officer that he does not wish to say anything more, the Enquiry Officer could not have closed the proceedings and submitted the report only on the basis of petitioner's reply. It was incumbent upon him under the rules, as well as in observance of the principle of natural justice to have got the charges proved by examining the witnesses who may have proved the record in respect of the charges in accordance with law. In any case, the Inquiry Officer was required to give reasons for refusing summoning of witnesses. In the present case, the Court finds that considering the charges and the reply, the contractor in respect of whom it was stated by petitioner that the over writing was made by the Contractor himself and the Registrar, who was Drawing and Disbursing Officer and the member in charge were necessary witnesses, both to prove the charges, as well as defence witnesses....."

(Emphasis by Court)

19. Also relevant in this connection is the decision of this Court in **Dukh Haran Prasad vs. State of U.P. and Ors., 2015 (3) AWC 2227.** In Dukh Haran Prasad, it has been held:

"15. It is not disputed by the learned Standing Counsel that the imposition of the penalty of stoppage of three increments with cumulative effect upon the petitioners was a major penalty. If that be the admitted position, the procedure prescribed under Rule 7 was to be mandatorily followed. It has been repeatedly held by this Court that in the case of imposition of a major penalty, a failure to hold an oral inquiry is fatal. If there be any need to refer to authority for this proposition, one may only note the judgment rendered by a Division Bench of this Court in the case of Sharad Kumar Varma v. State of U.P. and others; 2006 (110) FLR 630."

20. On the same point is the decision of a Division Bench of this Court **Kaptan Singh vs. State of U.P., 2014 (5) AWC 5171**. It has been held in Kaptan Singh:

"9. We are unable to accept the contention of the learned Additional Chief Standing Counsel. Even if the delinquent employee does not request for personal hearing the burden of proving the charges normally being upon the department, the enquiry officer was under obligation to fix a date for such enquiry, with information to the delinquent and to conduct enquiry

wherein he was required to examine documentary as well as oral evidence, if any, in support of the charges. Even if the delinquent employee did not participate in the enquiry, the Enquiry Officer was duty bound to discharge his obligation as an Enquiry Officer of ascertaining the truth in respect of the charges levelled against him, on the basis of evidence, as to whether the same are proved against him or not.

10. Even if the delinquent does not demand personal hearing or does not give the names of witnesses with brief synopsis of points on which the wishes to examine or cross-examine the witnesses, the Inquiry Officer is not absolved from fixing a date of enquiry, with intimation to the delinquent and if he does not appear on the date fixed to either adjourn the enquiry to some other date or to proceed ex parte, as he deems fit. In either eventuality, he is required to hold inquiry, if delinquent is present, in his presence, if he is absent, ex parte. If oral evidence is referred in the charge-sheet, same is required to be recorded/examined, if not, even then the documentary evidence is required to be examined in the light of the charges for ascertaining the truth in respect thereof. The delinquent is also entitled to be intimated the date for oral enquiry, wherein the Inquiry Officer should confront the delinquent with the charges and the evidence in support thereof, put relevant queries to him, elicit and record his replies/response in respect thereof. Such oral enquiry is necessary as it gives an opportunity, to the delinquent to explain his conduct and to the Inquiry Officer to have a better perspective of the controversy, as, it is not always possible to discern the truth from written replies and documents which may not necessarily convey the complete truth. Even where the delinquent does not dispute the veracity of the documentary evidence, oral enquiry is necessary as he may still have an explanation to offer.

13. The reference to "documentary evidence" in Rule 7(iii) and (v) clearly indicates that the same have to be examined, as aforesaid, on the date to be fixed for enquiry, whether in the presence of the delinquent or in absentia (ex parte). This requirement though not express is implicit in the aforesaid rules, as is the requirement of holding an oral enquiry as it is a sine qua non for providing reasonable opportunity to defend and is part of the principles of natural justice under Articles 311 and 14 of the Constitution. Reference may be made in this regard to the judgments of the Apex Court in State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772 : 2010 (4) AWC 4221 (SC); Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570; State of U.P. v. T.P. Lal Srivastava,(1996) 10 SCC 702 and Imperial Tobacco Company of India Ltd. v. Its Workmen, AIR 1962 SC 1348 and the judgments of this Court in R.K. Singh v. Director/Appointing Authority, Govind Ballabh Pant Social Science Institute, Jhunsi, Allahabad and another, (2001) 2 UPLBEC 1282 : 2001 (3) AWC 1694 and Subhash Chandra Sharma v. U.P. Co-operative Spinning Mills and others, (2001) 2 UPLBEC 1475. The aforesaid requirement of law has not been followed in the instant case."

21. There are very illuminating remarks on the point involved here to be found in the guidance of their Lordships of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772. In State of U.P. vs. Saroj Kumar Sinha**, it has been held:

"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."

(Emphasis by Court)

22. Bearing in mind the aforesaid position of law, this Court is of opinion that this petition deserves to succeed with liberty to the respondents to proceed afresh in the matter, after issuing a charge sheet drawn up in accordance with Rule 7 of the Rules, and further adhering to the principles of holding an inquiry, where there is likelihood of imposition of a major penalty.

23. In the result, this writ petition succeeds and is **allowed**. The impugned order of dismissal from service dated 03.02.2017, passed by the District Magistrate, Chitrakoot, Annexure No.1 to the writ petition, is hereby **quashed.** The petitioner shall be reinstated in service forthwith. It will be open to the respondents to hold a fresh enquiry, after issuing a fresh charge sheet, drawn up in accordance with Rule 7 of the Rules. The charge sheet shall be served upon the petitioner by Speed Post and Registered Post at the correct postal address, to be communicated by the petitioner to the District Magistrate, Chitrakoot by 15th January, 2021. The District Magistrate, Chitrakoot shall retain a postal track of any dispatch made by him to the petitioner. It will be open to the respondents to conclude the inquiry expeditiously, in accordance with law, after granting due opportunity to the petitioner, and bearing in mind the guidance in this judgment.

24. The petitioner shall be entitled to receive his current salary from the date of reinstatement in service. The entitlement to receive the arrears will remain dependent on the final outcome of the disciplinary proceedings and the orders made there. During the period of the disciplinary proceedings, if the respondents choose to pursue them, it will be open to the respondents to post the petitioner, wherever they find it convenient. The petitioner will cooperate with the inquiry.

25. There shall be no order as to costs.

(2021)01ILR A876
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2020

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Writ-A No. 16247 of 2019

Kushal Pal Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Nisheeth Yadav

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 311 (1) and (2) – Ambit and Scope – Disciplinary proceeding – Major punishment – Article 311 gives constitutional protection to a

Member of civil service of the Union or of the State – Normal rule is that no major punishment, such as, dismissal, removal or reduction in rank should be inflicted without taking recourse of regular disciplinary enquiry – It postulates for extending reasonable opportunity to a civil servant before subjecting him to major punishment. (Para 10 and 15)

B. Civil Law - U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 – Rule 8(2)(b) – Disciplinary proceeding – Termination without holding inquiry – Validity – Rule 8 (2) (b) has carved out certain exceptions where even without holding regular proceeding punishment of dismissal, removal or reduction in rank can be inflicted – Power under Rule 8(2)(b) could have been invoked only on being satisfied that holding of enquiry is not 'reasonably practicable' and that too after recording the reasons – The reasons have to be recorded by authority in writing as to why inquiry is not reasonably practicable while exercising the power under Rule 8(2)(b). (Para 10, 11 and 15)

Writ Petition allowed. (E-1)

Cases relied on :-

1. U.O.I. & anr.Vs Tulsiram Patel, AIR 1985 SC 1416,

2. Jaswant Singh Vs St. of Punj. & ors. (1991) SCC 362

3. Special Appeal Defecctive no. 565 of 2020, St. of U.P. & anr. Vs Satya Prakash Rai decided on 29.09.2020

4. Reena Rani Vs St. of Har. , (2012) 10 SCC 215

5. Risal Singh Vs St. of Har. & ors., (2014) 13 SCC 244

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. By means of present petition, petitioner has sought following reliefs:-

I. A writ, order or direction in the nature of certiorari quashing the impugned order dated 07.08.2019 passed by the respondent no. 2

II. A writ, order or direction, in the nature of mandamus directing the respondents to reinstate the petitioner on his post with all emoluments payable to him.

III. Any other suitable order or direction as this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case.

3. Facts in narrow compass are that petitioner was appointed on the post of Constable in Uttar Pradesh Police Services on 25.06.2005. The petitioner was on security duty at Sadar Jail situated in the periphery of Ghaziabad Kutchery. Usually, it was not his duty to produce the prisoners before the court. On 7.8.2019, he was assigned the duty of search at gate of Prison Room but he accompanied one Naushad, who was accused in Case Crime No. 438 of 2016 under Sections 302, 201 I.P.C. Police Station Kheda, District Ghaziabad, to produce before Court Room No.1 at about 1.45 p.m. and came back at about 4.00 p.m. without the said prisoner. On enquiry, respondent no.2 came to know that after producing the said accused before the said court room, he illegally helped him in fleeing away from the court campus and, thus, he terminated the petitioner from service holding that he played an active role in getting the accused fled away.

4. Learned counsel for the petitioner submitted that on 07.08.2019 approximately 350 criminals including said accused Naushad were brought from Dasna

Jail and were kept in the lock-up room situated in the court campus of Ghaziabad. As accused persons were more, who had to be produced before the Court concerned and the constables were less in number, the Head Constable, namely, Satish Kumar, who was supervisor of the said lock-up had ordered him to produce said accused Naushad before the Court of Additional District Judge, First Court, Ghaziabad. Therefore, the petitioner escorted him to the said Court where he came to know that his case was transferred to the Additional District Judge 7th . When he reached there and waited for his turn to be produced before the Court, the accused, taking advantage of the rush, jacked off his hands of the petitioner and rushed away. It is submitted that the petitioner had only obeyed the order of his higher officer, namely, Satish Kumar, Head Constable and there was no control over the circumstances in which the accused fled away as there was huge rush in the surrounding area. Without looking to the fact and getting the matter inquired by way of holding enquiry, the respondent No. 2 terminated his services invoking the power conferred under Rule 8(2)(b) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as the "Rules 1991') as well as Article 311(2)(b) of the Constitution of India without even giving opportunity of hearing to him. It is further submitted that in case of termination/dismissal order passed under Rule 8(2)(b), it is required on the part of the Disciplinary Authority to record reasons in writing that reasonably it was not practicable to hold enquiry. Rule 8(2)(b) of the Rules 1991 is pari-materia to Article 311(2)(b) of the Constitution of India. It is lastly submitted that as the order of termination has been passed without recording reasons in writing for not holding the enquiry in the matter and even without providing opportunity of hearing to the petitioner, the same is bad and liable to be set aside.

5. In support of his submissions, the learned counsel for the petitioner placed reliance on the judgment of Apex Court as well as this Court rendered in the cases of ***Union of India and another vs. Tulsiram Patel, AIR 1985 SC 1416; Jaswant Singh vs. State of Punjab and others (1991) SCC 362 and State of U.P. and another vs. Satya Prakash Rai, Special Appeal Defecctive no. 565 of 2020 dated 29.09.2020.***

6. Per contra, learned Standing Counsel for the respondents urged that there is no need to conduct enquiry and order has rightly been passed by exercising power under Rule 8(2)(b) of Rules 1991. **It is further contended that the impugned order clearly gives reasons for dispensing with the service of the petitioner as such no interference is required in the matter.** There is no illegality in the order, as such, the order impugned requires no interference by this Court under Article 226 of the Constitution of India.

7. I have considered the submissions advanced on behalf of both the parties and perused the judgments relied upon by the learned counsel for the parties.

8. The facts of the case are not disputed. Rule 8(2)(b) of Rules 1991 as well as Article 311(2)(b) of Constitution of India reads as under:

Rule 8(2)(b) of Rules, 1991

"8(2)(b) where the authority empowered to dismiss or remove a person

or to reduce him in rank is satisfied for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

Article 311(2)(b) of Constitution of India

"311(2)(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

9. Perusal of aforesaid, clearly mandates that no police officer shall be dismissed, removed or reduced in rank except after proper enquiry and disciplinary proceedings as contemplated under the Rules. Further proviso (b) stipulates that this rule shall not apply where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing it is not reasonably practicable to hold such enquiry. Thus, as a general rule, no police officer shall be dismissed, removed or reduced in rank except after proper enquiry and disciplinary proceedings as contemplated by the Rules. Clause (b) is in the form of a proviso permits the authority concerned to dismiss or remove a person or to reduce him in rank, if he is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry.

10. The above provision is pari-materia with Article 311 (1) and (2) of the Constitution, which gives constitutional protection to a Member of civil service of the Union or of the State. The normal rule is that no major punishment, such as, dismissal, removal or reduction in rank should be inflicted without taking recourse of regular disciplinary enquiry against any delinquent. However, Rule 8 (2) (b) of the Rules, 1991 has carved out certain exceptions where even without holding regular proceeding punishment of dismissal, removal or reduction in rank can be inflicted. In order to dispense with the regular departmental proceeding for inflicting major punishment recording reasons is a condition precedent to prevent arbitrary, capricious and mala fide exercise of power. Absence of reasons vitiates the order and renders it unsustainable in law. Secondly, the authority has to record its satisfaction based on credible material in the record, to dispense with the enquiry. Onus is on the State or its authorities to show that the order of dismissal has been passed strictly as per prescription of the statutes.

11. The power under Rule 8(2)(b) of the Rules, 1991, could have been invoked only on being satisfied that holding of enquiry is not "reasonably practicable" and that too after recording the reasons. The circumstances in which it cannot be "reasonably practicable" to hold enquriy were considered by Hon'ble the Supreme Court in the case of **Union of India Vs Tulsi Ram Patel, AIR 1985 SC 1416** held as follows:

"60. The Second Proviso to Article 311(2) Clause (2) of Article 311 gives a constitutional mandate to the principles of natural justice and audi alteram partem rule by providing that a person employed in a civil capacity under the Union or a State shall not be dismissed or removed from service or reduced in rank until after an inquiry in which he has been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those charges. To this extent, the

pleasure doctrine enacted in Article 310 (1) is abridged because Article 311 (2) is a express provision of the Constitution. This safeguard provided for a government servant by clause (2) of Article 311, however, taken away when the second proviso to that clause becomes applicable. The safeguard provided by clause(1) of Article 311, however, remains intact and continues to be available to the government servant. The second proviso to Article 311 (2) becomes applicable in the three cases mentioned in clauses (a) to (c) of that proviso. These cases are :

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; and

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

130. The condition precedent for the application of clause

(b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished : feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner : to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to given evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through other threatens, intimidates and terrorizes the officer who is the disciplinary authority or member of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be

made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause(3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail."

12. In the case of **Jaswant Singh vs. State of Punjab and others, AIR (1991) 1 SCC 362**, the Apex Court while dealing with the exercise of power as conferred by way of exception under Article 311 (2) (b) of the Constitution of India, opined as under:

"Clause (b) of the second proviso to Article 311 (2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at page 270 of Tulsiram Case: (SCC p.504, para 130)

A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the department's case against the government servant is weak and must fail.

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the sanctification of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

13. In **Reena Rani vs. State of Haryana, (2012) 10 SCC 215**, after referring to the various authorities in the field, the Hon'ble Apex Court ruled out when reasons are not ascribed, the order is vitiated and accordingly set aside the order of dismissal which had been concurred with by the Single Judge and directed for reinstatement in service with all consequential benefits. It has also been observed therein that the order passed by this Court would not preclude the competent authority from taking action against the appellant/petitioner in accordance with law.

14. In the case of **Risal Singh vs. State of Haryana and others, (2014) 13 SCC 244** the Hon'ble Apex Court Court observed as follows:

"Non-ascribing of reason while passing the order dispensing with enquiry, which otherwise was must, definitely invalidates such action.....

Tested on the touchstone of the aforesaid authorities, the irresistible conclusion is that the order passed by the Superintendent of Police dispensing with the inquiry is totally unsustainable and is hereby annulled. As the foundation founders, the order of the High Court giving the stamp of approval to the ultimate order without addressing the lis from a proper perspective is also indefensible and resultantly, the order of dismissal passed by the disciplinary authority has to pave the path of extinction"

15. From the perusal of judgements referred hereinabove, it is clear that order

of termination cannot be passed without providing opportunity of hearing and further reasons have to be recorded by authority in writing as to why inquiry is not reasonably practicable while exercising the power under Rule 8(2)(b) of Rules 1991. In the case at hand, reasons recorded in the impugned order are not such on the basis of which it can be said that holding of inquiry was not reasonably practicable. Further Article 311(2)(b) of the Constitution of India postulates for extending reasonable opportunity to a civil servant before subjecting him to dismissal or removal from service or in the event of reduction in rank.

16. In view of the forgoing observations, this Court is of the view that the order impugned is contrary to the provisions of Rule 8(2)(b) of the Rules 1991 as well as Article 311(2)(b) of the Constitution of India and the same is not sustainable in the eye of law.

17. For the reasons recorded hereinabove the impugned order dated 07.08.2019 is hereby quashed. However, it would be open to the respondents to initiate disciplinary proceedings against the petitioner, if they so desire in accordance with the rules.

18. With aforesaid observation, the writ petition is allowed. No costs.

(2021)01ILR A882
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

Service Single No. 18375 of 2020

P.P. Pandey (Parmatma Prasad Pandey) ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Prashant Kumar Singh, Alok Mehrotra

Counsel for the Respondents:
C.S.C., Ratnesh Chandra

A. Fundamental Rules – Rule 9(21), 9(31) – Civil Service Regulation – Regulation 14, 18, 151 – Compulsory Retirement – Superannuation Pension – Increment – Determination – Employee becomes entitled for increment upon completion of six months or more of service in the past year i.e. naturally, services already rendered – Cutoff date of first July of any year indicated in the Government Order is only for the purposes of payment of the increment which has already fallen due – It is only recognition of a right which has already vested in an employee – Held, it is merely a fortuitous circumstance that the Government Servant has superannuated on the date when the increment, earned earlier, is to be actually paid – An employee becomes entitled for an increment upon completion of six months or more of service rendered in the past year. (Para 29, 35 and 41)

B. Service law – Increment – Ambit and Object – Increment is earned by a Government Servant for services rendered in the past year and the Government Servant becomes entitled to it on the concluding day of the year but it would actually become payable only from the next day – Actual payment of an increment earned during service is merely consequential to the actual act of earning the increment while in service. (Para 35)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Writ Petition No.8440 of 2011, M Balasubramaniam Vs St. of Tamil Nadu & ors.)

decided by the High Court of Judicature at Madras on 03.08.2011

2. Writ Petition No.15732 of 2017, P. Ayyamperumal Vs The Registrar, Central Administrative Tribunal, Madras Bench

3. S. Banerjee. Vs U.O.I. , AIR 1990 Supreme Court 285

4. Principal Accountant General, A.P. & anr. Vs C. Subba Rao, 2005(2) L.L.N. 592

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

1. Heard Mr. Prashant Kumar Singh, learned counsel for petitioner, learned State Counsel appearing on behalf of opposite party no.1 and Mr. Ratnesh Chandra, learned counsel appearing for opposite parties no.2 and 3.

2. Counter affidavit filed on behalf of opposite parties no.2 and 3 is taken on record.

3. Learned counsel for petitioner submits that he does not wish to file any rejoinder affidavit and the matter may be adjudicated on the basis of judgment applicable in the case.

4. Petition has been filed against the order dated 24.09.2020 whereby increment due to petitioner on 01.07.2010 has been denied on the ground that the petitioner is not entitled to the same since he was not in service on 01.07.2010, having superannuated on 30.06.2010.

5. Learned counsel for petitioner has submitted that petitioner was appointed in the cadre of Assistant Regional Manager (Operation) in the U.P. State Road Transport Corporation with effect from 17.11.1978 and subsequently attained superannuation on 30.06.2010. It is submitted that earlier with regard to following relief, petitioner had filed Writ Petition No.12390 (S/S) of 2020 in which this Court vide order dated 31.07.2020 had directed the concerned authority to decide petitioner's representation. In pursuance to the same, impugned order has been passed rejecting petitioner's representation.

6. Learned counsel for petitioner submits that the only ground for rejecting petitioner's representation is that the judgments referred to by the petitioner in his representation are inapplicable upon the Corporation since the Corporation is not a party to the said judgment.

7. Learned counsel for petitioner submits that as per the recommendations of Sixth Pay Commission, an increment in the salary of employees is to be provided on completion of Six month or more service rendered in the past year. It is submitted that once an employee had completed six months or more of service in the past year, he became entitled for increment in his salary, the actual payment of which was to be made on 01.07.2020. As such, it is submitted that the petitioner having completed six months and more of unblemished service for the year 2009-2010 became entitled for the same prior to superannuation and the actual payment of which only was to be made on 01.07.2010.

8. Learned counsel further submitted that the fact as to whether petitioner was in service as on 01.07.2010 or not is completely immaterial since the date of 01.07.2010 has been indicated in the recommendations of Sixth Pay Commission only for the purposes of actual payment/addition of the increment in view of services already rendered. As such the petitioner had accrued a right for increment

prior to 01.07.2010 and therefore his not being in service on 01.07.2010 is immaterial.

9. Learned counsel has placed reliance on judgment and order dated 03.08.2011 passed in Writ Petition No.8440 of 2011 (***M Balasubramaniam vs. State of Tamil Nadu & Ors)*** by the High Court of Judicature at Madras. He has also relied upon a Division Bench judgment of the same Court in the case of P**.** ***Ayyamperumal vs. The Registrar, Central Administrative Tribunal, Madras Bench, High Court*** in Writ Petition No.15732 of 2017.

10. Mr. Ratnesh Chandra, learned counsel appearing on behalf of opposite parties no.2 and 3 has refuted the submissions advanced by learned counsel for petitioner with the submission that increment as required to be added for completing year of service necessarily indicates addition in salary of an employee and not in the pension. It is submitted that since petitioner was not in service as on 01.07.2010, he was being paid only pension and not salary and therefore the provision in the Government Order would be inapplicable upon petitioner who was not actually in service as on 01.07.2010. Learned counsel has further submitted that in case such an increment is permitted for superannuated employee such as the petitioner, the effect of the same would be that such superannuated employee would be getting a pension that would be higher than their last pay drawn as salary. It is submitted that there is no such provision for including increment in the pension of superannuated employee. Learned counsel has submitted that paragraph 8 of the Government Order dated 08.12.2008 which forms the basis of petitioner's claim clearly indicates the said fact, which is applicable upon employees of the Corporation.

11. Upon consideration of material available on record and submissions advanced by learned counsel for parties, it is undisputed that petitioner was in the service of the Corporation and superannuated on 30.06.2010. It is also undisputed that the Government Order dated 08.12.2008 having the provision of increment is applicable upon employees of the Corporation.

12. The only question requiring adjudication is whether an employee superannuating prior to cut off date indicated in the Government Order i.e. first July of year would be entitled for increment or not ?

13. For determination of the aforesaid question, it would be appropriate to peruse the relevant rule regarding the same.

14. Fundamental Rules are core Rules governing all general conditions of service like pay, leave, deputation, retirement and dismissal, removal and suspension. All Central Government employees are governed by these Rules. If there are Special Rules governing a particular "service" and in event conflict with Fundamental Rules, Special Rules would prevail, for generalia specialibus non derogant.

15. Fundamental Rules 9(21) and 9(31) regarding pay and time scale of pay is as follows:-

9(21) "Pay" (a) Pay means the amount drawn monthly by a Government servant as-

(i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned

for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, special pay and personal pay; and

(iii) any other emoluments which may be specially classed as pay by the President.

(b) Not printed.

(c) Not printed.

9(31) "Time-scale of pay"- (a) Time-scale of pay means pay which, subject to any condition prescribed in these rules, rises by periodical increments from a minimum to a maximum. It includes the class of pay hitherto known as progressive.

(b) Time-scales are to be identical if the minimum, the maximum, the period of increment and the rate of increment of the time-scales are identical.

(c) A post is said to be on the same time-scale as another post on a time-scale if the two time-scales are identical and the posts fall within a cadre, or a class in a cadre, such cadre or class having been created in order to fill all posts involving duties of approximately the same character or degree of responsibility, in a service or establishment or group of establishments, so that the pay of the holder of any particular post is determined by his position in the cadre or class and not by the fact that he holds that post.

16. Chapter-Ill of the Fundamental Rules contains "General conditions of service". Chapter-IV deals with "Pay" whereas Chapter-IX deals with "Retirement". Fundamental Rule 17 and Fundamental Rule 56 insofar as they are relevant read as under:

Fundamental Rule. 56. (a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Government servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years.

Provided further that a Government servant who has attained the age of fifty-eight years on or before the first day of May, 1998 and is on extension in service, shall retire from the service on expiry of his extended period of service, or on the expiry of any further extension in service granted by the Central Government in public interest, provided that no such extension in service shall be granted beyond the age of 60 years.

(b) A workman who is governed by these rules shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years.

17. Central Civil Services Pension Rules were promulgated in 1972 in exercise of power under proviso to Article 309 of the Constitution of India. These Rules, as mentioned earlier, in the absence of any legislation made by the Parliament of India under Article 309 of the Constitution of India, have force of law and all the principles of interpretation that are applicable to a statute would equally apply while interpreting these Rules. Indeed, as per Section 3 read with clauses (50) and (51) of Section 3 of General Clauses Act, 1897, the provisions thereof apply to Pension Rules also.

Rule 33-. Emoluments

The expression 'emoluments' means basic pay as defined in Rule 9(21)(a)(i) of the Fundamental Rules which a

Government servant was receiving immediately before his retirement or on the date of his death; and will also include non-practising allowance granted to Medical Officer in lieu of private practice.

Explanation:- Stagnation increment shall be treated as emoluments for calculation of retirement benefits.

Note 1 - If a Government servant immediately before his retirement or death while in service had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be the emoluments for the purposes of this rule:

Provided that any increase in pay (other than the increment referred to in Note 4) which is not actually drawn shall not form part of his emoluments.

Note 2 - Where a Government servant immediately before his retirement or death while in service had proceeded on leave for which leave salary is payable after having held a higher appointment, whether in an officiating or temporary capacity, the benefit of emoluments drawn in such higher appointment shall be given only if it is certified that the Government servant would have continued to hold the higher appointment but for his proceeding on leave.

Note 3 - If a Government servant immediately before his retirement or death while in service had been absent from duty on extraordinary leave or had been under suspension, the period whereof does not count as service, the emoluments which he drew immediately before proceeding on such leave or being placed under suspension shall be the emoluments for the purposes of this rule.

Note 4 - If a Government servant immediately before his retirement or death while in service, was on earned leave, and earned an increment which was not withheld, such increment, though not actually drawn, shall form part of his emoluments.

Provided that the increment was earned during the currency of the earned leave not exceeding one hundred and twenty days, or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days.

Note 5 - Deleted

Note 6 - Pay drawn by a Government servant while on deputation to the Armed Forces of India shall be treated as emoluments.

Note 7 - Pay drawn by a Government servant while on foreign service shall not be treated as emoluments, but the pay which he would have drawn under the Government had he not been on foreign service shall alone be treated as emoluments.

Note 8 - Where a pensioner who is re-employed in Government service elects in terms of Clause (a) of sub-rule (1) of Rule 18 or clause (a) of sub-rule (1) of Rule 19 to retain his pension for earlier service and whose pay on re-employment has been reduced by an amount not exceeding his pension, the element of pension by which his pay is reduced shall be treated as emoluments.

Note 9 - Deleted.

Note 10 - When a Government servant has been transferred to an autonomous body consequent on the conversion of a Department of the Government into such a body and the Government servant so transferred opts to retain the pensionary benefits under the rules of the Government, the emoluments drawn under the

autonomous body shall be treated as emoluments for the purpose of this rule. (emphasis supplied.)

18. Here, we may also read Rule 5 of the Pension Rules:

5. Regulation of claims to pension or family pension :-(1) Any claim to pension or family pension shall be regulated by the provisions of these rules in force at the time when a Government servant retires or is retired or is discharged or is allowed to resign from service or dies, as the case may be.

(2) The day on which a Government servant retires or is retired or is discharged or is allowed to resign from service, as the case may be, shall be treated as his last working day. The date of death shall also be treated as a working day: Provided that in the case of a Government servant who is retired prematurely or who retires voluntarily under clauses (j) to (m) of Rule 56 of the Fundamental Rules or Rule 48 or Rule 48-A, as the case may be, the date of retirement shall be treated as a non-working day.

19. Regarding Fundamental Rule and Civil Service (CCA) Rule, it is a relevant fact that the Government of India Act, 1919 by virtue of Section 96B(2) empowered the Secretary of State for India to make Rules regarding conditions of service of Government Servant. It was in exercise of such power that the aforesaid rules were made. Prior to promulgation of Fundamental Rules, the Government of India made various Rules and Regulations in relation to service condition of government servant which were published as the Civil Service Regulation and continued to be applied after independence so far as they were not inconsistent with subsequent Rules made under Article 309 of the Constitution of India of the relevant statutes.

20. As per Article 14, when an officer is required to retire on attaining a specified age, the day on which he attains that age is reckoned as non-working day and the officer must retire with effect from and including that day. Article 18 defines "Calendar Month" and also gives examples for reckoning the period of six months beginning on 28th February, 31 March, 1 April etc. The last day on which thirty days is completed is taken as the completion of the period of the Calendar Month. Regulation 43 defines "Progressive Appointment" to mean as an appointment the pay of which is progressive, that is, pay which, subject to the good behaviour of an officer, rises, by periodical increments, from a minimum to a maximum. Articles 151 to 154 deal with accrual of increment and it would be better to read Articles 151 to 153.

21. Thus a person who gets progressive appointment would be entitled to a periodical rise in the pay subject to good behaviour and such increment accrues from the day following that on which it is earned. That is to say, a Government servant would get and draw increment after completion of one year. If the day for payment of annual increment is first of January, a Government servant would be entitled for annual increment on 31st December of that year, but the same would accrue only from First January of next year.

22. A Government servant, as per Rule 35, shall be granted superannuation pension on his attaining age of compulsory retirement. Such Government servant shall be paid pension based on the qualifying

service and based on the average emoluments drawn during the last ten months of his service. For the purpose of qualifying service and calculating average emoluments, one has to look to Rule 5 and Rule 34 of the Pension Rules. Rule 5(2) mandates that the day on which a Government servant retires shall be treated as his last working day.

23. As per Article 151 of Civil Sservice Regulations, annual increment payable to a Government servant will accrue from the day following that day on which it is earned. The Government servant would get a right for annual increment only after conclusion of the year and therefore on the day when the increment falls due, it would not become payable, but it would become payable only from the next day.

24. Upon consideration of the aforesaid Rules, it is apparent that "pay' includes other emoluments which may be specially classed as pay. Fundamental Rules 56(a) indicates that every Government Servant shall retire from service on the afternoon of the last day of the month in which he attains the age of 60 years. Proviso to the said Rule stipulates that a Government Servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of superannuation.

25. Rule 33 of the Central Civil Services (pension) Rule defines the expression "emoluments' to mean basic pay as defined in Rule 9(21)(a)(i) of the Fundamental Rules, which the Government Servant was receiving immediately before his retirement or on the date of his death. The Proviso Note 1 of the said Rules imposes a bar in any increase in pay (other than the increment) referred to in Note 4 which is not actually drawn from forming a part of emoluments.

26. Note 4 states that in case a Government Servant immediately before his retirement or death while in service, was on earned leave, and earned an increment which was not withheld, shall form a part of his emoluments even if not actually drawn.

27. The aforesaid provision clearly indicates provision for increment forming the part of emolument even if not actually drawn although applicable only in case the Government Servant was on earned leave. However, the same does indicate the fact that such an increment can form a part of the emolument even after retirement.

28. Relevant provision to be considered is under Articles 151, 152 and 153 of the Fundamental Rules which have been quoted hereinabove and specifically stipulate that an increment accrues from the date following that on which it is earned. The said provision clearly elaborates the fact that accrual of increments pertains to actual payment and is to be made subsequent to the date on which it is earned. As such, the accrual of increment pertains only to actual payment of a benefit, which has been earned prior to its date of accrual.

29. Considering the aforesaid, particularly in view of Article 151 of the Fundamental Rules, it is apparent that first of July being the appointed date for accrual of increment merely implies actual payment of a benefit such as increment which has been earned prior to such appointed date.

30. It is admitted between learned counsel for parties that increment in terms

of aforesaid Government Order is required to be paid to an employee upon completion of six months or more of services rendered in the past year. It is thus quite apparent that entitlement for increment to an employee accrues upon completion of six months or more service in the past year i.e. services already rendered. In terms of paragraph 8 of the aforesaid Government Order, the said fact is apparent that increment is to be paid for services already rendered. Thus, it is seen that the employee becomes **entitled** for increment upon completion of six months or more of service in the past year i.e. naturally, services already rendered. The cut off date of first July of any year indicated in the Government Order is only for the purposes of payment of the increment which has already fallen due. **It is therefore only recognition of a right which has already vested in an employee.**

31. The High Court of Judicature at Madras in the case of ***M Balasubramaniam vs. State of Tamil Nadu (supra)*** has dealt with the same issue on the following manner:-

".....It is equally important to state that there is no rule which stipulates that an employee must continue in service for being extended the benefits of the service already rendered by him.

32. A Division Bench of the same Court in the case ***P. Ayyamperumal vs. The Registrar, Central Administrative Tribunal*** has followed the aforesaid judgment. The matter was thereafter agitated before Hon'ble the Supreme Court in Special Leave Petition (Civil) Diary No.22283 of 2018 which vide order dated 23.07.2018 was dismissed on facts.

33. Learned counsel for petitioner has also placed reliance on decision of Hon'ble Supreme Court in ***S. Banerjee. Vs. Union of India, reported in AIR 1990*** Supreme Court 285. In the considered opinion of this Court, the said judgment would be inapplicable in the present case in view of different fact situation since in the aforesaid case, not only was the matter pertaining to dearness allowance but also in view of the fact that the applicant therein was in fact granted superannuation with effect from 01.01.1986 by specific order and therefore Hon'ble the Supreme Court held that since there was a clear direction that he would be deemed to have superannuated with effect from 01.01.1986, it could not be said that he had superannuated on 31.12.1985. In the present circumstance, the superannuation was actually a day before the date on which increment accrues.

34. Learned counsel appearing on behalf of opposite parties has in turn placed reliance on a Full Bench judgment rendered by the High Court of Andhra Pradesh in the case of ***Principal Accountant General, Andra Pradesh & Another Vs. C. Subba Rao; reported in 2005(2) L.L.N. 592*** with the submission that in the aforesaid Full Bench, it has been categorically held that since increment is an addition to pay, the same would be inapplicable in case of persons who have superannuated prior to the date of its accrual because on the date of accrual, a superannuated employee is not entitled to any salary or pay. The Full Bench has held that in order to be eligible for an increment falling due on the first of the succeeding month, an employee must satisfy not only the condition of becoming entitled but that he should continue to be on duty as a Government Servant since after superannuation on the last working day of

the month, he ceases to be such a Government Servant.

35. Upon consideration of the aforesaid, Full Bench judgment, with utmost respect, this Court is unable to concur with the same. The learned Full Bench in the judgment itself has quoted Article 151 of the Civil Service Regulations with the observation that ***'the Government Servant would get a right for annual increment only after conclusion of the year and therefore on the day when the increment falls due,*** it would not become payable, but it would become payable only from the next day.

36. In view of said Article 151 of Civil Service Regulations, it is apparent that the Full Bench also noticed the fact that the increment is earned by a Government Servant for services rendered in the past year and the Government Servant becomes entitled to it on the concluding day of the year but it would actually become payable only from the next day. The said observation also makes it clear that it is only the actual payment of the increment, which is to be made on the first of July of the year and has actually been earned by the Government Servant for the services rendered during the past year when he was in service. As such, the actual payment of an increment earned during service is merely consequential to the actual act of earning the increment while in service. It is merely a fortuitous circumstance that the Government Servant has superannuated on the date when the increment, earned earlier, is to be actually paid. It is also a relevant fact that the opposite parties have framed the U.P. State Transport Corporation Officers Service (General) Regulations 1998.

37. Regulation 3(n) has defined pay as an amount drawn monthly as follow:-

(n) "Pay" means amount drawn monthly by an officer as-

(i) basic any sanctioned for the post;

(ii) special pay or personal pay;

(iii) any other emoluments which may be specially classed as pay by the Board. It does not include dearness allowance, travelling allowance and other allowances;

38. Annual increment has been defined in Regulation 9 of the Regulation is as follow:

9. Annual increment*.- (1) (a) An annual increment may be allowed to an officer in accordance with the provisions of sub-regulation (2) at the rate as shown in the scales of pay admissible to the officer concerned unless the increment has been withheld as a disciplinary measure or at the Efficiency Bar.*

(b)All the officers will be granted increment on the first day of the month in which the increment falls due.

(c) If probation is extended, such extension will not count for increment, unless the Appointing Authority directs otherwise.

(d) An officer who has remained off duty on extraordinary leave, study leave or any other such similar leave, the date of increment shall correspondingly be shifted and the period of such leave shall not be counted for the purposes of increment. An officer who officiates in a higher post or in a higher time scale of pay shall be eligible to count for increments the period spent by him on such higher post or higher time scale of pay in his lower post when reverted to that post or time scale of pay.

(2) To reward an officer for excellent performance and in order to motivate him

for continuous excellent performance, the Board may grant premature increments subject to a maximum of three to an officer in the time scale of pay.

39. The aforesaid provisions in the Service Regulations are inconsonance with the Fundamental Rules and the Civil Service Regulation and clearly indicate the fact that increment is earned/allowed to an officer for services rendered by him in the past year.

40. The condition and procedure for applicability of increment has been made in the Government Order dated 08.12.2008, which has been adopted by the Corporation.

41. A perusal of paragraph 8 of the Government Order dated 08.12.2008 does not indicate any such condition that increment is to be paid only in case the employee is in service as on First July of the year. Once the authorities concerned have not indicated any such factor in the Government Order, it is not for this Court to construe such a meaning in the Government Order, which has deliberately been omitted.

42. In view of aforesaid, it is quite apparent that an employee becomes entitled for an increment upon completion of six months or more of service rendered in the past year.

43. It is also to be noticed that the impugned order has been passed only on the basis of that judgments passed by the High Court at Madras and by Hon'ble the Supreme Court are inapplicable because, the Corporation was not a party in those proceedings. It is settled law that it is the ratio decidendi which is applicable with regard to any lis and not as to the party in the dispute. The authority concerned should have appreciated that the present dispute is the same as was being agitated before High Court at Madras and there is no distinction whatsoever. However, this aspect has been lost sight of while passing the impugned order.

44. So far as the submission of learned counsel for opposite party is concerned that granting relief as has been sought by the petitioner would imply that pension of an employee would be more than the last pay drawn does not appear to be reasonable in view of fact that even if such an increment is allowed, the immediate effect will be on the last pay drawn only with consequential effect upon the pension of superannuated employee. Therefore it cannot be said that in case of allowing such an increment, the pensionary benefits of an employee would be more than the last pay drawn.

45. Upon consideration of aforesaid factors, the writ petition is liable to succeed and therefore writ in the nature of certiorari is issued quashing the impugned order dated 24.09.2020. A further writ in the nature Mandamus is issued commanding the opposite parties no.2 and 3 to grant increment due to petitioner on 01.7.2010 with all consequential benefits.

46. Orders pertaining to same and actual payment thereof shall be made within a period of six months from the date a copy of this order is produced before concerned authority.

47. Consequently, the writ petition stands ***allowed.***

(2021)01ILR A892
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2020

BEFORE

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

Writ A No. 36193 of 2015

Rajesh Kumar ...Petitioner
Versus
Chairman Nagar Panchayat, G.B. Nagar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manu Saxena

Counsel for the Respondents:
C.S.C., Anupama Parashar Upadhyay, Sri Chandra Bhan Gupta, Sri Devendra Kumar, Sri Satendra Kumar Upadhyay, Smt. Anupama Parashar, Sri Satyendra Kr. Upadhyay

A. Service Law – Disciplinary Inquiry – Major Punishment – Proof of charges – Leading of the witnesses – Parole Evidence – Necessity of – Obligation of Establishment and Inquiry Committee – Even if an employee does not appear before the Inquiry Tribunal/Committee, the charges do not stand proved by the delinquent's default – The establishment have to lead, both documentary evidence and examine witnesses in support of the charges. The charges have to be established by the establishment, even if the delinquent is *ex parte* – If the employee appears, he has a right not only to cross-examine witnesses, who appear on behalf of the establishment, but also to lead his own evidence, both documentary and oral – In cases involving major punishment, parole evidence ought to be led to establish the charges – Held, the inquiry committee has proceeded to accept the charges by surreptitiously rejecting the petitioner's reply to each of them, with no evidence before them to prove the charges – Documents that were considered, were not proved by any evidence, particularly, parole evidence. (Para 23 and 32)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Chamoli District Co-operative Bank Ltd. Through its Secretary/ Mahaprabandhak & anr. Vs Raghunath Singh Rana & ors., (2016) 12 SCC 204

2. St. of U.P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

3. St. of U.P. Vs Aditya Prasad Srivastava & anr., 2017 (2) ADJ 554 (DB) (LB)

4. Smt. Karuna Jaiswal Vs State Of U.P. Through Secy Mahila Evam Bal Vikas, 2018 (9) ADJ 107 (DB) (LB)

5. Roop Singh Negi Vs P.N.B. & ors., (2009) 2 SCC 570

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

1. This writ petition is directed against an order dated May the 14th, 2015 passed by the Executive Officer, Nagar Panchayat, Jewar, District Gautam Budh Nagar, terminating the petitioner's service. In addition, the petitioner has been ordered to deposit a sum of Rs.11,000/- with the Employers, held to be embezzled by him.

2. Admittedly, a counter affidavit has been filed in this case on behalf of respondent nos.2 and 3, to which a rejoinder has been filed on 26th February, 2017. However, the counter affidavit has not been placed on record by the office. Learned Counsel for the petitioner has supplied a copy of the counter affidavit, which is being retained on record and shall form part of it. Thus, the parties have exchanged affidavits.

3. Admit.

4. Heard forthwith.

5. Heard Mr. Manu Saxena, learned Counsel for the petitioner and Mr. Satendra Kumar Upadhyay, learned Counsel appearing on behalf of respondent nos.1 and 6. No one appears on behalf of respondent nos.2 and 3, though the name of Mr. Devendra Kumar, learned Counsel, is shown on behalf of the said respondents.

6. The petitioner was appointed as a Tax Collector with the Nagar Panchayat, Jewar, District Gautam Budh Nagar. He was suspended pending inquiry by the Executive Officer, vide order dated 20.04.2012. The allegations indicate that there were, in the receipts relating to levies on sale of animals in the cattle fair, many irregularities found. It was indicated that in a number of receipts, the number of cattle and the sum of money collected have been tampered with. The petitioner was charged prima facie with tampering official record to commit embezzlement and placed under suspension, as aforesaid. A charge sheet was issued to the petitioner on 22.06.2012, to which he submitted his reply on 07.10.2012. An inquiry report was submitted in the matter on 17.01.2013 by the Inquiry Officer/ Naib Tehsildar. The Inquiry Officer found that the petitioner had embezzled a sum of Rs.87,370/-, but since that money was deposited in the Nagar Panchayat Account, the Inquiry Officer thought that no charge survived against the petitioner. The forwarding note of the office to the Executive Officer shows that the petitioner was recommended to be reinstated in service, with a warning not to repeat his misconduct.

7. It must be remarked that the inquiry report was considered by the Disciplinary Authority/ the Executive Officer, who held the petitioner not guilty of embezzlement, but held him guilty of charges of tampering official records and not depositing Government moneys in accordance with rules. The petitioner was reinstated in service with a warning not to repeat such a mistake in future. He was also awarded an adverse entry. This order of reinstatement with a minor punishment was made by the Executive Officer on 16.02.2013.

8. Post reinstatement in service, the petitioner was given charge of a Tax Collector. He was assigned duties at different places from time to time. Despite reinstatement, the petitioner was neither paid salary for the period during which he was suspended from service nor his subsistence allowance. These were not paid, though he was reinstated in service. It appears that post reinstatement also, the petitioner's salary was not paid. The petitioner made a number of representations in this regard to the Nagar Panchayat, but to no avail. Still, the Executive Officer appears to have written a letter addressed to the Chairman dated 13.01.2014, apprising the latter that the petitioner has been reinstated in service with the imposition of a minor punishment, and that there was no justification to withhold his salary. It does appear from this letter that there was some issue raised by the Chairman about the jurisdiction of the Executive Officer to pass final orders in the disciplinary proceedings. The Executive Officer cited the provisions of Sections 74, 75 and 76 of the Uttar Pradesh Municipalities Act, 1916 to say that he had powers to dispose of the disciplinary

proceedings against an employee of the petitioner's cadre.

9. The course of proceedings show that the Chairman of the Nagar Panchayat and the Executive officer were not ad idem about the disciplinary proceedings initiated against the petitioner and concluded by the Executive Officer's order dated 16.02.2013. Upon receipt of the memo dated 13.01.2014 from the Executive Officer, the Chairman ordered an inquiry afresh to be done by one Mohan Lal Gupta, an Officer of the Nagar Panchayat. He submitted a short report dated 22.04.2014, saying that about the added charge of threat to commit suicide by the petitioner, there was no evidence and so far as the other charges were concerned, these had already been inquired into and the disciplinary proceedings concluded against the petitioner. It is also indicated in this report that the Chairman was the Disciplinary Authority relating to employees of the clerical cadre and still higher cadres. This remark in the inquiry report dated 22.04.2014 is further reflective of some issue between the Chairman and the Executive Officer, about the disciplinary jurisdiction over an employee of the petitioner's cadre.

10. It is alleged by the petitioner that the Chairman, on receipt of this report, sent one Vikas Sharma, a member of the Nagar Panchayat, from Ward no.16 to the Nagar Panchayat Office, with instructions to secure the entire record relating to disciplinary proceedings against the petitioner. The member concerned had instructions from the Chairman to remove the record of the disciplinary proceedings away from the Nagar Panchayat Campus. It is claimed that the member concerned forcefully took away the entire record of the disciplinary proceedings, relating to the petitioner, on 09.05.2014 at about 10 O' clock in the morning. A report in this connection was immediately submitted by the Clerk to the Executive Officer on 09.05.2014. The petitioner also reported the matter to the Executive Officer on 09.05.2014. A First Information Report was lodged by the Executive Officer on 09.05.2014 with Police Station Kotwali Jewar, District Gautam Budh Nagar. It, however, does not appear from the record that the written information sent vide memo no. 198/3/ न.प.जे./ 2014, dated 09.05.2014, led to the registration of a crime.

11. It is asserted that this action of the Executive Officer enraged and annoyed the Chairman of the Nagar Panchayat to the extent that he set aside the petitioner's reinstatement order dated 16.02.2013 and ordered revival of his earlier suspension order dated 20.04.2012. This order was passed by the Chairman on 30.05.2014. In consequence, disciplinary proceedings against the petitioner stood revived. The petitioner says that this revival was without jurisdiction. Nevertheless, another inquiry report was submitted on 23.06.2014, followed by a further report dated 24.06.2014, both undertaken by Vikas Sharma, the member of the Nagar Panchayat, detailed by the Chairman to remove the disciplinary proceedings' record from the Nagar Panchayat premises, earlier. Based on these two inquiry reports dated 23.06.2014 and 24.06.2014, a show cause notice dated 26.06.2014 was issued to the petitioner by the Chairman of the Nagar Panchayat.

12. The show cause notice details some five charges against the petitioner, four of which did not figure in the charge

sheet issued to him. The petitioner filed a reply to the show cause on 05.07.2014. Post submission of the petitioner's reply to the show cause notice, the Inquiry Officer, Mohal Lal Gupta, who had submitted the first inquiry report dated 11.02.2013, substantially exonerating the petitioner, submitted a fresh inquiry report. It is claimed by the petitioner that this report was made by Mohan Lal Gupta under coercion and undue influence by the Chairman. This report runs contrary to the earlier inquiry report dated 11.02.2013 authored by Gupta himself. The inquiry report dated 07.07.2014 holds the petitioner guilty.

13. It must be remarked here that the inquiry report dated 07.07.2014 is more of an office appraisal note about the inquiry reports submitted against the petitioner (without mentioning the dates of those reports). This report dated 07.07.2014 also certifies the fact that it is the Chairman, who is the competent Disciplinary and Appointing Authority, vis-a-vis an employee of the petitioner's cadre. This report/ office note also recommends that it is not in the Nagar Panchayat's interest for the petitioner to continue in service.

14. The Chairman, by his order dated 08.07.2014, terminated the petitioner's services. The petitioner filed an appeal from the termination order dated 08.07.2014 to the Divisional Commissioner, under Section 77 of the Uttar Pradesh Municipalities Act, 1916. The Commissioner found that the procedure adopted by the Chairman was utterly flawed, where no proper charge sheet was issued to the petitioner. It was also found that a three member inquiry committee report dated 24.06.2014, that dealt with the charges against the petitioner, was not provided to the petitioner. It was also held that the Chairman was not the petitioner's Appointing Authority, but the jurisdiction vested with the Executive Officer, under the provisions of Sections 74 and 75 of the Act of 1916. The order of the Chairman terminating the petitioner's services dated 08.07.2014 was, therefore, held to be without jurisdiction and the product of an essentially flawed procedure. The petitioner's appeal was allowed by the Commissioner vide order dated 30.09.2014, setting aside the order dated 08.07.2014, terminating the petitioner's services. It was further ordered that in case some embezzlement or other misconduct had been committed by the petitioner, the competent Authority can place him under suspension, after issuing him with a charge sheet, and conclude the disciplinary proceedings in accordance with rules.

15. In compliance with the aforesaid orders, the petitioner was reinstated in service. However, taking a cue from the liberty given by the Commissioner to proceed afresh, the petitioner was promptly placed under suspension pending inquiry, once more. The suspension order was passed by the Executive Officer, indicating added charges, apart from the claimed embezzlement. A charge about the issue of a death certificate after accepting a bribe of Rs.200/-, a charge about threat to commit suicide, a charge about misbehaving with a clerk followed by an "et cetera', were included. This suspension order was followed by a charge sheet dated 22.12.2014. This charge sheet carries six charges. The petitioner filed his reply to the said charge sheet on 02.01.2015.

16. It is the petitioner's case that post submission of his reply, no inquiry was convened. He was not intimated of any

date, time or venue of inquiry. He was not shown any documents, on which the establishment relied to prove the charges, or permitted to cross-examine witnesses. In fact, no witness was examined in support of the charges. It is the petitioner's case that entire disciplinary proceedings were held and concluded behind his back, for whatever these were. The impugned order of termination from service was passed on 14.05.2015, with no inquiry ever being held to prove the charges, on which it was founded. It is claimed that the entire disciplinary proceedings culminating in the impugned order have been undertaken in utter violation of the principles of natural justice.

17. It is argued by Mr. Manu Saxena, learned Counsel for the petitioner, that the impugned order is one that has been passed without following the prescribed procedure for holding a disciplinary inquiry or adhering to the essentials of such an inquiry, like fixing a date, time and place with intimation to the petitioner. These vitiate that order. Apart from it, the impugned order has been assailed as a product of the then incumbent Chairman's mala fides, who has virtually scripted an outcome on a premeditated basis.

18. This Court has looked into the counter affidavit filed on behalf of the Nagar Panchayat and the Executive Officer, arrayed as respondent nos.3 and 2, respectively, in that order. This Court notices that there is a plea raised in paragraph no.27 of the counter affidavit that the present challenge laid to the impugned order of termination of service is rendered meaningless, because pendente lite the petitioner has instituted Writ - A No.46921 of 2015 with a solitary prayer that the petitioner may be paid the entire arrears of his salary. That writ petition was dismissed vide order dated 27.10.2015, because the entire arrears of the petitioner's salary were paid in the meanwhile. In order to examine the effect of institution of Writ - A No.46921 of 2015 by the petitioner on the cause of action involved in the present writ petition, this Court called for the papers of the decided case and perused the same. A perusal of the said writ petition shows that the cause of action there is quite unrelated to that involved in the present writ petition, though there are assertions of a similar kind, assailing the procedure of disciplinary proceedings undertaken against the petitioner and the unfair manner in which he was suspended and terminated from service. The cause of action is confined entirely to three heads of dues of the petitioner, to which he would be entitled, irrespective of the impugned order of termination. The reliefs claimed in Writ - A No.46921 of 2015 would be the best evidence about the unrelated and limited cause of action there. The material reliefs, sought in Writ - A No.46921 of 2015, read:

"A. issue a writ, order or direction in the nature of mandamus, commanding the respondents to pay the entire salary of the petitioner w.e.f. April-2012 till October-2014 along with interest thereon @ 18% per annum, within time specified by this Hon'ble Court.

B. issue a writ, order or direction in the nature of mandamus, commanding the respondents to pay the suspension allowance w.e.f. November-2014 till 14.05.2015 along with interest thereon @ 18% per annum, within time specified by this Hon'ble Court.

C. issue a writ, order or direction in the nature of mandamus, commanding the respondents to pay the suspension allowance w.e.f. November-2014 till

14.05.2015 along with interest thereon @ 18% per annum, within time specified by this Hon'ble Court."

19. Paragraph no.24 of the writ petition last mentioned discloses the fact of institution of the present writ petition and its pendency. It has been clearly disclosed, what reliefs have been sought here, somuch so that the petitioner has appended as Annexure no.19, a copy of the array of parties here, the relief clause and the order made on 09.07.2015 by the Court, while entertaining the writ petition and a further order dated 04.08.2015.

20. This Court is, therefore, of opinion that the cause of action involved in the present writ petition is distinct and different from that involved in Writ - A No.46921 of 2015, which had very limited office. The institution of Writ - A No.46921 of 2015 or its eventual dismissal as infructuous vide order dated 27.10.2015, have no bearing on the petitioner's right involved in the present petition.

21. Now, turning to the thrust of Mr. Manu Saxena's submission, the specific case pleaded is that post a third round of suspension and redone disciplinary proceedings, no inquiry, whatsoever, was held after the petitioner submitted his reply to the charge sheet. No date, time and venue of inquiry were determined or the petitioner intimated about it. The impugned order was passed on a mere perusal of papers, based on the report of the inquiry committee, which did nothing more than looking into the charge sheet and the petitioner's reply, or at best, perusing some records in the petitioner's absence. No witnesses were examined on behalf of the establishment before the inquiry committee, or any documentary evidence properly led and proved. This Court notices that this submission of the learned Counsel for the petitioner is based on specific averments made in paragraph nos.20 and 21 of the writ petition, relative to which Grounds "Q' and "R' have been raised.

22. A perusal of the counter affidavit shows that the assertion in paragraph nos.20 and 21 of the writ petition have not been specifically denied, with pleadings to show, along with material, that a date, time and place for inquiry were fixed and intimated to the petitioner. Paragraph nos.20 and 21 of the writ petition have been answered in paragraph no.29 of the counter affidavit, that carries no denial, whatsoever, about those specific assertions in the writ petition. This Court also finds that whatever of the record has been enclosed with the counter affidavit, does not evidence an inquiry being held with a date, time and place intimated to the petitioner. A perusal of the inquiry report dated 12.05.2015, annexed as Annexure no. CA-15, also does not show that anyone on behalf of the establishment appeared before the inquiry committee to lead evidence in support of the charges.

23. It is, by now, the settled position of law that even if an employee does not appear before the Inquiry Tribunal/ Committee, the charges do not stand proved by the delinquent's default. These cannot be proved by the inquiry committee, going through the record of their own. The establishment have to lead, both documentary evidence and examine witnesses in support of the charges. The charges have to be established by the establishment, even if the delinquent is ex parte. If the employee appears, he has a right not only to cross-examine witnesses, who appear on behalf of the establishment,

but also to lead his own evidence - both documentary and oral. Apart from that, it is also, by now, an acknowledged principle of law that in cases involving major punishment, parole evidence ought to be led to establish the charges. A perusal of the inquiry report in this case shows that no such procedure has been adopted. The inquiry committee has perused the charge sheet, the petitioner's reply and the documents annexed to the charge sheet of its own. No evidence before them has been led on behalf of the establishment, with the documents being proved or witnesses being examined. The inquiry committee has proceeded to accept the charges by surreptitiously rejecting the petitioner's reply to each of them, with no evidence before them to prove the charges.

24. The first, second and fifth charges have not been held to be proved. Therefore, those need not be looked into. The third charge has been held proved, which relates to an embezzlement of a sum of Rs.11,000/-. The charge has been held proved on an inquisitorial examination of the Bank Account entries relied on by the establishment, with no witness from the Accounts Department of the Nagar Panchayat or otherwise In-charge of handling the Accounts to prove in what manner the entries precisely prove the charge about embezzlement. The entire finding has been recorded without any evidence being led before the inquiry committee.

25. The fourth charge relates to a threat by the petitioner to commit suicide. The finding has again been recorded upon a reading of the charge, the petitioner's reply and pre-recorded statements of some employees and members of the Nagar Panchayat about an event dated 17.02.2014, when the meeting of the Board was in progress. None of the employees or members of the Nagar Panchayat, who witnessed the alleged threat, were examined by the establishment in support of the charge. Still, the charge was held partly proved.

26. The sixth charge relates to the petitioner not constructing the demand book relating to tax or making efforts to realize the assessed tax. The charge has been held proved on a perusal of the petitioner's reply and documents on record before the inquiry committee. It has been held that from time to time, directions have been given to the petitioner to secure assessment of house tax and to recover the same in accordance with the Board's resolutions and applicable bylaws, but he has not shown any interest in that regard. Whatever tax he has recovered, is negligible. The demand has not been properly drawn. This charge would require the oral evidence of those officers and employees, who directed the petitioner to ensure assessment and effect recovery of taxes. There was much detail to be proved on the basis of evidence, both oral and documentary, to be led on behalf of the establishment. Nothing of the kind was done. The inquiry committee, instead recorded a finding of guilt on the sixth charge, on a mere perusal of papers that can hardly be called evidence, properly led and proved to establish the charge.

27. Here, it would be relevant to refer to the law regarding the essential requirements of holding a disciplinary inquiry, where charges are serious and imposition of major punishment is involved. In this connection, reference may be made to the decision of the Supreme Court in **Chamoli District Co-operative**

Bank Ltd. Through its Secretary/ Mahaprabandhak and another vs. Raghunath Singh Rana and others, (2016) 12 SCC 204. In Chamoli District Co-operative Bank Ltd. Through its Secretary, it has been held:

"22. From the propositions of law, as enunciated by the Apex Court as noted above, and the facts of the present case, we arrive at the following conclusions:

22.1. After service of charge-sheet dated 16-1-1993 although the petitioner submitted his reply on 4-2-1993 but neither inquiry officer fixed any date of oral inquiry nor any inquiry was held by the inquiry officer.

22.2. Mandatory requirement of a disciplinary inquiry i.e. is holding of an inquiry when the charges are refuted and serving the inquiry report to the delinquent has been breached in the present case.

22.3. Respondent 1 employee having not been given opportunity to produce his witnesses in his defence and having not been given an opportunity of being heard in person, the statutory provisions as enshrined in Regulation 85(i)(b), have been violated.

22.4. The disciplinary authority issued show-cause notice dated 4-5-1993 to Respondent 1 employee without holding of an inquiry and subsequent resolution by disciplinary authority taken in the year 2000 without there being any further steps is clearly unsustainable. The High Court has rightly quashed the dismissal order by giving liberty to the Bank to hold de novo inquiry within a period of six months, if it so desires.

22.5. The Bank shall be at liberty to proceed with the disciplinary inquiry as per directions of the High Court in para 1 of the judgment. The High Court has already held that the petitioner shall be deemed to be under suspension and shall be paid suspension allowance in accordance with the rules."

28. In **State of U.P. and others vs. Saroj Kumar Sinha, (2010) 2 SCC 772**, it has been held:

"27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

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.

(Emphasis by Court)"

29. This position of law was echoed by a Division Bench of this Court in **State of U.P. vs. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB) (LB). In State of U.P. vs. Aditya Prasad Srivastava**, it has been held by their Lordships of the Division Bench:

"17. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in enquiry the department has to establish the charge against the eployee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary.

(Emphasis by Court)"

30. There are some very pertinent remarks in a Division Bench decision of this Court, sitting at Lucknow in **Smt. Karuna Jaiswal vs. State Of U.P. Through Secy Mahila Evam Bal Vikas, 2018 (9) ADJ 107 (DB) (LB)** relevant to the issue here. It was a case where the inquiry was held ex parte, but the petitioner was not intimated of the date, time and place of inquiry, nor oral evidence was led. It was held in **Smt. Karuna Jaiswal** thus:

"14. It is also equally relevant and significant to notice in this case that though the petitioner failed to submit her reply to the charge-sheet, however, the Enquiry Officer did not fix any date, time and place for oral enquiry. It is settled principle that even in a situation where the delinquent officer/employee does not submit reply to the charge-sheet, the Enquiry Officer still needs to prove the charges on the basis of material and evidence available on record and for the said purpose he needs to fix and intimate to the charged officer, the date, time and place for oral enquiry.

15. The law in this regard is very well settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others vs. Saroj Kumar Sinha, reported in [(2010) 2 SCC 772], wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the unrebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex-parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex-parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

31. There is sterling guidance on this issue to be found in the decision of their Lordships of the Supreme Court in **Roop Singh Negi vs. Punjab National Bank and others, (2009) 2 SCC 570**, where it has been held:

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled 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."

32. In the present case, it appears without cavil, that the documents that were considered, were not proved by any evidence, particularly, parole evidence. The documents, which the inquiry committee took into consideration, were, therefore, idle papers, but not documentary evidence. Those papers had to be galvanized through a well-ordered presentation and proof, before the inquiry to be done by the establishment. Nothing of the kind was done.

33. In view of what this Court has found and the way the law bears on the issue, the impugned order dated 14.05.2015 cannot be sustained. At the same time, the impugned order, being one that is held to be bad on account of an utterly flawed procedure adopted to hold disciplinary proceedings, liberty to the respondents to proceed afresh ought not to be denied in the event they desire to proceed afresh.

34. In case, the respondents do elect to proceed afresh, they would be at liberty to do so from the stage where the charge-sheet dated 22.12.2014 was served upon the petitioner and he submitted the reply dated 02.01.2015. All subsequent proceedings would stand effaced, including the impugned order of termination of services. It is also required to be stipulated that ever if the respondents choose to proceed afresh, the petitioner shall be forthwith reinstated in service and paid all arrears of salary due upto date (excluding whatever the petitioner has already received). Also, considering the manner in which the proceedings have taken course in this case, this Court thinks that if the petitioner were to be proceeded with against afresh at all, he ought not be placed under suspension pending inquiry any more.

35. In the result, this petition succeeds and is allowed with costs. The impugned order dated 14.05.2015 passed by the Executive Officer, Nagar Panchayat, Jewar, District Gautam Budh Nagar, terminating the petitioner's services, is hereby quashed. The respondents - the Executive Officer, Nagar Panchaway, Jewar, District Gautam Budh Nagar and the Chairman, Nagar Panchayat, Jewar, District Gautam Budh Nagar, are ordered to reinstate the petitioner in service forthwith, with all consequential benefits, including continuity of service and arrears of salary. In computing the arrears of salary due to the petitioners, the emoluments that the petitioner has already received, shall be adjusted. It will be open to the respondent, Nagar Panchayat and their various officers, if they so desire, to proceed afresh with the departmental proceedings against the petitioner. If the respondents proceed afresh, they would do so from the stage of the charge-sheet dated 22.12.2014 and its reply dated 02.01.2015 submitted by the petitioner; all subsequent proceedings shall stand effaced. In the peculiar facts and circumstances, in the event the respondents choose to proceed afresh, they will do so after reinstating the petitioner and paying all his due emoluments, but **shall not place him under suspension pending inquiry.**

36. Let this order be communicated to the Chairman and the Executive Officer, Nagar Panchayat, Jewar, District Gautam Budh Nagar, through the learned Chief Judicial Magistrate, Gautam Budh Nagar by the Joint Registrar (Compliance).

(2021)01ILR A902

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ B No. 39148 of 2017

Sibtulain Khan ...Petitioner
Versus
State of UP & Ors. ...Respondents

Counsel for the Petitioner:
Sri S. Rashid

Counsel for the Respondents:
C.S.C., Sri Ramesh Chandra Upadhyay

A. Civil Law – Consolidation of Holdings Act, 1953 - Sections 9, 11(1), 48 - U.P. Consolidation of Holdings Rules, 1954 - Rule 109 - U. P. Zamindari Abolition and Land Reforms Act - Section 229B - Application for *Amal Daramad* -Bereft of reasons, the decision is inherently arbitrary - It is well known that "conclusions" and "reasons" are two different things and reasons must show mental exercise of authorities in arriving at a particular conclusion.

It is trite to say for a legal principle that an order passed by any judicial or quasi-judicial Authority, or for that matter even Administrative Authorities, where rights of parties are decided ought to disclose reasons for the decisions reached. As is often said, reasons are the soul and heart of a decision and convey to the persons affected, as also a superior Authority or a Superior Court, the considerations that have weighed with the decision maker in arriving at his conclusions. On howsoever good and valid consideration a decision may have been rendered, the absence of reasons would make it foul of Article 14 of the Constitution. (Para 14 to 16)

Court observed that the matter has been pending consideration before the authorities

from last about 50 years, therefore concluded that, no useful purpose will be served in remitting the matter back before the authorities and allowed the application submitted by the petitioner u/Rule 109, directing the authorities to make the necessary *Amal Daramad* in the revenue record within a period of two months from the date of presentation of the copy of the order.

Writ Petition allowed. (E-3)

Precedent followed:

1. Sheo Pal Vs Basu Deo & ors., 2017 (135) RD 335 (Para 15)

2.U.O.I. Vs Mohan Lal Capoor, (1973) 2 SCC 836 (Para 16)

Present petition assails the order dated 30.11.2016, passed by Deputy Director of Consolidation, Azamgarh.

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

1. Heard Sri S. Rashid, learned counsel for the petitioner and learned Standing Counsel appearing for the respondent Nos.1 to 4.

2. The petitioner has preferred the present writ petition inter-alia with the prayer to quash the order dated 30.11.2016 passed by Deputy Director of Consolidation, Azamgarh in Revision No.100 under Section 48 of the Consolidation of Holdings Act, 1953 (hereinafter referred to as "the Act, 1953") with further prayer to allow the application filed by the petitioner under Rule 109 of the U.P. Consolidation of Holdings Rules, 1954 (hereinafter referred to as "the Rules, 1954).

3. Facts in brief as contained in the writ petition are that plot No.228 area 2-0000 acres, 235/2 area 1-205 Kadi and 237 area 1.640 Kadi in the name of the petitioner as well as his brother namely Sri Sikandar, The aforesaid lands were recorded in the revenue records as Sirdar. After the death of the brother of the petitioner, the name of his legal heirs were duly substituted in the revenue records.

4. An objection under Section 9 of the Act, 1953 was moved by one Riyaz and others. The aforesaid objection was decided by the Consolidation Officer vide his order dated 16.12.1971 directing that the name of the petitioner and his brother be struck off from the revenue records and the name of Gaon Sabha be recorded over plots in question. The petitioner as well as aforesaid Riyaz and Sohrab have preferred appeals under Section 11(1) of the Act, 1953 before the Consolidation Officer being Appeal Nos.842, 843 and 934 (Sibtulain Khan Vs. Goan Sabha, Village Bairedih). The Settlement Officer Consolidation vide its order dated 31.07.1972 allowed the appeal filed by the petitioner and dismissed the other two appeals filed by Riyaz and Sohrab and directions were given by him that the name of the petitioner and his brother Sikandar be restored as it was recorded earlier. Against the aforesaid orders, revisions were preferred by Sri Riyaz and Sohrab and Gaon Sabha before the Deputy Director of Consolidation. The Deputy Director of Consolidation vide order dated 25.08.1972 remained back the matter before the Consolidation Officer.

5. Against the aforesaid order dated 25.08.1972 passed by the Deputy Director of Consolidation, the petitioner preferred a writ petition being Writ Petition No.7637 of 1973 (Sibtul Ain Khan and others Vs. Assistant Director of Consolidation

Azamgarh and others). The aforesaid writ petition was finally allowed by a co-ordinate Bench of this Court vide its judgment and order dated 12.09.1979. The order passed in the aforesaid writ petition is reproduced below:-

"This writ petition is directed against the judgment of the Assistant Director of Consideration, Azamgarh dated 25.3.73 whereby the Revision petitions filed against the petitioners were allowed.

It is noteworthy that the petitioners claim in the disputed land was recognized by the appellate authority on the basis of an ex-parte decree in favour of the petitioners. The revisional court has dealt with the claims of the parties in the following words:-

"PAKSHON KI BAHAS SUNI GAI TATHA SAKSHYA KA SATARKATA PURVAK AVLOKAN KIYA GAYA. PATRAWALI PAR UPLABDH SAKSHYA SE YAH PRATIT HOTA HAI KI 1368F. KE KHASRE TATHA 1376F. KE KHASRE KEE VIVARAN BHOOMI YA TO AKSHATAR YA PURTAH BANZAR DARJ RAHI HAI, KUCHH VARSHON MEN PHASAL DIKHAY GAI HAI. KUCH BATAJAT MEN SADAK BHI DIKHY GAI HAI, PAKSHO KE BICH TATHA GAON SABHA KE BICH KUKAD ..... HAI PARANTU AISA PRATIT HOTA HAI KI KISI ASTAR PAR MAUKA MAUANA NAHIN KIYA GAYA JISASE YAH ISPASHT HO PATA KI VIVADHAST BHOOMI MEN KHETI KI JATI HAI TO KITNA KHESTRAPHAL MEN IN NIRNIYON KE NIRNAY LIYE UKTA PRACHHA KE IRNAYA KA HONA ATYANT AWASHYAK HAI. CHUNKI IS PRASHNA KA NIRNAYA APNISTHA NYAYALAYON PARA NAHI DIYA GAYA HAI ATAH UKTA NIRNAYA VIDHASTAR SAHI NAHI PRATIT HOTA 1968 R.D. PRISTH SAN 337, 1969 A.L.J. 88 882 TATHA 1969 D, 30KI SANKAREH BHI DIYA SAY PARANTU JAB TAK YAH KA SUKISHCHIT KAR LIYA JAI KI VADGRAST BHOMI MEN KHETI KI JATI HAI ATHWA NAHIN TAB TAK MUKADMEN KA ATRANIYA UNCHIT KAHIN PRATIT HOTA ATAH ADHNASTH NYAYALAY ONKA NIRNAYA NIRAST KIYA JATA HAI, NIGPARNIYAN SWIKAR KI JATI HAI...."

From the above question, it appears that the revisional court is under impression that unless the nature of the disputed land is ascertained it cannot be effectively decided as to whether the present petitioners are Sirdars of the land in question or not. I think the approach of the revisional court is patently erroneous. So long as the exparte decree in favour of the petitioners in respect of the dispute land stands the consolidation authorities have no jurisdiction to go beyond the exparte decree. Before the point is disputed whether the exparte decree has been not aside or not. However, it is not necessary for me to express any final opinion on that question as, I think that the impugned judgement of the Assistant Director of Consolation should be quashed and he should be asked to reconsider the claim of the contesting parties in accordance with law. It would be open to the parties to satisfy the revisional court as to whether the exparte decree relied upon by the present petitioners and accepted by the appellate authority holds good or not.

For the reasons given above, the writ petition succeeds and the impugned judgement of the Assistant Director of Consolation dated 25.08.1973 is hereby quashed and the Assistant Director of Consolation is directed to rehear the revision petitioners against the petitioners. Parties are directed to hear their own costs."

6. Pursuant to the order passed by this Court in the aforesaid writ petition, the matter was placed before the Deputy Director Consolidation which was dismissed by him vide order dated 10.09.1987 and thereafter, the restoration application filed by Riyaz and Sohrab which was also dismissed.

7. It is argued by learned counsel for the petitioner that the order dated 31.07.1972 passed by the Settlement Officer of Consolation has attained finality, thereafter, the petitioner submitted an application for *Amal Daramad* before the Assistant Consolation Officer. The Consolation Officer, on 08.03.1998 has made a reference and forwarded it along with report of A.C.O. dated 27.05.1997 before the Assistant Consolation Officer, Azamgarh for its approval. The Consolation Officer on 29.06.2001 also submitted its report under Section 109 of the Act, 1953 along with all relevant documents before the Deputy Director of Consolation, Azamgarh for *Amal Daramad*. It is argued that when long time, his application under Section 109 of the Act, has not been decided, the petitioner approached this Court by way of writ petition being Writ C No.7186 of 2013 and this Court disposed of the writ petition with a direction to decide the matter within three months. It is argued that thereafter, the Deputy Director of Consolation, Azamgarh decided the application in a cryptic manner and rejected the same by passing arbitrary, unjust and non-speaking order dated 30.11.2016.

8. In the impugned order, it is stated that the District Government Counsel has submitted report that the land is recorded as Bhita which is public utility land and thus, it could not be included in Chak.

9. A counter affidavit has been filed by the learned Standing Counsel. It is stated in the counter affidavit that the order passed by the Deputy Director of Consolidation which is impugned in the present writ petition is absolutely prefect and valid order and does not call for any interference by this Court.

10. In response to the same, it is argued by counsel for the petitioner that the order impugned is absolutely illegal and liable to be set aside. It is further argued that no revision whatsoever has been filed by anybody or authority challenging the order passed by the Settlement Officer of Consolidation as directed by the Deputy Director of Consolidation, Azamgarh in its order dated 30.11.2016. Moreover, the decree passed in Case No.480 dated 23.8.1965 in suit uner Section 229B is still unchallenged and hold good. Thus, rejection of application of the petitioner under Rule 109 is wholly illegal.

11. The order passed by the Settlement Officer of Consolidation which was passed in the year 1972 has become final, and as such, the application submitted by the petitioner under Rule 109 is liable to be allowed.

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

13. From perusal of the record, it is clear that the controversy starts in the year 1971 when the objection was filed by Riyaz and others which was decided on 16.12.1971 by which the name of the petitioner and his brother was struck off. Against the aforesaid order, petitioner and others filed appeals before the Settlement Officer, Consideration and the same were allowed by order dated 31.07.1972 by

which the name of the petitioner and his brother was restored and the appeal filed by Riyaz and Sohrab were dismissed. Against the aforesaid order, three revisions were filed by Riyaz, Soharab and Ghoan Sabha before the D.D.C. and D.D.C by order dated 25.08.1972 remanded back the matter before the Consideration Officer. Against the aforesaid order, petitioner filed Writ Petition No.7037 of 1973 before this Court and this Court vide order dated 12.09.1979 allowed the writ petition directing the D.D.C. to decide the matter himself. Thereafter, the D.D.C. vide order dated 10.09.1987 dismissed the revisions filed by Riyaz, Soharab and Ghoan Sabha. This order has never been challenged before any forum and the order dated 31.07.1972 passed by the Settlement Officer of Consolation attained finality. Thereafter, the petitioner filed an application under Section 9 of the Act, 1953 in the year 1998 and the same was dismissed on 30.11.2016.

14. The D.D.C. has not recorded any finding and has dismissed the application on the basis of the report of D.G.C. thus, the order is non-speaking order and is as it did not contain any reason or findings. It is trite to say for a legal principle that an order passed by any judicial or quasi-judicial Authority, or for that matter even Administrative Authorities, where rights of parties are decided ought to disclose reasons for the decisions reached. As is often said, reasons are the soul and heart of a decision and convey to the persons affected, as also a superior Authority or a Superior Court, the considerations that have weighed with the decision maker in arriving at his conclusions. Bereft of reasons, the decision is inherently arbitrary. On howsoever good and valid consideration a decision may have been rendered, the absence of reasons would make it foul of Article 14 of the Constitution.

15. Law in this connection is well settled in the case of ***Sheo Pal vs. Basu Deo & others, 2017 (135) RD 335.*** In this case following observations were made by this Court:-

"1. .....The only argument advances is that without giving any reason by a totally non-speaking order revision has been allowed by DDC.

3. A bare perusal thereof would leave no manner of doubt that it is totally a non-speaking and unreasoned order. The issues raised by petitioner has not been discussed at all and straightway conclusion have been recorded by DDC.

16. It is well known that "conclusions" and "reasons" are two different things and reasons must show mental exercise of authorities in arriving at a particular conclusion. In ***Union of India v. Mohan Lal Capoor MANU/SC/0405/1973 : (1973) 2 SCC 836,*** as under:-

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached."

17. Apart from the fact that the order impugned is non-speaking order, it appears from the perusal of the record that the matter is pending consideration before the authorities since 1972. Time and again orders after orders were passed, but till date

no final decision has been taken in the matter by the authorities. It further appears from the perusal of the record that in pursuance of the order of the High Court dated 12.9.1979, the Deputy Director of Consolidation has dismissed the revision filed by Riyaz and Sohrab on 10.9.1987. The application for setting aside the order was also dismissed by the Deputy Director of Consolidation. Thus, the order passed on 31.7.1972 is final.

18. Since the matter is pending consideration before the authorities from last about 50 years, in the special facts and circumstances of the case, no useful purpose will be served in remitting the matter back before the authorities.

19. In view of the same, the application submitted by the petitioner under Rule 109 is liable to be allowed and the authorities are directed to make the necessary *Amal Daramad* in the revenue record within a period of two months from the date of presentation of the copy of the order.

20. With the aforesaid observations, the writ petition is allowed.

(2021)01ILR A907
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2021

BEFORE

THE HON'BLE ABDUL MOIN, J.

Consolidation No. 1436 of 2021

Kalim Ullah ...Petitioner
Versus
D.D.C. Sultanpur & Ors. ...Respondents

Counsel for the Petitioner:
Brijesh Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law – U.P. Consolidation of Holdings Act, 1953 - Power to recall an ex-parte order - A Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. Although there is no express provision in the Act or Rules framed there under giving the Industrial Tribunal jurisdiction to set-aside its ex parte award, Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. (Para 9)

Writ Petition dismissed. (E-3)

Precedent distinguished:

Smt. Anar Kali & ors. Vs Deputy Director of Consolidation & ors., 1997 (15) LCD 921 (Para 3)

Precedent followed:

Grindlays Bank Ltd. Vs Central Government Industrial Tribunal, 1980 (Supp.) SCC 420 (Para 9)

Present petition assails the order dated 12.01.2021, passed by Deputy Director of Consolidation, Sultanpur.

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for respondent no.1.

2. Under challenge is the order dated 12.01.2021 passed by learned Deputy Director of Consolidation, Sultanpur, a copy of which is Annexure-1 to the writ petition, by which, upon an application moved by the private respondents, the ex-parte order dated 06.11.2015 has been

recalled and notices have been issued to the parties concerned fixing a particular date.

3. Learned counsel for the petitioner contends that taking into consideration the law laid down by the Full Bench of this Court in the case of **Smt. Anar Kali and others vs. Deputy Director of Consolidation and others** - 1997 (15) LCD 921, the power to recall an ex-parte order is not vested with the Deputy Director of Consolidation and consequently the Deputy Director of Consolidation has patently erred in passing the impugned order. Another ground taken by learned counsel for the petitioner is that a detailed objection had been filed against the application that had been filed by the private respondents praying for recall of the order dated 06.11.2015 which has not been adverted to while passing the impugned order and consequently the impugned order merits to be set-aside. No other ground has been urged.

4. On the other hand, learned Standing Counsel submits that the Deputy Director of Consolidation is vested with inherent powers to recall an ex-parte order and it is not a case of review so as to attract the law as laid down by the Full Bench in the case of **Smt. Anar Kali (supra).**

5. Having heard learned counsel for the parties and having perused the records, what is apparent is that by the impugned order dated 12.01.2021 ex-parte order dated 06.11.2015 has been recalled by the Deputy Director of Consolidation. So far as the Full Bench judgment in the case of **Smt. Anar Kali (supra)** is concerned, the question before the Full Bench, as finds place in paragraph 2 of the said judgment, was as under :-

"Whether it is open for the Consolidation authorities to reveiw/recall their final orders exercising inherent powers even though the U.P. Consolidation of Holdings Act, 1953 does not vest them any ***review jurisdiction.****"*

6. The said question has been answered in paragraph 39 of the said judgment that it is not open for the consolidation authorities to review/recall their final orders passed in the proceedings under the U.P. Consolidation of Holdings Act in exercise of inherent powers. Thus, the question before the Full Bench was as to whether a review would lie before the authority concerned after passing of the final order, which has been answered in paragraph 39 of the judgment that no such review/recall would lie. In the instant case, it is not case of the petitioner that a review had been filed by the private respondents against the order dated 06.11.2015 rather it is admitted that an application for recall was filed which has been allowed by means of order dated 12.01.2021. Thus, the question of law as stood answered in the case of **Smt. Anar Kali (supra)** which was for a review not lying before the authority concerned is not attracted in the facts of the instant case and thus the judgment of **Smt. Anar Kali (supra)** would not come to the rescue of the petitioner.

7. Upon this, learned counsel for the petitioner contends that in paragraphs 28 and 29 of the judgment of **Smt. Anar Kali (supra)**, the Full Bench has also considered two earlier Full Bench judgments of this Court and thereafter has held in paragraph 39 that even an application for recall would not be maintainable.

8. The said argument is patently fallacious inasmuch as once the question had been framed by the Full Bench of this Court which was only for the purpose "as to whether a review would lie before the authority concerned" consequently the observations made in paragraph 39 of the judgment have to be read with the question which was framed by the Full Bench and not otherwise. Thus, even the said argument of learned counsel for the petitioner is rejected.

9. A similar controversy came up before the Apex Court in the case of **Grindlays Bank Limited vs. Central Government Industrial Tribunal** reported in **1980 (Supp.) SCC 420**, wherein the Apex Court was seized of the question as to whether Industrial Tribunal could set-aside its ex-parte award if it was satisfied that the aggrieved party was prevented from appearing by sufficient cause. The Apex Court held that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. It was further held that although there is no express provision in the Act or Rules framed there under giving the Industrial Tribunal jurisdiction to set-aside its ex-parte award, Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary.

10. It is not the case of the petitioner that the Consolidation of Holdings Act precludes setting-aside an ex-parte order. Thus, taking into consideration the law laid down in the case of **Grindlays Bank Ltd. (supra)** the Court finds that no error has been committed by the authority concerned in passing the order dated 12.01.2021.

11. So far as the argument that the order dated 12.01.2021 does not contain any reasons and thus has to be set-aside, suffice is to state that only the order has been set-aside and it would always be open for the petitioner to file his objections in the said case when called upon by the court concerned.

12. Taking into consideration the aforesaid, no case for interference is made out. Accordingly, the writ petition is dismissed.

(2021)01ILR A909
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application u/s 482 No. 14204 of 2020

Bajrangi Lal Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Shitlesh Pandey, Sri Manjeet Kumar, Sri Pramod Kumar Maurya

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

A. Criminal Law – Code of Criminal Procedure - Sections 156(3), 200, 202, 203, 482 – Nature of dispute - Criminal Courts should ensure that the proceedings before it are not used for settling scores or to pressurize parties to settle the civil dispute. (Para 13)

The dispute of Civil Nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences even if they also amount to civil dispute. But in the present case ingredients to constitute offences

mentioned in the complaint could not be shown to exist on the material on record. (Para 15, 16)

Court also observed that the person with the primary grievance did not file any complaint nor appeared as witness. Therefore, did not find any illegality in the order of Magistrate in dismissing the complaint filed by the present applicant. Any case, for interference in the exercise of jurisdiction u/s 482 Cr.P.C. on the grounds of "preventing abuse of the process of Court" or "to secure the ends of justice" is not made out. (Para 19, 21)

Application Rejected. (E-3)

Precedent followed:

1. Mohd. Ibrahim Vs St.of Bihar, (2009) 8 SCC 751 (Para 13)

2. Medmeme, LLC & ors. Vs Ihorse BPO Solutions Pvt. Ltd. (2018) 13 SCC 374 (Para 14)

3. R.P. Kapur Vs St. of Punj., AIR 1960 SC 866 (Para 17)

4.St. of Har. Vs Bhajanlal, AIR 1992 SC 604 (Para 17)

5. Rakhi Mishra Vs St. of Bihar, (2017) 16 SCC 772 (Para 17)

Present application challenges orders dated 09.01.2020 and 04.08.2020, passed by Chief Judicial Magistrate, Mau and Session Judge, Mau respectively.

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

1. Heard Shri Pramod Kumar Maurya, Advocate holding brief of Shri Shitlesh Pandey, learned counsel for the applicant, Shri Pankaj Saxena, learned A.G.A. for the State.

2. The applicant has challenged the order dated 09.01.2020, passed by the learned Chief Judicial Magistrate, Mau in Criminal Case No. 5864 of 2018 (Bajrangi Lal Gupta verus State of U.P. and another) by which his complaint was rejected. He has also challenged the order dated 04.08.2020 passed by learned Session Judge, Mau in Criminal Revision No. 13 of 2020 (Computerized No. CNR No. UPMA01-000657-2020 by which his revision was also dismissed.

3. The applicant stating himself to be sister's son of Maina Devi (Mausi) filed the complaint case that opposite party no. 2 (Bhanja) of Maina Devi fraudulently got executed a registered sale deed dated 06.04.2017 with respect to Gata No. 513 M area 14 kadi situated in Village Korauli, Tehsil Ghosi District, Mau from Maina Devi without making payment of any sale consideration, whereas the applicant had been looking after his Mausi.

4. The applicant's application under Section 156(3) Cr.P.C. was rejected by Magistrate, against which, he filed Criminal Revision No. 198 of 2018 and after decision, therein the complaint was filed for taking action for the offences under Sections 419, 420, 467, 468, 471, 472, 504 and 506 I.P.C.

5. The statement of the applicant was recorded under Section 200 Cr.P.C. and the statement of P.W.-1 Shankar Prasad and P.W.-2 Lalji were recorded under Section 202 Cr.P.C.

6. The learned Magistrate by order dated 04.01.2020 rejected the complaint and the applicant's revision was also rejected on 04.08.2020 as aforesaid.

7. The Magistrate rejected the compliant on the grounds that the dispute was predominantly of civil nature. The remedy by way of civil suit was available. The applicant had not stated if his Mausi

was alive or not and that no prima facie case for summoning was made out.

8. Learned counsel for the applicant submitted that prima facie, coginzable offence for summoning was made out against the opposite party no. 2 and the Magistrate rejected the complaint under Section 203 Cr.P.C. in cursory manner. The revisional court also did not consider this aspect of the matter and illegally dismissed the revision.

9. Learned A.G.A. submits that the orders under challenge do not suffer from any illegality as the dispute was of civil nature.

10. I have considered the submissions advanced by learned counsel for the applicant and learned A.G.A. for the State and perused the material on record.

11. A perusal of the complaint shows that the dispute is predominantly a civil dispute regarding execution of sale deed by the applicant's Mausi in favour of opposite party no. 2.

12. As per the own case of the applicant Maina Devi was recorded tenure holder. If the sale consideration passed to the transferor or not, can be considered in the suit said to be pending, in the statement of the applicant/complainant recorded under Section 200 Cr.P.C., before the court of Civil Judge (Junior Division).

13. In ***Mohd Ibrahim versus State of Bihar (2009) 8 SCC 751***, it has been held by the Hon'ble Apex Court 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, obviously either to apply pressure on the accused or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that the proceedings before it are not used for settling scores or to pressurize parties to settle the civil dispute.

14. ***In Medmeme, LLC and others versus Ihorse BPO Solutions Pvt. Ltd. (2018) 13 SCC 374*** where the dispute between the parties was of civil nature and proceedings in respect of the same were pending before the arbitrator the proceedings of the criminal complaint were quashed. Paragraph nos. 12 to 15 of ***Medmeme, LLC (supra)*** are being reproduced as under:-

"12. After going through the allegations contained in the complaint and the material on record, we are of firm conclusion that the matter entirely pertains to civil jurisdiction and not even a prima facie case is made out for offences Under Sections 420, 406, 409 read with Section 120B of Indian Penal Code even if the allegations contained in the complaint are to be taken on their face value. The complaint gives a clear impression that it was primarily a case where the Respondent had alleged breach of contract on the part of the Appellants in not making the entire payments for the services rendered to the Appellants. On the other hand, it is not in dispute that substantial amounts have been paid by the Appellants to the Respondent-company for the services rendered.

13. Reason for non-payment of the balance amount as given by the Appellants is that the services rendered by the Respondent-company were not in terms of the agreement entered into between the parties and were deficient in nature. For this reason, even the Appellants have filed claims against the Respondent-company alleging that Appellant suffered losses

because of the defective services provided by the Respondent.

14. On the basis of it, we find that it cannot be said that at the time of entering into the agreement, either the first agreement or even the second agreement, there was any intention on the part of the Appellants to cheat the Respondent. No suspicion of any nature was shown or even alleged. It is also not the allegation of the Respondent in the complaint that the agreement was entered into with fraudulent or dishonest intention on the part of the Appellants in inducing the Respondent to enter into such a contract. At best, the dispute between the parties is of a civil nature, proceedings in respect of which are pending before the learned Arbitrator.

15. We, thus, allow this appeal, set aside the judgment of the High Court and thereby allow the petition filed by the Appellants in the High Court Under Section 482 of Code of Criminal Procedure. The result whereof would be quashing of the proceedings arising out of Complaint No. 142 of 2012 pending in the Court of Judicial Magistrate-II, Puducherry."

15. In the case of ***Mohd. Ibrahim (supra)*** it has also been held that the Dispute of Civil Nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences even if they also amount to civil dispute.

16. It could not be established before this Court as to how on the basis of the averments of the complaint and the material on record prima facie case for summoning of the opposite party no. 2 under Sections 419, 420, 467, 468, 471, 472, 504, 506 I.P.C. was made out. The ingredients to constitute such offences could not be shown to exist on the material on record.

17. It has also been well settled in law in the cases of:-

a. **R.P. Kapur versus State of Punjab AIR 1960 SC 866,**

b. **State of Haryana versus Bhajanlal AIR 1992 SC 604 and**

c. **Rakhi Mishra versus State of Bihar (2017) 16 SCC 772,** that at the stage of summoning, the Magistrate has to satisfy judiciously, if prima facie case is made out or not on the material available on record for summoning the accused persons.

18. The learned Magistrate has recorded that the applicant failed to state if his Mausi (Maina Devi) was alive or not. The complaint was filed by the applicant but not by Maina Devi and even she did not appear as a witness under Section 202 Cr.P.C.

19. The primary grievance, if any, would be to Maina Devi, but if she did not file any complaint nor appeared as witness, this Court does not find any illegality in the order of Magistrate in dismissing the complaint filed by the present applicant.

20. The revisional court has also on judicious considerations rightly rejected the revision.

21. The order passed by the Magistrate is in conformity with law. Any case, for interference in the exercise of jurisdiction under Section 482 Cr.P.C. on the grounds of "preventing abuse of the process of Court" or to secure the ends of justice" is not made out.

22. The application under Section 482 Cr.P.C. deserves to be rejected. It is accordingly rejected.

23. No orders as to cost.

(2021)01ILR A913
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2021

BEFORE

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

Matter Under Article 227 No. 4804 of 2020

Pradeep Tomar & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Sudhir Mehrotra, Sri D.K. Agrahari

Counsel for the Respondents:
C.S.C., Sri Rama Shankar Mishra

A. Civil Law – Constitution of India: Article 227; Indian Penal Code: Section 363; U.P. Marriage Registration Rules, 2017; Protection of Children from Sexual Offences Act, 2012: Section 5/6 - Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable a few decades ago may not necessarily be acceptable today. (Para 9)

B. Juvenile Justice (Care and Protection of Children) Act, 2015: Section 94, 94(2) - Reference to a medico-legal examination for the determination of age - The provisions of Section 94(2) makes it vivid that in the face of a date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board, the other evidence about the age of a victim cannot be looked into. If the date of birth certificate as envisaged in clause (i) of sub-Section (2) of S.94 of the Act is not available, the birth certificate given by a corporation or a municipal authority or a panchayat is the next evidence to be considered in the rung. **It is only when the evidence about age envisaged under clauses (i) and (ii) of Sub-Section (2) of S. 94 of the Act is not available, that a victim can be referred to a medico-legal examination for the determination of her age.**

In the present case, Court held that even if it is the prosecutrix's stand, that she is 18 years old, and has married Pintoo of her free will, she cannot be regarded as a major or permitted to prove herself a major, by asking herself to be referred to medical examination by a Board of Doctors, so long as her High School Certificate is clear on the point. (Para 12)

C. Prohibition of Child Marriage Act, 2006: Section 3, 12 – It was found that prosecutrix was not enticed away from her guardian's lawful custody. She left her home on her own and married accused. Therefore, marriage was not held to be void but voidable. (Para 13 to 15)

Writ Petition allowed. (E-3)

Precedent mentioned:

Suhani Vs St. of U.P., (2018) SCC Online SC 781 (Para 12)

Precedent followed:

1. Independent Thought Vs U.O.I. & anr., (2017) 10 SCC 800 (Para 9)

2. Jarnail Singh Vs St. of Hary., (2013) 7 SCC 263 (Para 11)

3. Smt. Priyanka Devi through her husband Vs St. of U.P. & ors., 2018 (1) ACR 1061 (Para 11)

4. Smt. Nisha Naaz alias Anuradha & anr. Vs St. of U.P. & ors., 2019 (2) ACR 2075 (Para 12)

Precedent overruled:

1. Smt. Rajkumari Vs Superintendent, Nari Niketan, 1998 Cr.L.J. 654 (All.) (Para 8)

2. Smt. Ramsati @ Syamasti Vs St. of U.P., Habeas Corpus Writ Petition No. 245 of 2015, decided on 07.09.2015 (Para 8)

Present petition assails the order dated 24.11.2020, passed by Judicial Magistrate- I, Hapur.

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

1. This petition under Article 227 of the Constitution has been filed seeking to set aside an order of the learned Judicial Magistrate-I, Hapur, dated 24.11.2020, passed in Case Crime No. 516 of 2020, under Section 363 IPC, P.S. Pilakhuwa, District Hapur, directing that the prosecutrix Km. Shivani be permitted to go along with her husband, the accused Pintoo son of Omvir.

2. A counter affidavit has been filed on behalf of the second opposite party by Mr. Rama Shankar Mishra, Advocate, which is taken on record. The petitioner has filed a rejoinder.

3. Admit.

4. Heard forthwith.

5. Heard Mr. Sudhir Mehrotra, learned counsel for the petitioners, Mr. Rama Shankar Mishra, learned counsel for opposite party no.2 and Mr. S.S. Tiwari, learned AGA appearing on behalf of the State.

6. The submission of Mr. Sudhir Mehrotra, learned counsel for the petitioners, briefly said, is to the effect that the date of birth of the prosecutrix, according to her High School Examination Certificate issued by the U.P. Board of High School and Intermediate Education, is 04.11.2004. She is, thus, a minor, aged 16 years and 2 months approximately. She would attain majority on 05.11.2022. Mr. Mehrotra submits that the Magistrate has erred in permitting the prosecutrix to accompany her husband, an accused in the crime, going by the marriage acknowledged by the parties to be solemnized on 21.09.2020 at the Pandav Kalin Neeli Chhatri Mandir Sanatan Dharam Vivah Padti Trust, Yamuna Bazar, Delhi. Mr. Mehrotra submits that the prosecutrix, being a minor, cannot be permitted to stay in a matrimonial relationship, where the marriage would be void under Section 12 of the Prohibition of Child Marriage Act, 2006 (for short, "the Act of 2006'). He submits that in any case the prosecutrix, who is not a major, cannot be permitted to stay with her husband and ought not to be allowed to accompany him. Doing so, would be permitting statutory rape and also an offence under Section 5/6 of the Protection of Children from Sexual Offences Act, 2012.

7. Mr. Rama Shankar Mishra, on the other hand, submits that the prosecutrix in her stand before the Magistrate has made it clear that she has married the accused Pintoo of her free will and wishes to stay with him. He emphasizes that the parties' marriage has been registered under the U.P. Marriage Registration Rules, 2017 by the Marriage Registration Officer, Ghaziabad on 21.09.2020. He has drawn the attention of this Court towards a certificate of the registration of marriage, dated 21.09.2020.

8. This Court has perused the impugned order and considered the entire facts and circumstances. The prosecutrix is a little over 16 years of age. The Magistrate has been swayed to permit the prosecutrix to go along with the accused, her husband on ground that the father of the prosecutrix made an application that he would not take her back home and that he had lodged an FIR, out of social embarrassment. The Magistrate has relied upon the decisions of this Court in **Smt. Rajkumari vs. Superintendent, Nari Niketan, 1998 Cr.L.J 654 (All) and Smt.**

Ramsati @ Syamsati vs. State of U.P., Habeas Corpus Writ Petition No. 245 of 2015, decided on 07.09.2005 to hold that upon marriage of a minor according to her wishes, she could be left free to live her life.

9. The law has changed much course since the decisions above referred were rendered. In **Independent Thought vs. Union of India and another**, **(2017) 10 SCC 800**, it has been held:

"**Rape or penetrative sexual assault**

67. Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 IPC) or aggravated penetrative sexual assault [an offence under Section 5(n) of thePocso Act and punishable under Section 6 of the Pocso Act] the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognise it as rape for the purposes of IPC. That it is a heinous crime which also violates the bodily integrity of a girl child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation.

72. If such is the traumatic impact that rape could and does have on an adult victim, we can only guess what impact it could have on a girl child--and yet it is not a criminal offence in the terms of Exception 2 to Section 375 IPC but is an offence under the PocsoAct only. An anomalous state of affairs exists on a combined reading of IPC and the Pocso Act. An unmarried girl below 18 years of age could be a victim of rape under IPC and a victim of penetrative sexual assault under the Pocso Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the Pocso Act, but she cannot be a victim of rape under IPC if the rapist is her husband since IPC does not recognise such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of IPC notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the Pocso Act. We see no rationale for such an artificial distinction.

73. While we are not concerned with the general question of marital rape of an adult woman but only with marital rape of a girl child between 15 and 18 years of age in the context of Exception 2 to Section 375 IPC, it is worth noting the view expressed by theCommittee on Amendments to Criminal Law chaired by Justice J.S. Verma (Retired). In Paras 72, 73 and 74 of the Report it was stated that the outdated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision [C.R. v. United Kingdom, ECHR, Ser. A. No. 335-C (1995): (1995) 21 EHRR 363] of the European Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim". The relevant paragraphs of the Report read as follows:

"72. The exemption for marital rape stems from a long outdated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far

back as 1736, Sir Matthew Hale declared: "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.' [Sir Matthew Hale -- History of the Pleas of the Crown, 1 Hale PC (1736) 629. See further S. Fredman, Women and the Law (OUP, 1997) pp. 55-57.]

73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, "marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband'. [R. v. R., (1992) 1 AC 599, p. 616: (1991) 3 WLR 767: (1991) 4 All ER 481 at p. 484 (HL)]

74. Our view is supported by the judgment of the European Commission of Human Rights in C.R. v. United Kingdom [C.R.v. United Kingdom, ECHR, Ser. A. No. 335-C (1995): (1995) 21 EHRR 363] which endorsed the conclusion that [Ed.: Emphasis has been supplied to the matter between two asterisks.] a rapist remains a rapist regardless of his relationship with the victim [Ed.: Emphasis has been supplied to the matter between two asterisks.]. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act, 1994."

(emphasis in original)

74. In Eisenstadt v. Baird [Eisenstadt v. Baird, 1972 SCC OnLine US SC 62: 31 L Ed 2d 349: 92 S Ct 1029: 405 US 438 (1972)] the US Supreme Court observed that a

"marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup". (SCC OnLine US SC para 21)

75. On a combined reading of C.R. v. United Kingdom [C.R. v.United Kingdom, ECHR, Ser. A. No. 335-C (1995): (1995) 21 EHRR 363] and Eisenstadt v. Baird [Eisenstadt v. Baird, 1972 SCC OnLine US SC 62: 31 L Ed 2d 349: 92 S Ct 1029: 405 US 438 (1972)] it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent.

76. There is an apparent conflict or incongruity between the provisions of IPC and the Pocso Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under IPC and therefore not an offence in view of Exception 2 to Section 375 IPC thereof but it is an offence of aggravated penetrative sexual assault under Section 5(n) of the Pocso Act and punishable under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonised and read purposively to present an articulate whole.

79. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes

have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted:

79.1.Firstly, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet--so also with the status of a child, despite any prefix.

79.2.Secondly, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age.

79.3.Thirdly, Exception 2 to Section 375 IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

80. What is sought to be achieved by this artificial distinction is not at all clear except perhaps to acknowledge that child marriages are taking place in the country. Such child marriages certainly cannot be in the best interest of the girl child. That the solemnisation of a child marriage violates the provisions of the PCMA is well known. Therefore, it is for the State to effectively implement and enforce the law rather than dilute it by creating artificial distinctions. Can it not be said, in a sense, that through the artificial distinction, Exception 2 to Section 375 IPC encourages violation of the PCMA? Perhaps "yes" and looked at from another point of view, perhaps "no" for it cannot reasonably be argued that one statute (IPC) condones an offence under another statute (the PCMA). Therefore the basic question remains--what exactly is the artificial distinction intended to achieve?

Justification given by the Union of India

81. The only justification for this artificial distinction has been culled out by the learned counsel for the petitioner from the counter-affidavit filed by the Union of India. This is given in the written submissions filed by the learned counsel for the petitioner and the justification (not verbatim) reads as follows:

(i) Economic and educational development in the country is still uneven and child marriages are still taking place. It has been, therefore, decided to retain the age of 15 years under Exception 2 of Section 375 IPC so as to give protection to husband and wife against criminalising the sexual activity between them.

(ii) As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalising the

consummation of a marriage union with a serious offence such as rape would not be appropriate and practical.

(iii) Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 IPC has been retained considering the basic facts of the still evolving social norms and issues.

(iv) The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However, after wide ranging consultations with various stakeholders it was further decided to retain the age at 15 years.

(v) Exception 2 of Section 375 IPC envisages that if the marriage is solemnised at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under IPC.

(vi) It is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 IPC has been provided considering the social realities of the nation.

82. The above justifications given by the Union of India are really explanations for inserting Exception 2 in Section 375 IPC. Besides, they completely sidetrack the issue and overlook the provisions of the PCMA, the provisions of the JJ Act as well as the provisions of the Pocso Act. Surely, the Union of India cannot be oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age or to the three pro-child statutes and other human rights obligations. That these facts and statutes have been overlooked confirms that the distinction is artificial and makes Exception 2 to Section 375 IPC all the more arbitrary and discriminatory.

83. During the course of oral submissions, three further but more substantive justifications were given by the learned counsel for the Union of India for making this distinction. The firstjustification is that by virtue of getting married, the girl child has consented to sexual intercourse with her husband either expressly or by necessary implication. The second justification is that traditionally child marriages have been performed in different parts of the country and therefore such traditions must be respected and not destroyed. The third justification is that Para 5.9.1 of the 167th Report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several Members felt that marital rape has the potential of destroying the institution of marriage.

84. In law, it is difficult to accept any one of these justifications. There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being married. It would be reading too much into the mind of the girl child and assuming a state of affairs for which there is neither any specific indication nor any warrant. It must be remembered that those days are long gone when a married woman

or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

85. Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable a few decades ago may not necessarily be acceptable today. This was noted by a Constitution Bench of this Court (though in a different context) in State of M.P. v. Bhopal Sugar Industries Ltd. [State of M.P. v. Bhopal Sugar Industries Ltd., (1964) 6 SCR 846: AIR 1964 SC 1179] that: (AIR p. 1182, para 6)

"6. ... But, by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid."

90. We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self-esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by IPC. Her husband, for the purposes of Section 375 IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of IPC. This was recognised by LCI in its 172nd Report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonise the provisions of various statutes and also harmonise different provisions of IPC inter se.

91. We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born from early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable.

Harmonious and purposive interpretation

101. The entire issue of the interpretation of the JJ Act, thePocso Act, the PCMA and Exception 2 to Section 375 IPC can be looked at from yet another perspective, the perspective of purposive and harmonious construction of statutes relating to the same subject-matter. Long ago, it was said by Lord Denning that when a defect appears, a Judge cannot fold his hands and blame the draftsman but must also consider the social conditions and give force and life to the intention of the legislature. It was said inSeaford Court Estates Ltd. v. Asher [Seaford Court Estates Ltd. v.Asher, (1949) 2 KB 481 (CA) affirmed in Asher v. Seaford Court Estates Ltd., 1950 AC 508 (HL)] that: (KB p. 499)

"... A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

105. Viewed from any perspective, there seems to be no reason to arbitrarily discriminate against a girl child who is married between 15 and 18 years of age. On the contrary, there is every reason to give a harmonious and purposive construction to the pro-child statutes to preserve and protect the human rights of the married girl child.

Implementation of laws

106. The Preamble to our Constitution brings out our commitment to social justice, but unfortunately, this petition clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament. Young girls are married in thousands in the country, and as Section 13 of the PCMA indicates, there is an auspicious day -- Akshaya Trutiya -- when mass child marriages are performed. Such young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences. Civil society can do just so much for preventing such child marriages but eventually it is for the Government of India and the State Governments to take proactive steps to prevent child marriages so that young girls in our country can aspire to a better and healthier life. We hope the State realises and appreciates this.

Conclusion

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."

10. So far as the age of the prosecutrix is concerned, in the face of the High School Certificate, there is no cavil that evidence about her being a major, which is her stand, cannot be accepted. She cannot be referred to medical examination for determination of her age, so long as her date of birth founded on her High School Certificate, is available. This certificate clearly indicates that she is a minor. There, her date of birth is 04.11.2004. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 makes the following provision regarding presumption and determination of age:

"94. **Presumption and determination of age.-** (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(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.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

11. The provisions of Section 94 (2) of the Act, which are designed to determine the age of a juvenile, have been extended to the victim in **Jarnail Singh v. State of Haryana; (2013) 7 SCC 263** and by a Division Bench decision of this Court in **Smt. Priyanka Devi through her**

husband vs. State of U.P. and others 2018 (1) ACR 1061, to which I was a party. It has been held in Smt. Priyanka Devi thus:

"13. Learned counsel for the petitioner lastly urged that provisions of Section 94 of the Juvenile Justice Act, 2015 do not apply to the case in hand as the same are available for the purposes of determination of age for a juvenile or a child in conflict with the law but would not apply to the determination of age in the case of a victim.

14. We are afraid that the aforesaid submission is not correct. The issue was examined by the Supreme Court in the case of Mahadeo S/o Kerba Maske v. State of Maharashtra and Another; (2013) 14 SCC 637 where in paragraph no. 12 of the report it was held as under:

"Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well." (Emphasis supplied)

15. This issue has also been considered in an earlier judgment of the Supreme Court in Jarnail Singh v. State of Haryana; 2013 (7) SCC 263, where too it has been held that rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 must apply both to a child in conflict with law as well as to a victim of a crime. Paragraph 23 of the said report reads thus:

"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."

16. Thus, principles applicable to the determination of age in the case of a juvenile would in terms apply to cases of determination of the age of a victim as well. It may be pointed out that at the point of time when Mahadeo (supra) was decided by their lordships of the Supreme Court, the Juvenile Justice Act, 2000 was in force and their lordships were interpreting the provision of Rule 12(3) of the Juvenile Justice (Care and Protection of Child) Rules, 2007. The said Act of 2000 has since been repealed and has been replaced by the Juvenile Justice Act, 2015. The rules framed under the Act of 2000 are thus no longer on the statute book. However, the provisions that found place in Rule 12(3) of the Juvenile Justice (Care and Protection of Child) Rules, 2007 framed under the Juvenile Justice Act, 2000 are now, with certain modifications engrafted into the the Principal Act vide section 94 of the Juvenile Justice Act, 2015. The inter se priority of criteria to determine age under Rule 12(3) of the Rules, 2007 (supra) and section 94 of the Act, 2015 remains the same albeit with certain modifications which are of no consequences to the facts in hand. In short, provisions of Rule 12(3) of the Rules, 2007 framed under the Juvenile Justice Act, 2000 are para meteria to the provision of Section 94 of the Juvenile Justice Act, 2015. This being the comparative position, the principles of law laid down by their lordships in the case of Mahadeo (supra) would apply with equal force to the provisions of section 94(2) of the Juvenile Justice Act, 2015 while determining the age of a victim of an offence under Sections 363 and 366 IPC. Thus, the submission of the learned counsel for the petitioners, on this score, is not tenable."

12. The provisions of Section 94(2) makes it vivid that in the face of a date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board, the other evidence about the age of a victim cannot be looked into. If the date of birth certificate as envisaged in clause (i) of sub-Section (2) of Section 94 of the Act is not available, the birth certificate given by a corporation or a municipal authority or a panchayat is the next evidence to be considered in the rung. It is only when the evidence about age envisaged under clauses (i) and (ii) of Sub-Section (2) of Section 94 of the Act is not available, that a victim can be referred to a medico-legal examination for the determination of her age. Therefore, even if it is the prosecutrix's stand, which this Court assumes to be so that she is 18 years old, and has married Pintoo of her free will, she cannot be regarded as a major or permitted to prove herself a major, by asking herself to be referred to medical examination by a Board of Doctors, so long as her High School Certificate is clear on the point. After the decision of their Lordships of the Supreme Court in **Suhani vs. State of U.P., 2018 SCC Online SC 781**, there was some confusion whether a victim could be referred to the medical examination of a Board of Doctors for determination of her age, in the face of a recorded date of birth in the High School certificate. But, after the decision of a Division Bench of this Court in **Smt. Nisha Naaz alias Anuradha and another vs. State of U.P. and others 2019 (2) ACR 2075** holding that the decision in Suhani does not lay down any law but is a decision on facts, the principles in Smt. Priyanka Devi, following the decision in Jarnail

Singh, is law that would govern the fate of this case. In **Smt. Nisha Naaz alias Anuradha**, it was held:

"14. A plain reading of Section 94 of the 2015, Act would reveal that only in absence of: (a) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board; and (b) the birth certificate given by a corporation or a municipal authority or a panchayat, age is to be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board. A Division Bench of this court in the case of Smt. Priyanka Devi Vs. State of U.P. and others in Habeas Corpus Petition No.55317 of 2017, decided on 21st November, 2017, after noticing the provisions of the 2015, Act and the earlier 2000, Act and the rules framed thereunder, came to the conclusion that as there is no significant change brought about in the 2015, Act in the principles governing determination of age of a juvenile in conflict with law, in so far as weightage to medico legal evidence is concerned, the law laid down in respect of applicability of those provisions for determination of a child victim would continue to apply notwithstanding the new enactment. The Division Bench in Priyanka Devi's case (supra) specifically held that as there is on record the High School Certificate, the medico legal evidence cannot be looked into as the statute does not permit.

15. The judgment of the apex court in Suhani's case (supra) does not lay down law or guidelines to be used for determination of the age of child victim. Further, it neither overrules nor considers its earlier decisions which mandated that the age of child victim is to be determined by the same principles as are applicable for determination of the age of juvenile in conflict with law. From the judgment of the apex court in Suhani's case (supra), it appears that the concerned victim (petitioner no.1 of that case) was produced before the court and the court considered it apposite that she should be medically examined by the concerned department of All India Institute of Medical Sciences (for short AIIMS). Upon which, AIIMS, by taking radiological tests, submitted report giving both lower as well as higher estimates of age. On the lower side the age was estimated as 19 years and on the higher side it was 24 years. Therefore, even if the margin of error was of 5 years, the victim was an adult. Hence, on the facts of that case, in Suhani's case, the first information report was quashed by the Apex Court. The decision of the Apex Court was therefore in exercise of its power conferred upon it by Article 142 of the Constitution of India which enables it to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. The said decision cannot be taken as a decision that overrules the earlier binding precedents which lay down the manner in which the age of a child victim is to be determined."

13. So long as the prosecutrix is a minor, she cannot be permitted to accompany the accused Pintoo, whom she claims to have married. In order to determine whether the prosecutrix was enticed away from her guardian's lawful custody, or she went away of her own, this Court ascertained the prosecutrix's stand, who is present in Court. Her stand is recorded verbatim:

Q. Aapka Naam?
Ans. Shivani
Q. Aapki Aayu Kya Hai?

Ans. 04.01.2002 (18 years)

Q. Aap Pintoo Ko Janti Hain?

Ans. Haan.

Q. Pintoo Kaun Hain?

Ans. Mere Pati.

Q. Pintoo Aapko Bahla Fusla Kar Le Gaya Tha?

Ans. Nahi, Mai Apni Marzi se Uske Saath Gayi Thi.

Q. Aap Apne Mata-Pita Ke Pass Jaana Chahti Hain?

Ans. Nahi. Main Apne Pati Ke Pass Jana Chahti Hun.

14. Looking to Shivani's stand, it is evident that she has not been enticed away by Pintoo. Rather, she has left her home of her own accord and married him. In this view of the matter, the marriage would not be void under Section 12 of the Act of 2006, but would be voidable under Section 3 of the said Act.

15. The conclusion is evident from the provisions of Sections 3 and 12 of the Act of 2006 which read as under:

"3. **Child marriages to be voidable at the option of contracting party being a child.--(**1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.

12. Marriage of a minor child to be void in certain circumstances.--Where a child, being a minor--

(a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place; or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes,

such marriage shall be null and void."

16. It would, therefore, be open to the prosecutrix to acknowledge the marriage or claim it to be void, once she attains the age of majority. It would also be open to her, once she attains the age of majority, to go wherever she likes and stay with whomsoever she wants.

17. Since, she is not inclined to go back to her parents, for the present, this Court is left with no alternative but to direct the State to place her in a suitable State facility other than a Nari Niketan, may be a Safe Home/Shelter Home.

18. The District Magistrate, Hapur and the Superintendent of Police, Hapur are ordered to ensure that the prosecutrix is immediately housed in a suitable Safe Home/Shelter Home, or other State facility where she would be safe and taken care of.

19. The learned District Judge, Hapur is also directed to ensure that a Lady Judicial Officer, posted in his Judgeship, will visit the prosecutrix once a month and inquire about her welfare. In case there is anything objectionable, she will immediately report the matter to the District Judge, who will take appropriate steps to ensure the prosecutrix's welfare during her stay in the State facility/Safe Home/ Shelter Home, wherever she is housed.

20. Shivani would be permitted to live in State facility/Safe Home/Shelter Home till 04.11.2022, and thereafter, she may go wherever she wants and stay with whomsoever she likes, including Pintoo, whom she claims to be her husband.

21. In the result, this petition succeeds and is allowed. The impugned order dated 24.11.2020, passed by the learned Judicial Magistrate-I, Hapur in Case Crime No. 516 of 2020 under Section 363 IPC, P.S. Pilakhuwa, District Hapur is hereby set aside. The prosecutrix shall be dealt with in accordance with the directions made hereinabove.

22. Let Shivani, who is present in person, be forthwith taken into the care of the Court Officer and conveyed through the Registrar General to the Senior Superintendent of Police, Prayagraj. The Senior Superintendent of Police, Prayagraj shall cause the prosecutrix to be conveyed in safety to the Superintendent of Police, Hapur, who, along with the District Magistrate, Hapur will carry out the directions carried in this order forthwith.

23. The Court Officer shall convey Shivani to the Registrar General, who shall make immediate arrangement to take her into his immediate care and ensure compliance of this order.

24. Let this order be communicated to the learned District Judge, Hapur, the District Magistrate, Hapur, the Senior Superintendent of Police, Prayagraj and the Superintendent of Police, Hapur by the Joint Registrar (Compliance) within 24 hours.

(2021)01ILR A926
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

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

Matter Under Article 227 No. 6222 of 2018
(Criminal)

Jai Veer Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Mukesh Kumar, Sri Mukesh Kumar Singh

Counsel for the Respondents:

A.G.A., Sri Anirudh Kumar Upadhyay, Sri Raj Bahadur Verma, Sri Aniruddh Singh

A. Civil Law – Constitution of India: Article 227 – Scope of Magistrate's jurisdiction - Code of Criminal Procedure, 1973; Section 133, 145, 146(1) - The Magistrate's jurisdiction, from the bare and clear words of the Statute is about preventing a breach of peace arising from a dispute relating to possession of an immovable property. The jurisdiction is one that relates to preservation of breach of peace, and not an adjudication about possession of parties, much less their title. The scope is to determine which party was in actual possession of the property in dispute on the date that he makes the preliminary order, and also to determine if any party has been dispossessed two months anterior in point of time to the date when preliminary order is made. He can also take into account dispossession of a party at any time after he makes a preliminary order. The Magistrate can grant an injunction within limited parameters and not otherwise. (Para 17, 18)

It must also be noted that the Magistrate's jurisdiction to make an order under Section 145 of any kind, must involve a continuing breach of peace. If at any time before it passes an order relating to possession for one or the other party, the apprehension of breach of peace disappears, he must lay his hands off. He must not feel tempted to adjudicate because he has issued a preliminary order and the parties have put in their written statements and led evidence. This is the clear purport of sub-Section (5) of Section 145 of the Code. (Para 19)

Court observed that the learned Judge glossed over the fact that the information before the Magistrate, on the basis of which he passed the preliminary order, only spoke about a threat to the respondents' possession from the petitioners. There was no material about an apprehension of breach of peace. There was, thus, no jurisdiction at all to initiate these proceedings where the impugned orders have been passed. (Para 23)

Writ Petition allowed. (E-3)

Precedent followed:

1. Indira & ors. Vs Dr. Vasantha & ors., 1991 CrLJ 1798 (Mad.) (Para 19)

2. Yaqub Ali Vs St. of Raj. & ors., 1995 CrLJ 1376 (Raj.) (Para 19)

3. Chatraram & ors. Vs St. of Raj. & ors., 1996 CrLJ 4495 (Raj.) (Para 19)

4. Ashok Kumar Vs St. of U.K. & ors., (2013) 3 SCC 366 (Para 23)

Present petition challenges order dated 13.01.2017, passed by Executive Magistrate and affirmed by Additional Sessions Judge, Farrukhabad.

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

1. The petitioners here complain that the Executive Magistrate, in the purported exercise of his power under Section 145 (1) of the Code of Criminal Procedure, 19731 has usurped the civil court's jurisdiction and passed orders that only the civil court could have done.

2. Truly speaking, the controversy involved in this petition under Article 227 of the Constitution is about the Executive Magistrate's jurisdiction to pass the order impugned dated 13.01.2017, under Section 145 of the Code, that has met with approval of the Additional Sessions Judge in a revision carried by the petitioners from the Magistrate's order.

3. The dispute is about 16 decimals of land, a part of Khasra No. 359, situated in Mauza Abhaipur, Pargana Shamshadbad East, Tehsil - Sadar, District - Farrukhabad. The total area of Khasra No. 359 is 1.43 acres. Smt. Radha, wife of Luxmi Narain and Smt. Tara Devi, wife of Vidwan Singh,

both natives of Village Abhaipur, Police Station - Mohammadabad, District - Farrukhabad claim to be the title holders in possession of the 16 decimals of Khasra No. 359 last mentioned. The land aforesaid is hereinafter referred to as "the land in dispute". Smt. Radha and Smt. Tara Devi are respondent nos. 2 and 3 to this petition. For the sake of convenience, they shall hereinafter be referred to as "the respondents".

4. The petitioners are six in number. Jai Veer Singh, Badan Singh, Jeet Pal, are sons of Prem Raj, and Anand, Arun, Sangeet, are sons of Rustam Singh. The proceedings before the Magistrate were commenced by the respondents, under Section 145 (1) of the Code against Jai Veer Singh, Rustam Singh, Badan Singh and Jeet Pal Singh, all sons of Prem Raj and Mahipal Singh and Ajay Singh, both sons of Saudan Singh. Of all the original parties to the proceedings before the Magistrate, Rustam Singh appears to have passed away and his interest before this Court is represented by his three sons Anand, Arun and Sangeet. The other two parties to the proceedings before the Magistrate, Mahipal Singh and Ajay Singh, have not come up against the orders impugned. In these proceedings, Jai Veer Singh, Anand, Arun, Sangeet, Badan Singh and Jeet Pal shall be hereinafter collectively referred to as "the petitioners". This collective description will bear reference to the interest of Mahipal Singh and Ajay Singh, sons of Saudan Singh, who have not come up against the impugned orders. The respondents made an application to the Sub-Divisional Magistrate, Sadar, Farrukhabad on 24.02.2014, under Section 145 of the Code, wherein the substance of the respondents' case is no more than this, that the petitioners forcibly and illegally want to dispossess the respondents from the property in dispute, and by doing that, they design to block a public way to the east of the property. It is also said that in case the petitioners forcibly and illegally dispossess the respondents from the land in dispute, the public way to the east of that land would be obstructed, which would cause the respondents irreparable injury. It is also asserted that in case the petitioners dispossess the respondents, their purpose of instituting the proceedings would be rendered infructuous. It is prayed on behalf of the respondents that the Sub-Divisional Magistrate may injunct the petitioners from forcibly and illegally dispossessing the respondents and take all necessary proceedings for the purpose.

5. It needs mention here that the petitioners' claim to the property in dispute as heirs of a certain late Smt. Phula, widow of Lalta Singh, through their deceased father, the late Puttu, claiming her 1/9th share located to the west of the village road. The said share, according to the petitioners, works out to an area of 16 decimals.

6. It appears that on the Magistrate ordering the Station House Officer, Kotwali Mohammadabad, District - Farrukhabad to hold an inquiry into the allegations and submit a report, the police submitted a report dated 14.03.2014 to the Magistrate. A perusal of the police report shows that the respondents are natives of Village Abhaipur. Their father, Puttu, passed away, in consequence whereof, their names have been entered in the khatauni relating to the land in dispute. The report records the respondents' allegation that the petitioners want to forcibly take possession of the land in dispute, and that

they threaten them. The report also records the respondents' apprehension that the petitioners may take forcible possession of the land in dispute at any time. A site-plan of the property in dispute was also attached to the police report. On the basis of the police report, the Magistrate passed a preliminary order under Section 145 (1) of the Code on 27.07.2016, directing the parties to appear, put in their written statements and lead evidence in support of their respective cases. Later on, on 11.11.2016, the Magistrate passed an order under Section 146 (1) of the Code, directing attachment of the property in dispute on the ground of emergency, pending determination of proceedings under Section 145. That order records that during a tour of the area, the Magistrate did an inspection of the spot and found that there was tension prevailing between the parties concerning the land in dispute, which gave rise to an apprehension of breach of peace. He, therefore, ordered the land in dispute to be attached and delivered into the custody of any respectable person. The police were directed to carry out attachment and submit a report. The land in dispute was attached by the police on 14.12.2016 and given into the possession of one Natthu Singh, acting as the supurdgar.

7. After the parties led evidence, the case under Section 145 came up for determination before the Magistrate on 13.01.2017. The Magistrate ordered that the preliminary order dated 17.07.2016 passed by him is made absolute and the order dated 11.11.2016 under Section 146 (1) stands withdrawn. The petitioners were injuncted from interfering with the respondents' possession over the land in dispute. In case they had taken possession of the said land, they were ordered to vacate it within a week.

8. This order of the Magistrate's was challenged by the petitioners before the learned Sessions Judge, vide Criminal Revision No. 186 of 2017. This revision came up for determination before the learned Additional Sessions Judge, Court No. 6/Special Judge (E.C. Act), Farrukhabad on 24.05.2018. He has dismissed the revision and affirmed the Magistrate's order dated 13.01.2017.

9. Aggrieved, this petition under Article 227 of the Constitution has been filed.

10. The parties have brought a wealth of material on record in support of their respective cases about title to and possession of the property in dispute. This, they have done, through papers annexed to the writ petition, a counter affidavit dated 01.10.2018 filed by the respondents, a rejoinder affidavit dated 23.09.2020 on behalf of the petitioners, a supplementary affidavit dated 04.10.2020 filed by the petitioner, a supplementary short counter affidavit dated 09.10.2020 and a supplementary rejoinder affidavit in answer to it by the petitioners dated 13.10.2020.

11. Heard Mr. Mukesh Kumar Singh, learned counsel for the petitioners, Mr. Aniruddh Singh, learned counsel appearing on behalf of the respondents and Mr. Indrajit Singh, learned Additional Government Advocate appearing on behalf of the State of Uttar Pradesh.

12. The petitioners lay claim to the property in dispute, on the basis of title to a 1/16th share in Khasra No. 359 that they have purchased from one Tehsildar, son of

Sultan, by means of a registered sale deed dated 05.10.1987 and a further accretion to their rights in the said khasra number by transfer of the 1/16th share of Smt. Kokila Devi, wife of the late Puttu, in Khasra No. 359 vide registered sale deed dated 08.07.1988 executed in favour of Smt. Kokila Devi, wife of the late Prem Raj, mother of petitioners Jai Veer Singh, Badan Singh and Jeet Pal. The respondents dispute the validity of the sale deed executed by their mother Smt. Kokila Devi, wife of the late Puttu, dated 08.07.1988. They say that they have inherited the property upon the death of their mother, and after her, their father, the late Puttu as well as the share of the late Smt. Phula, through their father. It must be remarked here that according to the respondents' case, originally urged before the Magistrate, the property in dispute has an area of 16 decimals, inherited from Smt. Phula. But once the petitioners came up with the case that they had purchased the property in dispute through sale deeds dated 05.10.1987 and 08.07.1987 from Tehsildar, son of Sultan and Smt. Kokila Devi, wife of the late Puttu respectively, the respondents have assailed the petitioners' rights, on the basis of those two sale deeds, including that executed by their mother. It must also be remarked that Khasra No. 359 appears to have many co-sharers, amongst whom, Smt. Kokila, widow of the late Puttu, Tehsildar, son of Sultan and Smt. Phula, widow of the late Lalta Singh were all recorded with varying shares. It is, therefore, difficult to say with much precision here whether the property in dispute is exclusively that which lay in Smt. Phula's share or includes the share of Smt. Kokila, claimed to be purchased by the petitioners through a registered sale deed. All these issues are properly the subject matter of two suits pending between the petitioners on the one hand and the respondents on the other, before the Civil Court.

13. It figures on record that O.S. No. 614 of 2016 has been filed by the petitioners against respondents in the court of the learned Civil Judge (Junior Division), Farrukhabad, claiming a permanent injunction, seeking to restrain the respondents (the defendants to that suit) from interfering in the petitioners' peaceful possession over the property in dispute and from demolishing a wall shown by letters "Ba, Sa". The respondents, on the other hand, disowning the sale deed executed by their mother in favour of the petitioners relating to the property in dispute, have instituted O.S. No. 19 of 2017 before the learned Civil Judge (Junior Divsion), City - Farrukhabad, seeking a decree for the cancellation of the registered sale deed dated 27.07.1988. Thus, the dispute between the parties about the title of and possession to the property in dispute is engaging the attention of the civil court, in two suits that are virtually cross suits.

14. It is submitted by Mr. Mukesh Kumar, learned counsel for the petitioners, that the impugned orders passed by the courts below are manifestly illegal, inasmuch as the Magistrate has no jurisdiction to grant an order of injunction of the kind that he has made. It is only the civil court that could have passed that order. The learned Magistrate has exceeded his jurisdiction and passed an ultra vires order. It is urged by him that those proceedings are motivated by an ex-Village Pradhan, who had unsuccessfully got proceedings initiated under Section 133 of the Code, relating to the land in dispute that he claimed to be a public way. Those proceedings did not yield any relief in favour of the proxies acting for the ex-

village Pradhan, who had moved the Magistrate under Section 133 of the Code. He urges that it is the respondents now who are doing a second inning at the behest of the ex-village Pradhan, Natthu Singh, to deprive the petitioners of the property in dispute. He emphasizes that all this ought to be decided in a duly constituted suit by a Judge determining the action, and not by abuse of the process of criminal law. An Executive Magistrate, who is not a Judge, cannot decide the question of title or possession or title and possession. He submits that the issues involved, if at all these are ought to be determined in the pending suits between parties, and not in a surreptitious manner by the Magistrate, seized of proceedings under Section 145 of the Code. The orders passed by the Magistrate are beyond the scope of his jurisdiction.

15. Mr. Aniruddh Kumar, learned counsel for the respondents, on the other hand, submits that the impugned orders do not call for interference. He submits that the respondents are women and are facing unlawful deprivation of their property at the hands of the petitioners, who were threatening to forcibly dispossess them. He submits that in the suit filed by the petitioners, no temporary injunction has been granted as yet, though the temporary injunction application is still pending. On being confronted with the issue about the Magistrate venturing into forbidden territory, deciding questions relating to title and possession of parties, learned counsel for respondents submits that justice has to be administered promptly in such matters and the tardy process of the civil court defeats justice. He submits that the courts below, particularly the revisional court, has found the respondents to be the recorded owners in possession of the property in dispute, in whose favour mutation has been granted upon the decease of the last recorded bhumidhar, Smt. Phula, the respondents' predecessor-in-title. It is urged that title and possession, being found by the two courts below in favour of the respondents, the Magistrate has rightly injuncted the petitioner from interfering with the respondents' possession and also directed their eviction, in case they have taken possession.

16. This Court has given a thoughtful consideration to the rival contentions and perused the record. In order to determine the parameters of the Magistrate's jurisdiction, it would be profitable to refer to the provisions of Section 145 of the Code, which are extracted below :

145. Procedure where dispute concerning land or water is likely to cause breach of peace.

(1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section, the expression" land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in the manner provided by this Code

for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute,

(4) The Magistrate shall then, without, reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub- section (1), in possession of the subject of dispute: Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub- section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub- section (1).

(5) Nothing in this section' shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under subsection (1) shall be final.

(6) (a) If the Magistrate decides that one of the parties was, or should under the proviso to sub- section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub- section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub- section shall be served and published in the manner laid down in sub- section (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of. such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale- proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.

17. It is of seminal importance to notice that the Magistrate's jurisdiction,

from the bare and clear words of the Statute is about preventing a breach of peace arising from a dispute relating to possession of an immovable property. The jurisdiction is one that relates to preservation of breach of peace, and not an adjudication about possession of parties, much less their title. In fact, the provisions of Section 145 of the Code finds place in Chapter X of the Code, which relates to maintenance of a public order and tranquility. It is only to prevent breach of peace that the Magistrate has been summarily entrusted with jurisdiction to determine as to which party was in possession of the property that is cause of the apprehended breach of peace on the date that he makes the preliminary order under Section 145 of the Code. The scope about the inquiry as to which party was in actual possession of the property in dispute, has been expanded in temporal terms to a period of time two months next before the date of the Magistrate's preliminary order. It is also designed to take cognizance of any dispossession of a party made after the Magistrate passes the preliminary order under Section 145 (1). Thus, the scope of the Magistrate's jurisdiction is to determine which party was in actual possession of the property in dispute on the date that he makes the preliminary order, and also to determine if any party has been dispossessed two months anterior in point of time to the date when preliminary order is made. He can also take into account dispossession of a party at any time after he makes a preliminary order. In the eventuality where the Magistrate finds a party to be in actual possession of the property in dispute on the date of the preliminary order, he may declare such party to be entitled to possession thereof, until a court of civil jurisdiction or other court of competent jurisdiction orders that party to be evicted. In a case where the Magistrate so declares a party to be entitled to possession, until evicted in due course of law, he may forbid all disturbance of such possession until a court of competent jurisdiction orders otherwise. The Magistrate, therefore, can grant an injunction within these limited parameters and not otherwise. In a case covered by the provisions of sub-Section (4) to Section 145 of the Code, where the Magistrate finds that a party was in possession two months anterior to the date that he passed the preliminary order, or has been dispossessed after he made the preliminary order, he may order restoration of that party to possession found by him to be forcibly and wrongfully deprived during the specific period of time. There are other orders that could be made dependent on the contingencies that the Magistrate may encounter while deciding the question of possession on the date of preliminary order, but those are not relevant for the purpose of the present controversy.

18. It would, thus, appear that the sine qua non of the Magistrate's jurisdiction under Section 145 is an apprehended breach of peace relating to a dispute concerning an immovable property. The purpose of the jurisdiction is to preserve peace. The decision about possession that the Magistrate is to enjoined to take is for the purpose of preservation of peace; the Magistrate's decision about possession is only incidental to the purpose of maintaining peace. It is no jurisdiction to decide anything about the party's possession, much less title. It is also to be remarked that in the process of maintaining peace, whatever the Magistrate decides about actual possession of a party to a dispute relating to immovable property has nothing to do with the propriety of

possession. It is just designed to find out who was in settled possession, the sudden unsettlement whereof led to an apprehended breach of peace.

19. This being the scope of the Magistrate's jurisdiction, the invocation of power under Section 145 by a Magistrate, is frowned upon pending proceedings relating to possession or title of the said property before a civil court or any other court of competent jurisdiction, say, a revenue court or other special tribunal, that has seison of the dispute at given point of time when an apprehension about breach of peace arises. In this connection, reference may be made to the decisions in **Indira & Others v. Dr. Vasantha & Others2, Yaqub Ali v. State of Rajasthan & Others**3 and **Chatraram & Others v. State of Rajasthan & Others**4. Ideally, in that situation, the court concerned ought to be approached with an application for appropriate interim orders. Once orders are passed by a court of competent jurisdiction about possession or in any manner, making a temporary arrangement, the Magistrate ought not interfere in the matter. There could, however, be situations where there are no interim orders, and a serious threat to peace arises. In those cases, the Magistrate may act, but very carefully, and only when he finds that the court of competent jurisdiction is reluctant to pass orders, and the apprehension about breach of peace continues. It must also be noted that the Magistrate's jurisdiction to make an order under Section 145 of any kind, must involve a continuing breach of peace. If at any time before it passes an order relating to possession for one or the other party, the apprehension of breach of peace disappears, he must lay his hands off. He must not feel tempted to adjudicate because he has issued a preliminary order and the parties have put in their written statements and led evidence. This is the clear purport of sub-Section (5) of Section 145 of the Code.

20. Here, what this Court finds is that the contents of the application on which the proceedings have commenced, do not, at all, speak of any apprehension of breach of peace. All that is said there is that the respondents fear that they might be dispossessed by the petitioners. A reading of the application, which, in this case, is made to the Magistrate under Section 145 of the Code, clearly does not show that a dispute likely to cause breach of peace, relating to an immovable property, is in the offing. The Magistrate forwarded the application for an inquiry by the police. In taking that course of action, the Magistrate was absolutely right. The police submitted a report in the matter, which also shows that the respondents apprehend that they might be forcibly dispossessed by the petitioners from the land in dispute. The police report is absolutely silent about any apprehension as to breach of peace arising from the dispute existing between parties claimed vis-à-vis the land in dispute. The application by the respondents and the police report together were the information on which the Magistrate passed the preliminary order under Section 145(1) of the Code. It is this material on which he assumed jurisdiction to commence proceedings.

21. This Court must remark that in the absence of anything either in the respondent's application indicating an apprehension about breach of peace arising from a dispute relating to an immovable property or in the police report submitted on that application, there was no warrant at all for the Magistrate to have assumed

jurisdiction under Section 145 of the Code and pass a preliminary order under sub-Section (1) of Section 145 of the Code. The subsequent orders, which are all ancillary to the assumption of the jurisdiction in sub-Section (1) of Section 145, would fall once it is apparent that the Magistrate had no jurisdiction in the matter, in the first instance. The Magistrate perhaps, realizing his folly, has attempted to create jurisdictional facts while passing the order dated 11.11.2016 under Section 146 (1) of the Code, attaching the property in dispute and appointing a supurdgar. He says in that order that during a routine inspection of the area, he did a spot inspection and found that there was tension prevalent between the parties, relating to the land in dispute, which is likely to cause breach of peace. This mention in the record of proceedings on 11.11.2016 while passing an order under Section 146 (1) of the Code and much after preliminary order under Section 145(1) dated 27.07.2016 was passed, makes it apparent that it is an attempt by the Magistrate to create jurisdiction, post initiation of proceedings. Even if it be assumed that the Magistrate, on a spot inspection, did find something for the first time that an apprehension of breach of peace existed, it was then that he could have initiated fresh proceedings under Section 145(1), treating it as a piece of information. But on 27.07.2016, when the preliminary order giving rise to these proceedings was passed, there was absolutely nothing in the information before the Magistrate about any apprehension of breach of peace. Also, the Magistrate's remarks introducing a case of apprehension of breach of peace midway does not really disclose that there was any such apprehension. The order shows it to be more of a ipse dixit of the Officer, who seems to be keen on validating the proceedings before him, that he realized were initiated without jurisdiction.

22. It must be remarked here that for an Executive Magistrate to be perplexed with the subtleties of law, is a understandable predicament. The Executive Magistrate's are lay officers and proceedings of this complexity may go awry before them. It is for this reason that they are subjected to superintendence of the learned Sessions Judge in revisions and also of this Court, even though their determinations are otherwise and not subject to an appeal. But the learned Additional Sessions Judge, who heard the revision from the Magistrate's order, did not deliver the Magistrate's folly with the refinements of his forensic ability. He went into the merits of the matter about possession and title of parties, as it were an appeal from a temporary injunction matter in a civil cause. He has recorded the following decisive findings :

उनके पिता जी श्री पुत्तू लाल का स्वर्गवास हो जाने के कारण खसरा नं0 359 में 16 डि0 जमीन इनके नाम खतौनी में दर्ज है व इनका कब्जा है लेकिन निगरानीकर्तागण जयवीर सिंह, रुस्तम सिंह, बदन सिंह जीतपाल पुत्रगण प्रेम सिंह व महिपाल सिंह, अजय सिंह पुत्रगण सौदान सिंह निवासी अभयपुर थाना मोहम्मदाबाद उक्त जमीन पर जबरदस्ती कब्जा करना चाहते है तथा विपक्षीगण/आवेदिकागण को डरा धमकाते हैं। जिससे आवेदिकाओ को भय है कि यह लोग उक्त जमीन पर कभी कब्जा करने की फिराक में है यह कर सकते है। आख्या मय नक्शा नजरी के आधार पर धारा 145 दं0 प्र0 सं0 के अन्तर्गत कार्यवाही किए जाने हेतु उपलब्ध करायी गयी है। उक्त आख्या के साथ संलग्न नक्शा नजरी के अवलोकन से प्रकट होता है कि का0 सं0–7/2 के परिशीलन से प्रकट होता है कि खसरा सं0 359 रकबा 0.16 डि0 आराजी खडन्जा रास्ता के पश्चिम खाली जगह के रुप में दर्शाया गया है उसके उपरान्त मकान महिपाल सिंह व रुस्तम सिंह बने दर्शाए गए है। उक्त आराजी के सम्बन्ध में अवर न्यायालय की पत्रावली पर खतौनी का0 सं0 5 उपलब्ध है जिसमें विरासतन विपक्षी सं0 1 व 2 का नाम ए0 सी0 ओ0 चकबन्दी के आदेशानुसार मृतका मु0 फुला के स्थान पर

दर्ज हुआ है। इस प्रकार विपक्षी सं0 1 व 2 बिरासतन विवादित सम्पत्ति की मालिक व काबिज है। इसके विपरीत पत्रावली पर निगरानीकर्तागण की ओर से अपने स्वामित्व के सम्बन्ध में कोई प्रलेख प्रस्तुत नही किया गया है। इसके अलावा निगरानी पत्रावली में आख्या तहसीलदार की छाया प्रति दाखिल है जो पत्रावली पर का0 सं0 18 बी/10 है। जिसके परिशीलन से प्रकट होता है कि पुलिस द्वारा तैयार किए गए नक्शा नजरी उपरोक्त की पुष्टि तहसीलदार के नक्शे से होती है। उक्त सम्पत्ति पर सक्षम प्राधिकारी ए0 सी0 ओ0 चकबन्दी के आदेशानुसार विपक्षी सं0 1 व 2 का नाम बतौर वारिस दर्ज हुआ है जिसके विपरीत पत्रावली पर निगरानीकर्तागण की ओर से कोई साक्ष्य नही है। इसलिए विद्वान अवर न्यायालय द्वारा पारित प्रश्नगत आदेश में कोई विधिक अथवा तथ्यात्मक त्रुटि नही पाई जाती है।

23. In recording all these findings, the learned Judge also glossed over the fact that the information before the Magistrate, on the basis of which he passed the preliminary order, only spoke about a threat to the respondents' possession from the petitioners. There was no material about an apprehension of breach of peace. There was, thus, no jurisdiction at all to initiate these proceedings where the impugned orders have been passed. In this connection, the decision of the Supreme Court in **Ashok Kumar v. State of Uttarakhand & Others**5 succinctly lays down law thus :

7. We may notice, in the instant case, the application was preferred by the respondent under Section 145 CrPC and on that application, a report was called for and the Sub-Inspector of Police submitted his report before the SDM on 1-10-2009. It is stated in the enquiry report that the Sub-Inspector of the village went to Subhashgarh and noticed that even though the landed property stood in the name of Mona Sharma yet it was found that Ashok Kumar, the appellant herein was in possession of the land in question in Khasra No. 181. The relevant portion of the report reads as follows:

"It is the submission of applicant Mona Sharma that both Ashok Kumar and Narendra Kumar have taken possession over her land and both have stated that they have purchased land from Bal Krishan, husband of Mona Sharma whereas, this land comes in the category of 10(ka), which cannot be sold/purchased.... In the land there is situated under constructed house of Ashok Kumar in present time and eucalyptus and mango trees of Narendra Kumar s/o Jairam r/o Subhashgarh are standing."

24. The Magistrate's finding, on which he has passed the impugned orders, apart from being without jurisdiction, is cryptic. It reads thus and no more :

मेरे द्वारा पत्रावली पर उपलब्ध पुलिस आख्या एवं अभिलेखीय साक्ष्यों का भली भांति परिशीलन किया गया। पुलिस आख्या में उपरोक्त विवादित जमीन पर आवेदिकाओं का कब्जा बताया गया है। धारा 145 द0 प्र0 स0 में स्वामित्व/कब्जा होना आवश्यक है। विपक्षीगणों द्वारा ऐसा कोई ठोस साक्ष्य प्रस्तुत नही किया है, जिससे वादीगणो का कब्जा सिद्ध न हो सके। उपरोक्त विवेचनानुसार मैं इस निष्कर्ष पर पहुंचता हूं कि इस न्यायालय द्वारा दिनांक 27.07.2016 को धारा 145(1) द0 प्र0 सं0 के अन्तर्गत पक्षकारों के विरुद्ध जारी किये गये आदेश की पुष्टि किया जाना न्यायोचित प्रतीत होता है।

25. A reading of the aforesaid finding shows that there is not a word said about apprehension of breach of peace, which may invest the Magistrate with jurisdiction. Also, the Sessions Judge has not recorded any finding specifically as to which party was in possession on the date of the preliminary order or within two months ante-dating

that order, or if the respondents were dispossessed after the Magistrate made the preliminary inquiry. In the absence of specific findings on these matters, he could not have passed the order impugned, which has been affirmed in manifest error by the learned Additional Sessions Judge.

26. In the result, this petition succeeds and is allowed. The impugned order dated 13.01.2017 passed by the Sub-Divisional Magistrate, Sadar, District - Farrukhabad in Case No. 30 of 2016, under Section 145 of the Code, and the order dated 24.05.2018 passed by learned Additional Sessions Judge, Court No. 4/Special Judge (E.C. Act), Farrukhabad, in Criminal Revision No. 168 of 2017 are hereby quashed. The parties are free to suit their rights on merits in the pending civil suits. Since possession was taken from the petitioners under an order of attachment by the Magistrate in these proceedings, the same shall be forthwith caused to be restored by the Sub-Divisional Magistrate, Farrukhabad to the petitioners, if not already restored, in compliance with the interim order earlier made in this case.

27. Nothing said here would affect the determination of the parties' rights at the trial of the two suits pending between them or any suit that may be instituted about the adjudication of their rights relating to the property in dispute.

28. Let this order be communicated to the Sub-Divisional Magistrate, Farrukhabad for strict compliance and to the learned Sessions Judge, Farrukhabad for record, by the Joint Registrar (Compliance).

(2021)01ILR A937
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE
THE HON'BLE AJIT SINGH, J.

Application U/S 482 No. 5567 of 2020

Smt. Savita Devi @ Savitri Singh & Anr. ...Applicants

Versus

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

Counsel for the Applicants:
Sri Pradeep Yadav, Sri Jeetendra Kumar Yadav

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

Criminal Law - Criminal Procedure Code (2 of 1974)- Section 2 (d), Explanation - Charge sheet in non cognizable offence - charge-sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint and the procedure prescribed for hearing of complaint case shall be applicable to such case (Para 8)

Charge-sheet submitted by the Investigating Officer, U/ss 323 & 504 I.P.C., both offence non-cognizable, instead of being treated as a complaint, has been treated as a State Case by the concerned Magistrate - held same is not permissible under law - Cognizance & summoning order quashed - Magistrate directed for passing appropriate order in accordance with provisions of explanation to Section 2(d) Cr.P.C. (Para 9, 11)

Allowed. (E-4)

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

1. Heard learned counsel for the applicants and learned A. G. A. and perused the record.

2. This application under Section 482 Cr. P. C. has been filed by applicants with a prayer for quashing the entire proceedings of NCR No. 193 of 2015 (State vs. Savita Devi and another), under Sections 323 and 504 I.P.C., P.S. Rohniya, district-Varanasi, pending in the court of Special Chief Judicial Magistrate, Varanasi.

3. Learned counsel for the applicants submitted that initially an NCR was lodged by the opposite party no. 2 at P.S.- Rohniya, district-Varanasi in the aforesaid case. However, after completion of investigation charge sheet was submitted by the Investigation Officer under Sections 323 and 504 I.P.C.

4. Learned counsel for the applicants submitted that the offence under Sections 323 and 504 I.P.C. is non-cognizable, hence in view of the Explanation to Section 2 (d) of the Code of Criminal Procedure, the case could not proceed as State Case and it has to proceed as a complaint case. He further submitted that the learned Magistrate has erroneously taken the charge-sheet as a State case.

5. Learned A. G. A. vehemently opposed the submissions made by learned counsel for the applicants.

6. It is not disputed that the offence under Sections 323 and 504 I. P. C. is non-cognizable.

7. Explanation to Section 2 (d) of the Cr. P. C. runs as under:

"Explanation- *A report made by a police officer in a case which discloses, after investigation the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."*

8. In view of the said Explanation, report of the police officer after investigation disclosing commission of non-cognizable offence is to be deemed to be a complaint and the police officer who submitted the report has to be deemed to be a complainant. In other words the charge-sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint and the procedure prescribed for hearing of complaint case shall be applicable to that case."

9. In the present case from the material brought on record it transpires that the charge-sheet submitted by the Investigating Officer instead of being treated as a complaint, has been treated as a State Case by the concerned Magistrate, which is not permissible under law.

10. In view of the discussions made above, this Court came to the conclusion that impugned order of cognizance and summoning order dated 01.04.2017 upon charge-sheet in a case arising out of NCR in respect of bailable and non-cognizable offences is wrong and incorrect and is liable to be quashed.

11. The application is allowed accordingly and the impugned order dated 01.04.2017 is quashed with a direction to learned Magistrate for passing appropriate order in accordance with law as well as provisions of explanation to Section 2(d) Cr.P.C.

12. Let a copy of this order be sent to court below for proceeding with the case in accordance with law.

(2021)01ILR A939
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Appl. No. 47244 of 2020

Kiran Kumar ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Sanjive Kumar Gupta

Counsel for the Opp. Party:
A.G.A.

A. Civil Law - Essential Commodities Act,1955-Section 3/7-application-grant of bail-inordinate delay of 17 days in FIR-applicant running fair price shop for 10 years-no complaint ever made by the villagers-FIR lodged with ulterior motive due to village partybandi-Hence, the prayer for bail is granted. (Para 2 to 6)

The bail application is allowed. (E-5)

List of Cases cited:

Dataram Singh Vs St. of U.P. & anr.(2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard learned counsel for the applicant, learned A.G.A. appearing for the State and perused the record.

2. Applicant has moved the present bail application seeking bail in Case Crime No.254 of 2020 under Section 3/7 Essential Commodities Act, P.S. Dataganj, District Budaun.

3. Learned counsel for the applicant submits that the applicant has been falsely implicated in the present case due to ulterior motive. As per the F.I.R. version the alleged incident took place on 10.08.2019 at 17-00 hours and the complainant lodged the F.I.R. on 27.08.2019 and no explanation for the inordinate delay of 17 days had been explained. As per statement under Section 161 CrPC, of the complainant he reiterated the F.I.R. version.Learned counsel for the applicant further submits that the applicant has track record of running fair price shop for the last 10 years and no complaint was ever made by the villagers. The present F.I.R. was lodged due to village partyband and bad relations with the local leaders.

4. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 27.10.2020 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

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

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

7. The prayer for bail is granted. The application is **allowed**.

8. Let the applicant Kiran Kumar involved in Case Crime No.254/2019, under Section 3/7 Essential Commodities Act, P.S. Dataganj, District Budaun. be released on bail on executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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.

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

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

(2021)01ILR A940
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Ist Bail Appl. No. 46384 of 2020

Shubham Mishra ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Anil Kumar Pathak, Sri Chandra Pratap Singh

Counsel for the Opp. Party:
A.G.A.

A. Criminal Law - The Arms Act,1959- Section 4/25 - Application-grant of bail- accused falsely implicated-no criminal antecedent- recovered material planted by

the police-Police made false recovery in order to save real accused.(Para 2 to 6)

The bail application is allowed. (E-5)

List of Cases cited:

Dataram Singh Vs St. of U.P. & anr.(2018) 3 SCC 222

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard learned counsel for the applicant, learned A.G.A. appearing for the State and perused the record.

2. Applicant has moved the present bail application seeking bail in Case Crime No.205 of 2020, under Section 4/25 of Arms Act, P.S. Khataund, District Jalaun.

3. Learned counsel for the applicant submits that the applicant has been falsely implicated in the present case due to ulterior motive. Learned learned counsel for the applicant further summits that the recovered material has been planted by the police which would have been recovered from other accused and had been shown to have been recovered from the applicant in order to save the real accused for the reason known to them. He submits that the applicant is not connected with offence alleged and in the alleged place of occurrence no raid or recovery was made and the police has falsely implicated the applicant showing false raid and recovery. The applicant is innocent and law abiding person and is not involved in the case and the police has falsely implicated him in this case. He submits that no such incident had ever happened.

4. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 3.9.2020 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

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

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence and the law laid down by the Hon'ble Apex Court in the case of Dataram Singh vs. State of UP and another, (2018) 3 SCC 22, this Court is of the view that the applicant may be enlarged on bail.

7. The prayer for bail is granted. The application is allowed.

8. Let the applicant Shubham Mishra involved in Case Crime No.205 of 2020, under Section 4/25 of Arms Act, P.S. Khataund, District Jalaun be released on bail on executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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.

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

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

(2021)01ILR A942
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Appl. No. 48461 of 2020

Abhijeet Yadav ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Vivek Singh Shrinet

Counsel for the Opp. Party:
A.G.A.

A. Criminal Law - U.P. Gangster and Anti-Social(Prevention) Activities,Act,1986-Section 3(1)-application-grant of bail-applicant having been released on bail in all criminal cases which have been shown to be the basis of imposing provision of the Act-provision of the Act have been ill-used by the police in ordr to perpetuate the detention of the applicant in jail anyhow-Hence, the prayer for bail granted. (Para 2 to 6)

The bail application is allowed. (E-5)

List of Cases cited:

Dataram Singh Vs St. of U.P. & anr.(2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard learned counsel for the applicant as well as learned A.G.A. appearing for the State and perused the record.

2. This application has been filed seeking the release of the applicant on bail in Case Crime No. 609 of 2020, under Section 3(1) of the U.P. Gangster and Anti Social (Prevention) Activities Act, 1986, Police Station Jhangaha District Gorakhpur.

3. The chief plank of the submissions made on behalf of accused is that in all cases which have been made the basis to

impose the provisions of Gangster Act against the accused, he has already been granted bail by the Court. Contention is that the provisions of the Act have been ill-used by the Police in order to perpetuate the detention of the applicant in jail anyhow even though the offence under the aforesaid Act is not made out. Submission is that the applicant is not a gangster and has never acted or conducted himself as such. Counsel for the applicant has also tried to demonstrate that the alleged previous offences which are said to have been committed by the applicant can at the most be said to be stray incident of breach of law having no nexus with the definition of a gangster as has been provided in the Act.

4. Further submission is that as the applicant has already been released on bail in all the cases on the basis of which the provisions of the Act were imposed, it shall not be much justified to continue the incarceration of the applicant. Submission is also that the applicant is not guilty of having committed any offence under the Gangster Act. It has also been pointed out that the accused is in jail since 31.5.2020 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

5. Learned A.G.A. has opposed the prayer for bail but could not dispute the fact of applicant having been released on bail in all the criminal cases which have been shown to be the basis of imposing the provisions of the Act.

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence and larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of Dataram Singh vs. State of UP and another, (2018) 3 SCC 22, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant- Abhijeet Yadav, involved in Case Crime No. 609 of 2020, under Section 3(1) of the U.P. Gangster and Anti Social (Prevention) Activities Act, 1986, Police Station Jhangaha District Gorakhpur, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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

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

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

(2021)01ILR A944
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE

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

Writ-A No. 45161 of 2017

Akhilesh Kumar Upadhyay ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prabhakar Awasthi, Sri Dharmendra Kumar Dwivedi

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

Civil Law-Petitioner-appointment on compassionate ground-terminated on account of respondents confounding his father's name with that of another teacher - who was his father's namesake-The disassociation of Petitioner from 1992 until 2010 to be treated as effaced-therefore entitled for benefit of G.O. dated 01.02.2000 reckoning his appointment as an untrained teacher-Petitioner entitled to pay scale of trained teacher counting 5 years servive from joining duty.

W.P. allowed with cost. (E-7)

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

1. This writ petition is directed against an order dated 05.07.2017 passed by the Basic Shiksha Adhikari, Jaunpur, by which the Basic Shiksha Adhikari has refused to extend benefit of the Government Order dated 01.02.2000 to the petitioner, entitling him to salary of a trained teacher, upon completion of five years service.

2. Parties have exchanged affidavits.

3. Admit.

4. Heard forthwith.

5. Heard Mr. Dharmendra Kumar Dwivedi, learned Counsel for the petitioner, Mr. Mrigraj Singh, learned Counsel appearing on behalf of respondent nos.3 and 4 and Mr. Sriprakash Singh, learned Standing Counsel, appearing for respondent nos.1 and 2.

6. The petitioner's father was a Headmaster, posted at Prathmik Vidyalaya, Bhikharipur, Block Sujanganj, District Jaunpur. He died in harness on 05.09.1974. The petitioner applied for compassionate appointment, under the Dying-in-Harness Rules applicable. It is common ground between parties that the petitioner was appointed as Assistant Teacher (Primary), under the Dying-in-Harness Rules vide order dated 29.10.1991. He was posted to Prathmik Vidyalaya, Kailwal, Block Maharajganj, District Jaunpur. The petitioner joined on 01.11.1991.

7. It is asserted that on the basis of some false complaint that the petitioner had secured his appointment, relying on false documents, the petitioner's services were terminated by the Basic Shiksha Adhikari vide order dated 18.02.1992. This order of termination was challenged by the petitioner before this Court by means of Civil Misc. Writ Petition no.6619 of 1992. The orders passed in the aforesaid writ petition have not been placed before the Court, but what appears from the pleadings of parties is that the said writ petition was disposed of by an order dated 21.04.1992, directing the Basic Shiksha Adhikari to decide the petitioner's claim, asking for reinstatement with continuity of service. The Basic Shiksha Adhikari by his order dated 25.06.1992 rejected the petitioner's claim. This order was challenged by the petitioner by instituting Writ Petition (S/S) no.1241 of 1999 before the Lucknow Bench of this Court. Once again, the petitioner was relegated to the Basic Shiksha Adhikari for a decision of the matter afresh. It must be remarked that both these orders are not before this Court and reference to the outcome of those proceedings is based on the averments made in the writ petition that have not been disputed by the respondents. It appears that the matter somehow landed in the hands of the Director of Education, who also rejected the petitioner's claim by an order dated 07.01.2000.

8. The petitioner, finding that the respondent Authorities would not consider the matter in the right perspective, approached the State Administrative Tribunal, questioning all the decisions taken by the respondent Authorities, regarding termination of his services. He instituted Claim Petition no.1183 of 2000. The claim petition came up for hearing before the Tribunal on 05.11.2009 and was partly allowed. The orders dated 18.01.1992, 03.06.1992, 25.06.1992 and 07.01.1992 were set aside. The petitioner was ordered to be reinstated in service forthwith with liberty to the respondents to proceed with the inquiry, placing the petitioner under suspension and continuing the inquiry from the stage of furnishing him with a charge sheet. It was further ordered that the petitioner would be entitled to consequential service benefits, except back-wages, on a final outcome of the inquiry. The respondents were directed to conclude the inquiry within a period of three months. A perusal of the Tribunal's judgment shows that it proceeded on the reasoning that the order terminating the petitioner's services being stigmatic, disciplinary proceedings ought to have been held. It is in the context of this reasoning that the Tribunal made the orders, indicated hereinabove.

9. In compliance with the Tribunal's order, the Basic Shiksha Adhikari reinstated the petitioner in service vide order dated 29.06.2010. While doing so, the Basic Shiksha Adhikari clearly recorded in his order of reinstatement that the allegations on the basis of which the petitioner's services were earlier terminated, were absolutely untenable. It was indicated in the order of reinstatement that the precise allegations about the false certification of his candidature by the petitioner was on the basis that the petitioner's deceased father, Hridaya Narain Upadhyay died prior to 25.08.1972 and his Provident Fund amounting to Rs.1225/- was paid to his widow.

10. It is further recorded in the reinstatement order that the payment of Provident Fund, that was made to the wife of the late Hridaya Narain Upadhyay, was

regarding a different man other than the petitioner's father. His father was functioning until the month of May, 1974, when he had to proceed on medical leave. He died on 05.09.1974. The Basic Shiksha Adhikari has recorded the further fact that the petitioner had produced before him a copy of the family register, which shows that the date of death of his father, the late Hridaya Narain Upadhyay was 05.09.1974.

11. The Basic Shiksha Adhikari, on the basis of these facts, has recorded a categorical finding that it appears that there were two teachers in two different primary schools by the name of Hridaya Narain Upadhyay, who were different men. Recording the aforesaid finding, the Basic Shiksha Adhikari reinstated the petitioner.

12. It must be remarked here that it is but obvious that the part of the Tribunal's judgment that permits the Basic Shiksha Adhikari to issue a charge sheet to the petitioner and resume disciplinary proceedings against him from that stage and other incidental directions, loose all significance. The petitioner's reinstatement in terms of the Tribunal's order is in absolute terms with no further proceedings contemplated. This is also explicit from the terms of the reinstatement order dated 29.06.2010 passed by the Basic Shiksha Adhikari.

13. Now, the petitioner resumed his duties on 02.07.2010 and is discharging his duties ever since. On 21.01.2010, the Basic Shiksha Adhikari issued directions that the petitioner be paid salary as an untrained teacher. The petitioner points out that in accordance with the Government Order dated 15.05.1997, all teachers appointed to Primary Schools or Junior High Schools, under the control of the Basic Shiksha Parishad, who had been appointed under the Dying-in-Harness Rules as untrained teachers and had completed five years service on 30.04.1997 or had two years service left to superannuate, were exempted from training. Subsequently, by a Government Order dated 06.08.1999, it was provided that the teachers of the aforesaid category (untrained teachers appointed under the Dying-in-Harness Rules), who had completed five years continuous service as on 31.12.1999, or who had two years left to retire, were granted exemption from training. Thus, exemption from training was provided twice. A Government Order dated 01.02.2000 came to be issued providing that the teachers appointed under Dying-in-Harness Rules, after they had put in five years service, be made to undergo training. It further provides that in case due to any unforeseen eventuality training is not possible, upon completion of five years continuous service, an assistant teacher of this class be given benefit of a trained teacher's pay scale, and, thereafter, arrangement be made to ensure training.

14. It is also pointed out by the learned Counsel for the petitioner that upon enforcement of the Government Order dated 01.02.2000, untrained teachers, who were appointed under the Dying-in-Harness Rules and had completed five years continuous service, have been extended the benefit of a trained teacher's pay scale. He has drawn the Court's attention to a number of orders relating to such teachers, that have been annexed compendiously as Annexure no.8 to the writ petition. Learned Counsel has also invited the Court's attention to the fact that there were 215 teachers in the entire district of Jaunpur, who were untrained and appointed under the Dying-in-Harness Rules. The petitioner

was one of them. He has pointed out that by means of an order dated 18.04.2015, all these teachers have been asked to be relieved from their duties w.e.f. 27.04.2015 in order to undergo training at the DIET, Jaunpur w.e.f. 28.04.2015. The petitioner too was relieved and sent to training. It is stated that the petitioner has successfully completed his training, like other candidates. The petitioner, however, has not been granted a trained teacher's pay scale. He addressed various representations in the matter, including the representations dated 08.07.2015 and 03.02.2016, both to the Basic Shiksha Adhikari, but to no avail.

15. When those efforts went in vain, he approached this Court by means of Writ - A No.27008 of 2016. This Court disposed of the said petition, directing the Basic Shiksha Adhikari to consider the grievance of the petitioner and pass appropriate orders in accordance with law, preferably within four months of the date of receipt of a copy of the order dated 04.07.2016 passed by the Court in the writ petition, aforesaid. It is in consequence of the aforesaid directions that the impugned order dated 05.07.2017 has come to be made by the Basic Shiksha Adhikari, Jaunpur. The Basic Shiksha Adhikari has rejected the petitioner's representation on ground that the petitioner's services are to be reckoned with effect from 02.07.2010, when he was reinstated in service, in compliance with the order dated 29.06.2010. It has been urged that the petitioner's case is not one where he is qualified to receive benefit of the Government order dated 01.02.2000, or a further Government Order dated 24.04.2002.

16. Learned Counsel for the petitioner submits that the impugned order is manifestly illegal, inasmuch as it is one made in violation of the State Administrative Tribunal's judgment and order dated 05.07.2017, which ordered reinstatement in service with consequential benefits, except back-wages, on the final outcome of inquiry. He submits that once the respondents have held that the petitioner is in no way guilty of any charge while reinstating him, there is no further inquiry, the outcome of which would delay consequential service benefits. He submits that the consequential service benefits, except back-wages would include the benefit of continuity of service. The petitioner had joined service along with 215 other untrained teachers in the year 1991. Once he is notionally taken to have been in continuous service, he cannot be deprived of the benefits of the Government Order dated 01.02.2000. It is also pointed out that the petitioner has retired pendente lite on 31.03.2018. He would, therefore, be entitled to revision of his emoluments as a trained teacher, including salary, G.P.F. and pension. He would also be entitled to arrears under all these heads.

17. Mr. Mrigraj Singh, learned Counsel appearing on behalf of the Basic Shiksha Adhikari and the Accounts Officer in the Basic Shiksha Adhikari's office, refuted the aforesaid submissions. It is, however, not his case that the petitioner secured employment by submitting false documents. Rather, he has drawn the Court's attention to paragraph no.12 of the counter affidavit, where it is clearly admitted that the petitioner's father, the late Hridaya Narain Upadhyay was a man different from the other Hridaya Narain Upadhyay, whose wife had been paid Providend Fund. It is mentioned in that paragraph that the said Hridaya Narain Upadhyay worked at the Primary School,

Barpar, whereas the petitioner's father worked at the Primary School, Bhikharipur. It is also admitted that the petitioner's father died on 05.09.1974. The aforesaid assertions make it clear that there is nothing left to be inquired against the petitioner. There could indeed be no further disciplinary proceedings taken against the petitioner by serving him with a charge sheet as directed by the Tribunal. That part of the Tribunal's order has gone out of context.

18. Mr. Mrigraj Singh, however, submits that the petitioner joined on 02.07.2010 and would complete five years service on 02.07.2015. He has further been provided the pay scale of a trained teacher under the Government Orders, effective from 02.07.2015. He has drawn the Court's attention to paragraph no.15 of the counter affidavit in this regard. He disputes the petitioner's case that he is entitled, like the other untrained teachers appointed along with him on 29.10.1991, to a grant of trained teacher's pay scale on completion of five years' service reckoned from the year 1991, because in his case service has to be reckoned from 02.07.2010.

19. This Court has carefully perused the record and considered the rival submissions advanced on behalf of both sides. It is admitted for a fact that the petitioner was never at fault in securing his employment under the Dying-in-Harness Rules. His termination from service came about on account of the respondents confounding his father's name with that of another teacher, who was his father's namesake. This fact was not detected or disclosed by the respondents until judgment by the State Public Tribunal. It is on that account that the Tribunal found the order of termination to be procedurally flawed and permitted the respondents to issue a charge sheet to the petitioner, resuming disciplinary proceedings from that stage. The Tribunal granted all consequential benefits to the petitioner while ordering his reinstatement, but the consequential benefits granted, were made available contingent on the final outcome of the inquiry/ disciplinary proceedings.

20. Now, it is apparent that it was to say the least, negligence on the respondents' part to have confounded the name of the petitioner's father with another teacher's and on that basis, subjected him to all this harassment. It is equally true that once the respondents admit the fact that it was for their mistake in confounding the petitioner's father for another teacher, his namesake, that the petitioner's services were terminated, the judgment of the State Public Service Tribunal would now apply in terms as if the petitioner had been finally exonerated in the inquiry. The direction to grant all consequential benefits to the petitioner would apply except back-wages, that were denied. It is also clear that consequential benefits include continuity of service. The relief of continuity is no mere notion or inconsequential fiction. It is to apply with all its logical incidents. The effect would be that the petitioner would be deemed in service all these years, but for his entitlement to receive back-wages. Full effect, therefore, has to be given to the benefit of continuity in service granted to the petitioner, that is an integral part of the Tribunal's direction to grant consequential benefits. The petitioner, therefore, cannot be treated to be appointed w.e.f. 02.07.2010 in compliance with the order of the Basic Shiksha Adhikari dated 29.06.2010. The order of the Basic Shiksha Adhikari dated 29.06.2010 is in no way an order of appointment. It is an order to reinstate the

petitioner in continuation of his original appointment, made way back on 29.10.1991, in pursuance whereto he had joined on 01.11.1991. The disassociation of the petitioner between 18.01.1992 until the petitioner's reinstatement in service on 02.07.2010 has to be treated as effaced.

21. This being the effect of the Tribunal's order and the consequential order of reinstatement, the petitioner would certainly be entitled to the benefit of the Government Order dated 01.02.2000, reckoning his appointment as an untrained teacher under the Dying-in-Harness Rules in terms of the order dated 29.10.1991. The petitioner would be entitled to a trained teacher's pay scale on the basis of his appointment dated 29.10.1991, counting the period of five years with effect from the petitioner's joining duties on 01.11.1991.

22. In the result, this writ petition succeeds and **allowed with costs**. The impugned order dated 05.07.2017 passed by the Basic Shiksha Adhikari, Jaunpur (Annexure no.14 to the writ petition) is hereby **quashed**. A mandamus is issued to the respondents to forthwith redetermine all emoluments payable to the petitioner, including salary, pension, Provident Fund and other entitlements, on the basis that the petitioner is entitled to the trained teacher's pay scale on completion of five years service in terms of the Government Order dated 01.02.2000, reckoned with effect from the petitioner's appointment, dated 29.10.1991, pursuant whereto he joined on 01.11.1991. The Basic Shiksha Adhikari, Jaunpur and the Accounts Officer in the office of the Basic Shiksha Adhikari, Jaunpur are ordered to redetermine the entire emoluments payable to the petitioner within two months of the date of receipt of a copy of this order and to pay all arrears on account of this revision within a period of two months, thereafter.

(2021)01ILR A949
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2021

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Writ-A No. 52451 of 2009

Virendra Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sunil Kumar Srivastava, Sri Sudhir Kumar Chandraul, Ms.Vijeta Kushwaha

Counsel for the Respondents:
C.S.C.

Civil Law-Petitioner duly appointed in March' 2006 and his salary withheld from March,2006 without specifying any reason-later impugned order passed stating that incumbent who made appointment had undergone some disciplinary proceeding for irregularity committed in appointment of class III and IV employees-sanctioned post and due advertisement not denied-impugned order illegal.

W.P. allowed. (E-7)

List of Cases cited: -

1.Writ-A No. 66584 of 2008 (Chandra Deo Singh & ors. Vs St. of U.P. & ors.)

2.Writ-A No.3730 of 2009 (Ajai Raj Singh & ors. Vs St. of U.P. & ors.)

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. The instant writ petition under Article 226 of the Constitution of India has been filed, inter-alia, praying for the following reliefs:

i) Issue a writ order or direction in the nature of certiorari quashing the order dated 22.06.2009 (Annexure No.10) to the writ petition passed by Director Higher Education U.P. Lucknow, respondent no.2.

ii) Issue a writ order or direction in the nature of mandamus commanding the respondents to pay the salary to petitioner with arrears w.e.f. 01.03.2006 and month to month as and when falls due in accordance with law.

iii) Issue a writ order or direction in the nature of mandamus commanding the respondents not to interfere in peaceful functioning as Class IV employee (peon).

2. The facts, in brief, are that the State Government vide a Government Order dated 14th September, 2005 created 145 posts of Class-III and Class-IV in the Government Degree/ Post Graduate Colleges. Four posts each in the category of Lab Attendant and Lab Assistant were created in the College. The Director of Education (Higher), U.P., Allahabad (hereinafter referred to as the "Director") vide order dated 21st November, 2005 directed the Principal of all the Government Degree Colleges to initiate the recruitment process for filling up the vacancies of Class-III and Class-IV posts in their colleges. It is stated that It is claimed that the Committee of Management of the College issued an advertisement was published in daily newspaper "Dainik Jagran" on 17.12.2005 inviting vacancy of four posts in the category of Lab Attendant (Class IV) in Goswami Tulsi Das Rajkiya Snatakottar Mahavidyalaya Karvi, Chittrakoot (hereinafter referred to as the "Institution") calling applications from the eligible candidates against the four posts of Lab Attendant (Class-IV posts). The petitioner made application in pursuance of the said advertisement and they were found suitable by the Selection Committee and, accordingly, the Principal of the Institution issued appointment letters in favour of the petitioner on 28th February, 2006, in pursuance thereof the petitioner joined on 1st March, 2006 on the post of Peon and since then he is working in the Institution. It is alleged that despite the fact that the petitioner has been continuously working and discharging his duties, the payment of salary was withheld from March, 2006 without specifying any reason. Despite repeated representations having been filed by the petitioner before the respondent-authorities, the payment of salary of the petitioner continued to be withheld.

3. Aggrieved with the said action of the respondent-authorities, the petitioner filed ***Civil Misc. Writ Petition No.57104 of 2008 (Virendra Kumar Singh vs. State of U.P. and others)*** before this Court and vide order dated 12.11.2008, the writ petition has been disposed off. The order dated 12.11.2008 is quoted below:

"Contention of petitioner that he has been validly appointed, but no step is being undertaken for ensuring his remuneration since February, 2006.

Grievance raised by the petitioner can be very well looked into, examined and remedied by Director of Higher Education, U.P. Allahabad as such liberty is given to petitioner to represent his claim before the aforesaid authority within three weeks from today alongwith certified copy of this order. In this event of any such representation being made, the same shall be looked into, considered and appropriate decision be

taken, in accordance with law, within next eight weeks, and the decision so taken shall be communicated to the petitioner.

In terms of above observation, present writ petition is disposed of."

4. In compliance of the above order of this Court, the Director vide impugned order dated 22.06.2009 has rejected the claim of the petitioner, inter-alia, on the ground that the incumbent, who had made appointment of the petitioner, had under gone some disciplinary proceeding, which is said to have been taken against him for irregularity committed in the appointment of Class III & IV employees and since there are procedural irregularities in the appointment of the petitioner and, accordingly, the appointment of the petitioner has been declared illegal.

5. Submission of learned counsel for the petitioner is that the petitioner has been continuously working and discharging his duties on the post of peon w.e.f. 28.02.2006, but the payment of salary of the petitioner was withheld from March, 2006 without specifying any reason. Further submission is that no order has been passed by the respondents either stopping the salary of the petitioner or canceling his appointment in any manner, whatsoever, therefore, in absence of any order, the action of the respondents in abruptly stopping the salary of the petitioner is wholly illegal, arbitrary and unjustified. Further submission is that under the relevant Rules, the process of selection has been undertaken by the competent authority in pursuance of the relevant government order creating the additional post in the Institution. Thus, there existed no cogent reason for withholding the salary of the petitioner. Further submission is that in the impugned order, there is nothing about any illegality or irregularity in the appointment of the petitioner and in view thereof, there is no justification to refuse the claim of the petitioner as has been done by the impugned order, hence, the impugned order is wholly illegal and erroneous. Further submission is that in the impugned order, the Director has not pointed out any procedural irregularity but has referred the punishment awarded to Sri Surya Bali Dwivedi, the then officiating Principal of the College, which has no relation with the appointment of the petitioner made against duly sanctioned and vacant Class-IV posts. Further the impugned order does not disclose any illegality, infirmity or irregularity in the selection. Moreover, the version of the petitioner has not been considered. The State Government itself has taken disciplinary action against the then Director, who has passed the impugned order. Submission further is that in one of the similar matters in ***Writ-A No. 66584 of 2008 (Chandra Deo Singh and others v. State of U.P. and others), decided on 09th September, 2014 and Writ-A No.3730 of 2009 (Ajai Raj Singh and others vs. State of U.P. and others) decided on 03.04.2015,*** this Court has set aside the order of the Director and has remanded the matter back for reconsideration.

6. I have heard Ms. Vijeta Kushwaha, holding brief of Sri S.K. Chadraul, learned counsel for the petitioner, learned Standing Counsel for the State and perused the material available on record.

7. From the order of the Director, it appears that the appointment of the petitioner was made during the tenure of officiating Principal Sri Surya Bali Dwivedi, against whom a disciplinary action was taken. In the order, it has not

been denied that there were sanctioned posts and they were advertised in the widely circulated newspaper "Dainik Jagran". The fact that the posts were sanctioned and the petitioner possessed the essential qualification, has not been adverted to by the Director.

8. In view of above observations, I am of the opinion that the order of the Director dated 22nd June, 2009, as is impugned in the present writ petition, is unsustainable and it is hereby set aside. The matter is remitted to the Director to pass a fresh order after affording opportunity to the petitioner. The petitioner is at liberty to file a fresh representation along with supporting documents within three weeks from the date of receipt of a copy of this order. The Director shall consider the representation and the material filed by the petitioner and pass the appropriate order in accordance with law expeditiously.

9. Accordingly, the writ petitions is ***allowed.*** However, on the facts and in the circumstances of the case, there will be no order as to costs.

(2021)01ILR A952
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2020

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Writ-A No. 64258 of 2008

Smt. Neelam Singh & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.N. Singh, Sri Manish Yadav, Sri Prashant Kumar Tripathi, Sri Rajeev Misra, Sri Virendra Prakash

Counsel for the Respondents:
A.S.G.I., Sri A.K. Mishra, Ms. Archana Singh, Sri Vipin Sinha

Civil Law-Husband of Petitioner no.1 was a permanent employee of SBI-died during his service-application for compassionate appointment made-rejected stating presently no scheme for appointment on dying in harness exist-only scheme for payment of ex-gratia-2005 scheme provides only for ex-gratia payment-superseded by scheme of 2014 which revived the scheme providing compassionate appointment-mandamus issued to consider claim for compassionate appointment.

W.P. disposed. (E-7)

List of Cases cited: -

1. Canara Bank Vs M. Mahesh Kumar, arising out of Civil Appeal No.260 of 2008

2. Sushma Gosain & ors. Vs U.O.I. & ors., (1989) 4 SCC 468

3. Canara Bank Vs M. Mahesh Kumar, arising out of Civil Appeal No.260 of 2008

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. By means of this writ petition under Article 226 of the Constitution of India, the petitioners have prayed for a writ of mandamus directing the respondent nos. 2 and 3 to appoint the petitioner no.2 on a suitable post in Class-III or Class-IV.

2. Briefly stated facts of the present case, as noticed by this Court, are that the husband of the petitioner no.1, namely, late Chandra Bhushan Singh was a permanent employee of State Bank of India, who was posted as Messenger in Civil Lines Branch, Allahabad. On 06.12.2007, Chandra Bhushan died during his service and left behind him two sons, namely, Abhishek

Singh-petitioner no.2 and Avinash Singh, his widow wife-petitioner no.1-Smt. Neelam Singh and his old ailing parents. After the death of Chandra Bhushan Singh, the petitioners have made an application for appointment on compassionate ground before the respondent no.2-Chief Manager Human Resources (Network-III) Local Head Office Moti Mahal Marg, Lucknow in favour of petitioner no. 2, namely, Abhishek Singh, son of late Chandra Bhushan Singh. Vide letter dated 06.02.2008, the petitioners were informed by the respondent no.2 that presently there is no provision for appointment under the Dying-in-Harness Scheme, therefore, the appointment of the petitioner can not be made, hence, this writ petition.

3. Learned counsel for the petitioners has submitted that large number of dependents of Class III & IV, who died during service period, were given appointments by the respondents in various branches of the State Bank of India, but in the case of the petitioners, he has not been given appointment on compassionate ground, which is illegal. He has further submitted that only Rs.1,60,000/- has been paid as fund, which is too meager. He has further submitted that petitioners have no other source of livelihood and if the appointment of the petitioner no.2 is denied, the petitioners and their family member will suffer. The petitioner no.2 fulfills all minimum qualifications for being appointed on any Class-III/Class-IV posts, therefore, the petitioner no. 2 is entitled to be appointed as his younger brother and mother have no objection.

4. Learned counsel for the petitioners has further submitted that the Ministry of Finance has floated a Scheme for compassionate appointment in Public Sector Banks vide letter dated 07.08.2014. Subsequently, the Ministry of Finance, Government of India issued a letter dated 05.12.2014 in response to the request made by the State Bank of India, whereby it was decided that all public sector banks can have both options i.e. compassionate appointment or payment of lump-sum ex-gratia amount. He has further submitted that on the date of death of father of petitioner no.2 and on the date of making the application, the compassionate appointment scheme was in force and, therefore, the petitioner no.2 is entitled to be considered for compassionate appointment under the said scheme. Learned counsel for the petitioner has, lastly, submitted that after the aforesaid policy decision taken by the Government of India, there does not exist any impediment in the compassionate appointment, hence, the case of the petitioner is fully covered under the Scheme for compassionate appointment in Public Sector Bank (PSB). In support of his submission, learned counsel for the petitioners has relied upon the judgment of Hon'ble Apex Court in the case of ***Canara Bank vs. M. Mahesh Kumar***, arising out of Civil Appeal No.260 of 2008 and other connected matters.

5. On the other hand, countering the above said submissions Ms. Archana Singh, learned counsel for the respondent-Bank has vehemently opposed the writ petition and submitted that a new Scheme i.e. SBI Scheme for Payment of Ex-gratia Lumpsum Amount was inducted on 04.08.2005 and under the aforesaid Scheme, the provisions giving compassionate appointment was abolished and its place, provisions of making payment of ex-gratia lumpsum amount was inducted.

6. Learned counsel for the respondent-Bank has relied upon the judgment of Hon'ble Supreme Court in the case of ***State Bank of India and another vs. Raj Kumar*** passed in Civil Appeal No.1641 of 2010 decided on 08.02.2010, wherein the Apex Court directed the appellant-Bank to process such application under the new Scheme. Learned counsel for the respondent-Bank has further submitted that the deceased employee died much after enforcement of new scheme inducted on 04.08.2005 in which the provisions of giving compassionate appointment was abolished and in its place provisions of making payment of ex-gratia lumpsum amount was inducted, hence, the writ petition seeking compassionate appointment may be dismissed.

7. I have heard Sri Manish Kumar Tripathi, the learned counsel for the petitioner, Ms. Archana Singh, learned counsel for the respondent-Bank and perused the material available on record.

8. Undisputedly, the father of petitioner no.2 died on 6.12.2007 while he was serving on the post of Messenger in Civil Lines Branch, Allahabad and the petitioners have applied for compassionate appointment as per "Dying in Harness Scheme", but the respondent-Bank informed vide its letter dated 06.02.2008 that the claim for compassionate appointment cannot be provided in the light of aforesaid Scheme i.e. SBI Scheme for Payment of Ex-Gratia Lumpsum Amount and, thus, the petitioners were only entitled for payment of ex-gratia lumpsum amount as per new Scheme.

9. Normally, three basic requirements to claim appointment under any scheme for compassionate appointment are: (i) an application by a dependent family member of the deceased employee; (ii) fulfillment of the illegibility criteria prescribed under the scheme; and (iii) availability of posts, for making such appointment. If a scheme provides for automatic appointment to a specified family member, on the death of any employee, without any of the aforesaid requirements, it can be said that the scheme creates a right in favour of family member for appointment on the date of death of the employee. On the other hand, if a scheme provides that on the death of an employee, if a dependent family member is entitled to appointment merely on making of an application, whether any vacancy exists or not, and without the need to fulfill any eligibility criteria, then the scheme creates a right in favour of the applicant on making the application. Normal scheme contemplates compassionate appointment on an application by a dependent family member, subject to the applicant fulfilling the prescribed eligibility requirements.

10. In ***Sushma Gosain and others vs. Union of India and others, (1989) 4 SCC 468***, the law with regard to employment on compassionate ground for dependent of a deceased employee is well settled.

"9. We consider that it must be stated unequivocally that in all claims for appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case

pending for years. If there is no suitable post for appointment supernumerary post should be created to accommodate the applicant."

11. In the case of ***Canara Bank vs. M. Mahesh Kumar***, arising out of Civil Appeal No.260 of 2008 and other connected matters decided on 15.05.2015, the Court held as under:

"14. It is also pertinent to note that 2005 Scheme providing only for ex-gratia payment in lieu of compassionate appointment stands superseded by the Scheme of 2014 which has revived the scheme providing for compassionate appointment. As on date, now the scheme in force is to provide compassionate appointment. Under these circumstances, the appellant- bank is not justified in contending that the application for compassionate appointment of the respondent cannot be considered in view of passage of time."

12. The Hon'ble Apex Court in the aforesaid case, has also observed that the monetary benefit would not be replacement of the bread-earner, but that would undoubtedly bring some solace in the given situation.

13. It is also pertinent to note that 2005 Scheme provides only for ex-gratia payment in lieu of compassionate appointment, which stands superseded by the Scheme of 2014 which has revived the scheme providing for compassionate appointment. Thus, I find that after policy decision dated 05.04.2014 taken by Bank of India in respect of compassionate appointment, the case of the petitioners can be considered in light of the letter dated 05.04.2014 issued by Government of India.

14. In view of the aforesaid observations, mandamus is issued to the respondent-Bank to consider the claim of the petitioners within a period of three months from the date of presentation of copy of this order in light of the Scheme of compassionate appointment in Public Sector Bank w.e.f. 05.08.2014 issued vide its Letter No.F.No.18/2/2013-IR and letter dated 05.12.2014 issued by Government of India, Ministry of Finance, Department of Financial Services as well as judgment passed by Apex Court in the case of ***Canara Bank (supra).***

15. The writ petition stands disposed off.

16. There will be no order as to costs.

(2021)01ILR A955
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Criminal Revision No. 530 of 2014

Ashok Kumar Tyagi & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:
Sri S.S. Shukla, Sri Dharmendra Kumar Mishra

Counsel for the Opp. Parties:
A.G.A., Sri V.K. Agnihotri

A. Criminal Law – Rejection of final report submitted by investigating officer - Indian Penal Code 467, 468, 471, 420, 120-B; Code of Criminal Procedure: Section 190 - It is well settled law that Magistrate is not bound by the final report submitted by Investigating Officer, rather S. 190 Cr.P.C.

empowered the Magistrate to make the different view and proceed accordingly. There is no obligation on the Magistrate to accept the final report and if from the material on the case diary, he found that offence has been committed, the Magistrate can take cognizance u/s 190(1)(b) of Cr.P.C. (Para 12, 13)

Section 190 of Cr.P.C. empowered the Magistrate to take cognizance of any offence firstly upon receiving a complaint, secondly upon a police report and thirdly upon information received from any person other than a police officer or upon his own knowledge. The impugned order dated 13.1.2014 has been passed by learned Magistrate exercising his power u/s 190(1)(b) of Cr.P.C. (Para 9)

In the present case the learned Magistrate had taken cognizance after carefully perusing the case diary and after prima facie satisfaction that there is ample evidence against the accused persons for summoning them. The cognizance order has not been passed merely on the protest petition or any affidavit filed in support of it. The findings have been recorded by the learned Magistrate that after perusal of case diary and after prima facie satisfaction on the basis of material available in the case diary the cognizance has been taken. (Para 11, 12)

B. The Magistrate is empowered to take cognizance if the material on record makes out the case against the accused persons and 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. It is also laid down that while issuing the process the Magistrate is not required to record reasons. (Para 14)

The order passed by the learned Magistrate clearly indicates that he carefully examined the material and evidence collected during investigation which are part of the case diary and after prima-facie satisfaction had rejected the final report and taken cognizance under Section 190(1)(b). Cr.P.C. and as such there is no illegality or irregularity committed by learned Magistrate, while passing the order dated 13.1.2014. (Para 17)

C. Civil suit and criminal case can proceed simultaneously - 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. (Para 18)

Criminal Revision dismissed. (E-3)

Precedent followed:

1. Har Prasad & anr. Vs Ranveer Singh & anr., (2008) 11 SCC 431 (Para 31)

2. Jagdish Ram Vs St. of Raj. & anr., (2004) 4 SCC 432 (Para 14)

3. Vishnu Kumar Tiwari Vs St. of U.P., (2019) 8 SCC 27 (Para 15)

4. M/s India Carat Pvt. Ltd. Vs St. of Karn. & anr., (1989) 2 SCC 132 (Para 16)

5. P. Swaroopa Rani Vs M. Hari Narayana, (2008) (5) SCC 765 (Para 18)

Precedent distinguished:

1. Hari Ram & ors. Vs St. of U.P. & anr., 2016(2) JIC 513 (All.) (Para 10 (1))

2. Rishipal & ors. Vs St. of U.P. & anr., 2019 (2) JIC 325 (All) (Para 10 (2))

3. Inder Mohan Goswami & anr. Vs St. of Uttar. & ors. , 2008 (1) JIC 737 (SC) (Para 10 (3))

Present criminal revision assails order dated 13.01.2014, passed by Additional Chief Judicial Magistrate, Ghaziabad.

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. This criminal revision has been filed against the order dated 13.01.2014 passed by Additional Chief Judicial Magistrate, Court No.5, Ghaziabad in

Criminal Case No.373 of 2010 (Baleshwar Dayal Vs. Ashok and others), under Sections 420, 467, 468, 471 I.P.C., P.S. Kavi Nagar, District Ghaziabad, by which final report no.439 of 2011 dated 29.6.2011 was rejected and the revisionist no.1 Ashok Kumar Tyagi, revisionist no.2 Smt. Reena Tyagi and Ram Nath Tyagi were summoned.

2. The brief facts of the case are that the opposite party no.2 Baleshwar Dayal Tyagi is residing in Canada for last 32 years having nationality of Canada. The opposite party no.2 had purchased a plot on 28.6.1991 bearing no.R-9/4 area 1266.66 square yard situated in Raj Nagar Colony, Ghaziabad. Since the opposite party no.2 was residing at Canada, he executed a power of attorney and will deed on 1.1.1991 in favour of revisionist no.1, who is brother-in-law (Sala) of opposite party no.2, to look after his property. Since the revisionist no.1 is close relative of opposite party no.2 as such the opposite party no.2 had full faith on him but in the year 2007 opposite party no.2 knew that revisionist no.1 is going to misappropriate his property and as such he cancelled the power of attorney as well as the will deed on 6.3.2007 which was earlier executed in favour of revisionist no.1. The information regarding cancellation of power of attorney and will deed was sent on 16.3.2007 through U.P.C. as well as by registered post and revisionist no.1 was also informed on telephone by the opposite party no.2. Opposite party no.2 had also informed to the Sub Registrar, Ghaziabad as well as Secretary, Ghaziabad Development Authority on 19.3.2007 to the effect that he had already cancelled the power of attorney which was executed in favour of revisionist no.1 and now revisionist no.1 has no authority to sell out his property through power of attorney. In spite of cancellation of power of attorney the revisionist no.1 executed a sale deed in favour of M/s Karb Constructions Pvt. Ltd. on 20.3.2007 in which Ram Nath Tyagi, father-in-law of revisionist no.1 was the director. The opposite party no.2 had lodged a F.I.R. against revisionist no.1 Ashok Kumar Tyagi as well as against Ram Nath Tyagi (father-in-law of the revisionist no.1) on 31.1.2008 and the case was registered as Case Crime No.96 of 2008, under Sections 467, 468, 471, 420 I.P.C. in P.S. Kavi Nagar, District Ghaziabad.

3. During investigation the opposite party no.2 alleged that his bank account was fraudulently re-opened by the revisionist no.2 who is wife of revisionist no.1 and as such the revisionist no.2 was also implicated as accused in the aforesaid case. The Investigating Officer after investigating the matter had submitted the final report on 30.5.2009 which was rejected by the court below on the objections of opposite party no.2 and direction was issued for re-investigation. The Investigating Officer again had submitted the final report on 29.6.2011 on the ground that no offence was found against the accused persons and disputes between the parties are of civil nature and already a civil suit being O.S. No.162 of 2008 is pending between the parties. Aggrieved with the final report dated 29.6.2011 the opposite party no.2 had filed protest petition on 18.1.2012 stating therein that power of attorney was cancelled much prior to execution of sale deed and the accused persons have committed fraud to misappropriate the property of the opposite party no.2. There are ample evidence against the accused persons and they are guilty to commit offence under Sections 467, 468, 471, 420, 465, 466 I.P.C. The

learned Magistrate vide order dated 13.1.2014 had accepted the protest petition and the final report no.439 of 2011 dated 29.6.2011 was rejected and had taken cognizance under Section 190(1)(b) of Cr.P.C. and summoned the accused persons Ashok Kumar Tyagi, Ram Nath Tyagi and Smt. Reena Tyagi under Sections 420, 467, 468, 471, 120-B I.P.C. The order of learned Magistrate dated 13.1.2014 is challenged by Ashok Kumar Tyagi and Smt. Reena Tyagi through present criminal revision.

4. Heard Sri S.S. Shukla, learned counsel for the revisionists, Sri Raj Kamal Srivastava, learned A.G.A. for the State/opposite party no.1, Sri V.K. Agnihotry, learned counsel for opposite party no.2 and perused the record.

5. It is submitted by learned counsel for the revisionists that order passed by court below is against the material evidence on record collected by Investigating Officer during investigation. It is further submitted that Investigating Officer after due investigation had submitted final report that no offence is made out against the revisionists but the court below has committed jurisdictional error by exercising of power under Section 190(1)(b) of Cr.P.C. It is further submitted that the court below has failed to consider that there is civil litigation between the parties and the suit being O.S. No.162 of 2008 for cancellation of agreement to sale deed is pending in the court of Civil Judge (S.D.) and the final report was rightly submitted that no offence is made out against the revisionists.

6. On the other hand, learned A.G.A. appearing for the State has submitted that the order impugned has been passed by learned Magistrate on the basis of materials which are available on record and there is no illegality in any manner and the criminal revision is liable to be dismissed with costs.

7. Learned counsel appearing for opposite party no.2 has submitted that power of attorney had already been cancelled by the opposite party no.2 and the revisionist no.1 has no right or authority under the law to execute the sale deed in favour of his father-in-law. The revisionist no.2 who is wife of revisionist no.1 had operated the dead bank account of opposite party no.2 after re-opening the same and all the accused persons manipulated the papers only for the purposes to grab the property of the opposite party no.2. It is further submitted that there are sufficient evidence in the case diary to submit the charge-sheet against the accused persons but the Investigating Officer in collusion with accused persons had submitted the final report in favour of accused persons. It is further submitted by learned counsel for opposite party no.2 that learned Magistrate found that there are enough material against the accused persons for committing offence, has rightly summoned them by the impugned order. The order dated 13.1.2014 was passed by the learned Magistrate relying on the evidence which were available in the case diary. After prima-facie satisfaction it was concluded by the learned Magistrate that the accused persons had committed offence and as such they have rightly been summoned, and the criminal revision has no force and is liable to be dismissed.

8. The powers of Magistrate for taking cognizance is provided in Chapter XIV of Cr.P.C. and Section 190 is relevant for the purposes of controversy involved in the present case which reproduced herein below:-

"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."

9. Section 190 of Cr.P.C. empowered the Magistrate to take cognizance of any offence firstly upon receiving a complaint, secondly upon a police report and thirdly upon information received from any person other than a police officer or upon his own knowledge. The impugned order dated 13.1.2014 has been passed by learned Magistrate exercising his power under Section 190(1)(b) of Cr.P.C.

10. Learned counsel for revisionists had relied on following case laws:-

(1) 2016 (2) JIC 513 (All) Hari Ram and others Vs. State of U.P. and another.

(2) 2019 (2) JIC 325 (All) Rishipal and others Vs. State of U.P. and another.

(3) 2008 (1) JIC 737 (SC) Inder Mohan Goswami and another Vs. State of Uttaranchal and others.

11. It is submitted by learned counsel for revisionists on relying the aforesaid judgments that the Magistrate has erred in relying the facts stated in protest petition as well as affidavits filed along with protest petition. It is further submitted that the impugned order is against the law as the Magistrate has not referred to any material collected by Investigating Officer and the final report was rejected in the light of affidavits placed before him along with protest petition.

12. The facts of the present case are entirely different as in the present case the learned Magistrate had taken cognizance after carefully perusing the case diary and after prima-facie satisfaction that there are ample evidence against the accused persons for summoning them. The cognizance order has not been passed merely on the protest petition or any affidavit filed in support of it. The findings have been recorded by the learned Magistrate that after perusal of case diary and after prima-facie satisfaction on the basis of material available in the case diary the cognizance has been taken. It is well settled law that Magistrate is not bound by the final report submitted by Investigating Officer, rather Section 190 Cr.P.C. empowered the Magistrate to make the different view and proceed accordingly.

13. Hon'ble Apex Court in the case of ***Har Prasad and another Vs. Ranveer Singh and another*** reported in ***(2008) 11 SCC 431*** has laid down the law that there is no obligation on the Magistrate to accept the final report and if from the material on the case diary he found that offence has been committed, the Magistrate can take cognizance under Section 190(1)(b) of Cr.P.C. The paragraphs 7 & 8 are relevant for the purpose and are quoted herein below:-

"7. Reference may be made to a judgment of this Court in Abhinandan Jha and Ors. v. Dinesh Mishra where it was held as follows: (AIR pp. 120-23, paras 8-9, 12-13 & 17

"8. It is now only necessary to refer to Section 190, occurring in Chapter XV, relating to jurisdiction of Criminal courts in inquiries and trials. That section is to be found under the heading 'Conditions requisite for initiation of proceedings' and sub-section (1) is as follows:

'190. Cognizance of offences by Magistrates.- (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police-officer;

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.'

9. From the foregoing sections, occurring in Chapter XIV, it will be seen that very elaborate provisions have been made for securing that an investigation does take place into a reported offence and the investigation is carried out within the limits of the law, without causing any harassment to the accused and is also completed without unnecessary or undue delay. But the point to be noted is that the manner and method of conducting the investigation, are left entirely to the police, and the Magistrate, so far as we can see, has no power under any of these provisions, to interfere with the same. If, on investigation, it appears to the officer, in-charge of a police station, or to the officer making an investigation, that there is no sufficient evidence or reasonable grounds of suspicion justifying the forwarding of an accused to a Magistrate, Section 169 says that the officer shall release the accused, if in custody, on his executing a bond to appear before the Magistrate. Similarly, if on the other hand, it appears to the officer, in-charge of a police station, or to the officer making the investigation, under Chapter XIV, that there is sufficient evidence or reasonable ground to justify the forwarding of an accused to a Magistrate, such an officer is required, under Section 170, to forward the accused to a Magistrate; or, if the offence is bailable to take security from him for his appearance before such Magistrate. But, whether a case comes under Section 169, or under Section 170 of the Code, on the completion of the investigation, the police officer has to submit a report to the Magistrate, under Section 173, in the manner indicated therein, containing the various details. The question as to whether the Magistrate has got power to direct the police to file a charge - sheet, on receipt of a report under Section 173 really depends upon the nature of the jurisdiction exercised by a Magistrate, on receiving a report.

12. Though it may be that a report submitted by the police may have to be dealt with judicially, by a Magistrate, and although the Magistrate may have certain supervisory powers, nevertheless, we are not inclined to agree with the further view that from these considerations alone it can be said that when the police submit a report that no case has been made out for sending up an accused for trial, it is open to the Magistrate to direct the police to file a charge-sheet. But, we may make it clear, that this is not to say that the Magistrate is absolutely powerless, because, as will be indicated later, it is

open to him to take cognizance of an offence and proceed, according to law. We do not also find any such power, under Section 173(3), as is sought to be inferred, in some of the decisions cited above. As we have indicated broadly the approach made by the various High Courts in coming to different conclusions, we do not think it necessary to refer to those decisions in detail.

13. It will be seen that the Code, as such, does not use the expression 'charge-sheet' or 'final report'. But it is understood, in the Police Manual containing Rules and Regulations, that a report by the police, filed under Section 170 of the Code, is referred to as a 'charge-sheet'. But in respect of the reports sent under Section 169 i.e. when there is no sufficient evidence to justify the forwarding of the accused to a Magistrate, it is termed variously, in different States, as either 'referred charge', 'final report', or 'summary'.

17. We have to approach the question, arising for consideration in this case, in the light of the circumstances pointed out above. We have already referred to the scheme of Chapter XIV, as well as the observations of this Court in Rishbud and Inder Singh that the formation of the opinion as to whether or not there is a case to place the accused on trial before a Magistrate, is left to the officer in-charge of the police station. There is no express power, so far as we can see, which gives jurisdiction to pass an order of the nature under attack nor can any such powers be implied. There is certainly no obligation, on the Magistrate, to accept the report, if he does not agree with the opinion formed by the police. Under those circumstances, if he still suspects that an offence has been committed, he is entitled, notwithstanding the opinion of the police, to take cognizance, under Section 190(1)(c) of the Code. That provision in our opinion, is obviously intended to secure that offences may not go unpunished and justice may be invoked even where persons individually aggrieved are unwilling or unable to prosecute, or the police, either wantonly or through bona fide error, fail to submit a report, setting out the facts constituting the offence. Therefore, a very wide power is conferred on the Magistrate to take cognizance of an offence, not only when he receives information about the commission of an offence from a third person, but also where he has knowledge or even suspicion that the offence has been committed. It is open to the Magistrate to take cognizance of the offence, under Section 190(1)(c), on the ground that, after having due regard to the final report and the police records placed before him, he has reason to suspect that an offence has been committed. Therefore, these circumstances will also clearly negative the power of a Magistrate to call for a charge-sheet from the police, when they have submitted a final report. The entire scheme of Chapter XIV clearly indicates that the formation of the opinion, as to whether or not there is a case to place the accused for trial, is that of the officer in- charge of the police station and that opinion determines whether the report is to be under Section 170, being a 'charge-sheet', or under Section 169, 'a final report'. It is no doubt open to the Magistrate, as we have already pointed out, to accept or disagree with the opinion of the police and, if he disagrees, he is entitled to adopt any one of the courses indicated by us. But he cannot direct the police to submit a charge-sheet, because, the submission of the report depends upon the opinion formed by the police, and not on the opinion of the Magistrate. The Magistrate cannot compel the police to

form a particular opinion, on the investigation, and to submit a report, according to such opinion. That will be really encroaching on the sphere of the police and compelling the police to form an opinion so as to accord with the decision of the Magistrate and send a report, either under Section 169, or under Section 170, depending upon the nature of the decision. Such a function has been left to the police, under the Code."

. As the factual position goes to show the order passed by the learned Magistrate was in consideration of the police report and was not relatable to the protest petition. That being so, the view of the High Court does not suffer from any infirmity and no interference is called for."

14. Similarly in the case of ***Jagdish Ram Vs. State of Rajasthan and another*** reported in ***(2004) 4 SCC 432,*** the Hon'ble Apex Court laid down the law that the Magistrate is empowerd to take cognizance if the material on record makes out the case against the accused persons and 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. It is also laid down that while issuing the process the Magistrate is not required to record reasons. The paragraph 10 is reproduced herein below:-

"10. The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet the entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. The order passed by the Magistrate taking cognizance is a well written order. The order not only refers to the statements recorded by the police during investigation which led to the filing of final report by the police and the statements of witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. 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 inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. (Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal).

15. The similar view has also been taken by the Hon'ble Apex Court in the case of ***Vishnu Kumar Tiwari Vs. State of U.P.*** reported in ***(2019) 8 SCC 27.*** The paragraph 43 is relevant which is reproduced herein below:-

"43. It is true that law mandates notice to the informant/complainant where the Magistrate contemplates accepting the final report. On receipt of notice, the

informant may address the court ventilating his objections to the final report. This he usually does in the form of the protest petition. In Mahabir Prasad Agarwala v. State, a learned Judge of the High Court of Orissa, took the view that a protest petition is in the nature of a complaint and should be examined in accordance with provisions of Chapter XVI of the Criminal Procedure Code. We, however, also noticed that in Qasim v. State, a learned Single Judge of the High Court of Judicature at Allahabad, inter alia, held as follows: (Qasim case, SCC Online All para 6)

"6. ... In Abhinandan Jha also what was observed was "it is not very clear as to whether the Magistrate has chosen to treat the protest petition as complaint." This observation would not mean that every protest petition must necessarily be treated as a complaint whether it satisfies the conditions of the complaint or not. A private complaint is to contain a complete list of witnesses to be examined. A further examination of complainant is made under Section 200 Cr.P.C. If the Magistrate did not treat the protest petition as a complaint, the protest petition not satisfying all the conditions of the complaint to his mind, it would not mean that the case has become a complaint case. In fact, in majority of cases when a final report is submitted, the Magistrate has to simply consider whether on the materials in the case diary no case is made out as to accept the final report or whether case diary discloses a prima facie case as to take cognizance. The protest petition in such situation simply serves the purpose of drawing Magistrate's attention to the materials in the case diary and invite a careful scrutiny and exercise of the mind by the Magistrate so it cannot be held that simply because there is a protest petition the case is to become a complaint case."

16. The similar view has also been taken by the Hon'ble Apex Court in the case of ***M/s India Carat Pvt. Ltd. Vs. State of Karnataka and another*** reported in ***(1989) 2 SCC 132.*** The paragraphs 15 & 16 are relevant which are reproduced herein below:-

"15. In the case of H.S. Bains (supra) one Gurnam Singh submitted a complaint to the Judicial Magistrate 1st Class, Chandigarh alleging that H.S. Bains trespassed into his house along with two others on 11-8-1979 at about 8 a.m. and threatened to kill him and his son. The Magistrate directed the police under Section 156(3) of the Code to make an investigation. After completing the investigation, the police submitted a report to the Magistrate under Section 173(2) of the Code stating that the case against the accused was not true and that the case may be dropped. The learned Magistrate disagreed with the conclusion of the police and took cognizance of the case under Sections 448 and 506 of the Indian Penal Code and directed the issue of process to the accused. Thereupon, the accused moved the High Court for quashing the proceedings before the Magistrate. As the High Court declined to interfere, the accused approached this Court by way of appeal by special leave. Various contentions were advanced on behalf of the accused and one of them was that the Magistrate was not competent to take cognizance of the case upon the police report since the report was to the effect that no offence had been committed by the accused. It was further urged that if the Magistrate was not satisfied with the police report, there were only two courses open to him, viz. either to order a further investigation of the case by the police or to take cognizance of the case himself as if

upon a complaint and record the statements of the complainant and his witnesses under Section 200 of the Code and then issue process if he was satisfied that the case should be proceeded with. Repelling those contentions this Court held as follows:

"The Magistrate is not bound by the conclusions arrived at by the police even as he is not bound by the conclusions arrived at by the complainant in a complaint. If a complainant states the relevant facts in his complaint and alleges that the accused is guilty of an offence under Section 307 Indian Penal Code the magistrate is not bound by the conclusion of the complainant. He may think that the facts disclose an offence under Section 324 Indian Penal Code only and he may take congnizance of an offence under Section 324 instead of Section 307. Similarly if a police report mentions that half a dozen persons examined by them claim to be eye witnesses to a murder but that for various reasons the witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police."

16. The position is, therefore, now well settled that upon receipt of a police report under Section 173 (2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Section 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(b) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him."

17. The Magistrate is not bound to the final report submitted by Investigating Officer. The Magistrate can have his own opinion and if after prima-facie satisfaction he finds that there are sufficient material and evidence collected by the Investigating Officer during investigation, he can reject the final report and can issue process against the accused persons. The order passed by the learned Magistrate clearly indicates that he carefully examined the material and evidence collected during investigation which are part of the case diary and after prima-facie satisfaction had rejected the final report and taken

cognizance under Section 190(1)(b) Cr.P.C. and as such there is no illegality or irregularity committed by learned Magistrate while passing the order dated 13.1.2014.

18. The next submission of learned counsel for the revisionists is that the dispute is of civil nature and civil suit is still pending for cancellation of sale deed and as such criminal case can not proceed and the court below has exceeded its jurisdiction to summon the revisionists in a criminal case. It is well settled law settled by the Hon'ble Apex Court in the case of ***P. Swaroopa Rani Vs. M. Hari Narayana*** reported in ***2008 (5) SCC 765*** that civil suit and criminal case can proceed simultaneously. The relevant paragraphs 13 and 19 are quoted herein below.

"13. It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case. [See M.S. Sheriff v. State of Madras AIR 1954 SC 397, Iqbal Singh Marwah v. Meenakshi Marwah (2005) 4 SCC 370 and Institute of Chartered Accountants of India v. Assn. of Chartered Certified Accountants (2005) 12 SCC 226].

19. It goes without saying that the respondent shall be at liberty to take recourse to such a remedy which is available to him in law. We have interfered with the impugned order only because in law simultaneous proceedings of a civil and a criminal case is permissible."

19. In view of aforesaid discussions, there is no illegality or irregularity in the order passed by learned Magistrate dated 13.1.2014 by which the final report was rejected and the revisionists were summoned to face the trial. The revisionists have thus failed to point out any infirmity, illegality, irregularity, impropriety or incorrectness in the order and the present criminal revision lacks merits and deserves to be dismissed.

20. Accordingly, the criminal revision is dismissed. No order as to costs.

(2021)01ILR A965
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Criminal Revision No. 1611 of 2020

Lalaram ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Akansha Verma, Sri Deepak Kumar Verma, Sri Siya Ram Verma

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

A. Criminal Law – Discretion of magistrate u/s 156(3) CrPC - Code of Criminal Procedure: Section 156(3), 173(2), 190, 200, 202 (1), 397/401 - 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 u/s 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. (Para 12(i), 27)

Code of Criminal procedure 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. The duties of the police and their power to investigate are enumerated in Chapter XII of the Code (Ss. 154, 156 CrPC), under caption "information to the police and their powers to investigate." Cognizance and procedure of complaint case is provided under Chapter XIV and XV, respectively (Ss. 190, 200, 202 and 203 Cr.P.C.) (Para 14, 15, 16, 40)

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. (Para 17, 40)

Where the Magistrate receives a complaint or an application u/s 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 u/s 190, are that he may either take cognizance u/s 190 or may forward the complaint to the police u/s 156(3) Cr.P.C., for investigation by the police. Before it can be said that any magistrate has taken cognizance of any offence under Section 190(1)(a) CrPC, 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. (Para 18, 21, 22, 26)

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. (Para 19, 23)

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. A Magistrate need not order any such investigation if he proposes to take cognizance of the offence. (Para 24)

B. 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. (Para 12(ii), 28, 35)

The Magistrate may, 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, but in 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 (infra) may fall u/s 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. (Para 32, 34)

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. (Para 38)

C. Distinction in the power to order police investigation u/s 156(3) and u/s 202(1) of the Cr.P.C. 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 u/s 156(3) could be invoked by the Magistrate before he takes cognizance of the offence u/s 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 S.156(3). On the other hand, it was observed that S.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 u/s 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 u/s 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. (Para 12(iii), 37, 39)

D. The order passed by the Magistrate in the present case is not maintainable as perusal of the order clearly shows that the learned Magistrate has not applied judicious mind to the facts of the case and the law applicable therein. The order does not assign any reason, as to why the application was treated as a complaint case and why the order for police investigation was not required. The order does not reflect application of judicious mind. It does not stand the test of the law as laid down in the cases of 'Ashok Kumar' (infra) and Ram Deo Food Products (infra) of the Hon'ble Supreme Court, and in the case of 'Gulab Chand Upadhyay' (infra) of this Court. (Para 12(iv), 43)

Criminal Revision/Petition allowed. (E-3)

Precedent followed:

1. Lalita Kumari Vs Govt. of U.P., & ors., (2014) (2) SCC 1 (Para 7, 29)

2. Jitendra Kumar Vs St. of U.P. & ors., Criminal Revision No. 1768 of 2018, decided on 29.05.2018 (Para 7)

3. Shiv Mangal Singh Vs St. of U.P. & ors., Criminal Revision No. 715 of 2019, decided on 25.02.2019 (Para 7)

4. Sukhwasi Vs St. of U.P. & ors., 2007 (59) ACC 739 (Allahabad) (D.B.) (Para 8)

5. Gopal Das Sindhi Vs St. of Assam, AIR 1961 SC 986 (Para 21)

6. Fakruddin Ahmed Vs St. of Uttar., (2008) 17 Supreme Court 157 (Para 22)

7. Suresh Chand Jain Vs St. of M.P. & anr., (2001) 2 SCC 628 (Para 23)

8. Mohd. Yusuf Vs Smt. Afaq Jahan & anr., (2006) 1 SCC 627 (Para 24)

9. Hemant Yashwant Dhage Vs St. of Mah., (2016) 6 SCC 273 (Para 25)

10. Ram Babu Gupta Vs St. of U.P. & ors., [2001 (43) ACC 50 (FB) (Para 26)

11. Sukhwasi Vs St. of U.P. & ors., [2007 (9) ADJI (DB) (Para 27)

12. Anil Kumar Vs M.K. Aiyappa & anr., (2013) 10 SCC 705 (Para 28)

13. Jagannath Verma & ors. Vs St. of U.P. & anr., (2014) 8 ADJ 439 (F.B.) (Para 30)

14. Ram Dev Food Products Vs St. of Guj., (2015) 6 SCC 439 (Para 32)

15. Amrutbhai Shambhubhai Patel Vs Sumanbhai Kantibhai Patel & ors., (2017) 4 SCC 177 (Para 37)

16. Gulab Chand Upadhyaya Vs St. of U.P. & ors., (2002) Criminal Law Journal 2907 (Alld.) (Para 38)

Present criminal revision assails order dated 26.08.2020, passed by learned Judicial Magistrate u/s 156(3) CrPC, District Kanpur Dehat.

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

1. Heard Sri Deepak Kumar Verma, learned counsel for the revisionist/applicant Sri Pankaj Saxena, learned AGA appearing for the State and perused the material brought on record.

2. This Criminal Revision under Section 397/401 of Criminal Procedure Code (Cr.P.C.) has been filed challenging the order dated 26.08.2020, passed by learned Judicial Magistrate, Ist Kanpur Dehat, in Misc. Case No.743 of 2020 (Lalaram Vs. Ram Kishan & Others), under Section 156(3) Cr.P.C., Police Station Rasoolabad, District kanpur Dehat. Further prayer is for a direction to the court below to issue direction to the concerned police station for registration of first information report in pursuance of the Misc. Case No.743 of 2020 (Lalaram Vs. Ram Kishan & Others), under Section 156(3) Cr.P.C., Police Station Rasoolabad, District kanpur Dehat, under suitable section and submit report under Section 173(2) Cr.P.C. before the court concerned.

3. Considering nature of the order under challenge, as well as the order proposed to be passed and as purely legal question is involved and keeping this revision pending would serve no fruitful purpose as well as keeping in view that at this stage, the proposed accused-private respondents have no right to be heard, the notice to the private respondents is dispensed with.

4. Briefly stated facts of the case as per the revision/petition are that the opposite party nos.2 to 14 demolished foundation in front of the door of the revisionist/applicant on 02.07.2020 at about 10.00 A.M. for constructing path, to which the revisionist objected in view of the pendency of a Civil Suit No.279 of 2020 in the Court of learned Civil Judge (Senior Division), Kanpur Dehat. On 07.07.2020 at about 8.00 A.M., the opposite party nos. 2 to 14 entered the house of the revisionist and mercilessly beaten him with lathi-danda & foot. They also snatched Rs.1600/- from purse in the pocket of the revisionist and thereafter ran away by extending threat to face dire consequences. The revisionist immediately informed the concerned police station but his case was not registered and he was told to go for medical examination firstly. On the next day i.e. on 08.07.2020 the revisionist went to the District Hospital Akbarpur, Kanpur Dehat for his medical examination and was referred to the Dentist for further examination. The revisionist informed the whole incident to the Superintendent of Police Kanpur Dehat by way of an application through registered post on 16.07.2020, but no action was taken thereon and consequently he filed an application under Section 156(3) Cr.P.C. before the Judicial Magistrate Ist Kanpur Dehat on 14.08.2020, alongwith the injury report dated 08.07.2020, X-ray report dated 16.07.2020 and other documents, according to which the revisionist had sustained grievous injuries caused by hard and blunt object. The learned Magistrate by order dated 26.03.2020 treated the application as a complaint case.

5. Learned counsel for the revisionist 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.

6. Learned counsel for the revisionist 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. I have considered the submissions as advanced by the learned counsel for the applicant, the learned AGA and perused the material brought on record.

12. 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?

13. 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.

14. 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.

15. 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."

16. 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,*

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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."

23. 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."

24. 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."

25. 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.

26. 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."

27. In **"Sukhwasi Vs. State of U.P. & others" 2007 (9) ADJ 1 (DB), t**he 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."

28. 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.

29. 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."

30. 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."

31. 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."

32. **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.

33. 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."

34. 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.

35. 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.

36. 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."

37. 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."

38. 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)"

39. 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.

40. From the aforesaid judgments, some of the following proposition of law, well settled, may be summarized as under:-

(40.01). 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.

(40.02). 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.

(40.03). 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.,

(40.04). 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.

(40.05). 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.

(40.06). 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.

(40.07). The exercise of discretion by the Magistrate is basically guided by interest of justice, from case to case.

(40.08). 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.

(40.09). 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.

*(40.10). 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 .

(40.11). 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.

(40.12). 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.

(40.13). 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.

(40.14). 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.

(40.15). 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.

41. Point nos. 1, 2 and 3 as framed in para 12 of this judgment stands answered as per para no.40 above.

42. 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.

43. Now coming to point No.4 as regards the order under challenge, perusal of the order clearly shows that the learned Magistrate has not applied judicious mind to the facts of the case and the law applicable therein. The order does not assign any reason, as to why the application was treated as a complaint case and why the order for police investigation was not required. The order does not reflect application of judicious mind. It does not

stand the test of the law as laid down in the cases of **''Ashok Kumar'** (Supra) and **Ram Deo Food Products (Supra)** of the Hon'ble Supreme Court, and in the case of **''Gulab Chand Upadhyay'** (Supra) of this Court.

44. The present revision therefore, deserves to be allowed and the order under challenge deserves to be set-aside, with the direction to the learned Magistrate to pass fresh orders on the application of the revisionist/applicant, after affording opportunity of hearing to him in accordance with law, within a period of two months from the date of production of true/attested copy of this judgment, before him. It is made clear that this Court has not commented upon the merits of the application under Section 156(3) Cr.P.C. either way. In other words this Court has not adjudicated if the order for police investigation be passed or the application be registered as a complaint case. This would be in the discretion of the learned Magistrate to be exercised keeping in view the principles of law as discussed above.

45. With the aforesaid observations and directions, this revision /petition is **allowed.**

46. No orders as to costs.

(2021)01ILR A994
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Application u/s 482 No. 4048 of 2004

Irshad Hussain ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri M.D.Singh Shekhar, Sri Shanshank Shekhar, Sri Vaibhav Goswami

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

A. Criminal Law – Application u/s 482 – Jurisdiction of Court - Indian Penal Code: Ss. 420, 468, 471, 257, 259, 379, 411, 413, 120B; Code of Criminal Code: Section 100, 482 - In exercise of jurisdiction under S. 482 Cr.P.C. this Court is not supposed to examine defence evidence as a Trial Court when after taking cognizance Magistrate has issued warrant and evidence is yet to be adduced in Trial. (Para 13)

In exercise of jurisdiction u/s 482 CrPC, it is not permissible for the Court to act as if it were Trial Court. Court has only to be prima facie satisfied about existence of sufficient ground for proceeding against accused. For that limited purpose, Court can evaluate material and documents on record but it cannot appreciate evidence to conclude whether materials produced are sufficient or not for convicting accused. High Court should not exercise jurisdiction u/s 482 CrPC embarking upon an enquiry into whether evidence is reliable or not or whether on reasonable apprehension of evidence, allegations are not sustainable, or decide function of Trial Judge. (Para 21, 30)

In *State of Haryana* vs. *Bhajan Lal and others (infra)* issue of jurisdiction of this Court u/s 482 Cr.P.C. has been considered and what has been laid down therein in para. 102 has been repeatedly followed and reiterated consistently. They have been reproduced in very recent judgment in *Google India Private Limited* Vs. *Visakha Industries and Ors.,* AIR 2020 SC 350. (Para 15)

B. Exercise of inherent power under Section 482 CrPC is not a rule but exception. The power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; and that the extraordinary or inherent powers do not

confer an arbitrary jurisdiction on the court to act according to its whim or caprice.(Para 16, 18)

Words "rarest of rare cases" are used after the words 'sparingly and with circumspection' while describing scope of Section 482 CrPC. Those words merely emphasize and reiterate what is intended to be conveyed by the words 'sparingly and with circumspection'. They mean that the power u/s 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences u/s 302 IPC, but to emphasize that the power u/s 482 Cr.P.C. to quash FIR or criminal proceedings should be used sparingly and with circumspection. (Para 17)

For interference u/s 482, three conditions are to be fulfilled. The injustice which comes to light should be of a grave, and not of a trivial character; it should be palpable and clear and not doubtful and there should exist no other provision of law by which the party aggrieved could have sought relief. (Para 20, 22)

In the present case, the entire argument of applicant is basically his defence which cannot be examined at this stage. No material irregularity in the procedure followed by Court below has been pointed out. It is not a case of grave injustice justifying interference in this application at this stage. (Para 29, 33)

Application dismissed. (E-3)

Precedent followed:

1. Bhajan Lal & ors., (1992) Supp (1) SCC 335 (Para 14)

2. Google India Private Limited Vs Viisakha Industries & ors., AIR 2020 SC 350 (Para 15)

3. Jeffrey J. Diermeier & ors. Vs St. of W.B. & ors., (2010) (6) SCC 243 (Para 17)

4. Som Mittal Vs St. of Karn., (2008) (3) SCC 753 (Para 18)

5. Lakshman Vs St. of Karn. & ors., (2019) (9) SCC 677 (Para 19)

6. Chilakamarthi Venkateswarlu & ors. Vs St. of Andhra Pradesh & ors., AIR 2019 SC 3913 (Para 20)

7. Zandu Pharmaceuticals Works Ltd. & ors. Vs Mohd. Sharaful Haque & ors., (2005) (1) SCC 122 (Para 21)

8. M.A.A. Annamalai Vs St. of Karn. & ors., (2010) (8) SCC 524 (Para 22)

9. Sharda Prasad Sinha Vs. St. of Bih., AIR 1977 SC 1754 (Para 22)

10. Nagawwa Vs Veeranna Shivalingappa Konjalgi & ors., 1976 AIR 1976 SC 1947 (Para 22)

11. Rakhi Mishra Vs St. of Bih. & ors., (2017) (16) SCC 772 (Para 23)

12. Sonu Gupta Vs Deepak Gupta & ors., (2015) (3) SC 424 (Para 23)

13. Roshni Chopra & ors. Vs St. of U.P. & ors., (2019) (7) Scale 152 (Para 23)

14. Dy. Chief Controller OF Imports & Exports Vs Roshanlal Agarwal & ors., (2003) 4 SCC 139 (Para 23)

15. U.P. Pollution Control Board Vs Mohan Marketing Ltd. & ors., (2000) (3) SCC 745 (Para 24)

16. Kanti Bhadra Shah Vs St. of W.B. (2001) SCC 722 (Para 24)

17. Nupur Talwar Vs C.B.I. & ors., (2012) (11) SCC 465 (Para 25)

18. Parbatbhai Aahir & ors. Vs St. of Guj. & ors., (2017) (9) SCC 641 (Para 26)

19. Arun Singh & ors. Vs St. of U.P. passed in Criminal Appeal No. 250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017), decided on 10.02.2020 (Para 27)

20. Md. Allauddin Khan Vs The St. of Bih. & ors., (2019) 6 SCC 107 (Para 31)

21. St. of M.P. Vs. Yogendra Singh Jadaun & anr., Criminal Appeal No. 175 of 2020, decided on 31.01.2020 (Para 32)

Present application u/s 482 Cr.P.C. has been filed, with the prayer to quash entire proceedings of Criminal Case u/Ss 419, 420, 467, 468, 471, 256, 259, 379, 411, 413 and 120B I.P.C. and order dated 07.04.2004, passed by Chief Judicial Magistrate, Chitrakoot.

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

1. Heard Sri M.D. Singh Shekhar, learned Senior Advocate, assisted by Sri Vaibhav Goswami, Advocate, for applicant and learned A.G.A. for State.

2. This is an application under Section 482 Cr.P.C. filed by sole applicant, Irshad Hussain, with the prayer to quash entire proceedings of Criminal Case No. 803 of 2004 under Sections 419, 420, 467, 468, 471, 256, 259, 379, 411, 413 and 120B I.P.C. and order dated 07.04.2004 whereby Chief Judicial Magistrate, Chitrakoot (hereinafter referred to as "CJM, Chitrakoot") has taken cognizance and issued warrants to applicant and another, pending in the Court of Chief Judicial Magistrate (hereinafter referred to as "CJM"), Chitrakoot.

3. Facts in brief, as stated in the application, are that applicant obtained his Bachelor of Technology degree in Electrical and Electronics and appointed as Junior Engineer in Indian Telephone Industries Limited, Naini, Allahabad (hereinafter referred to as "ITI, Allahabad") which is a Central Government undertaking and instrumentality of State within the meaning of Article 12 of Constitution. In August, 1997, i.e., 23.08.1997 applicant departed for Jeddah (Saudi Arabia) to perform religious obligation Haj (Umera). Just a two days before, i.e., on 21.08.1997, at P.S. Kotwali Karvi, District Chitrakoot, a First Information Report (hereinafter referred to as "FIR") was lodged by one R.N. Verma, Superintendent of Post Offices, Banda Prakhand, Banda against Ram Lakhan Verma, Ayodhya Prasad Pandey and Sushil Chand Tripathi under Sections 409, 419, 420, 467, 468, 471, 120B I.P.C. for committing fraud and embezzlement of 5,70,500/-.

4. The case set up in FIR was that on 04.07.1997 one Ayodhya Prasad Pandey, son of Ram Bahori Pandey, resident of Bharatpuri, Karvi, working as Postal Assistant and Supervisor has shown payment of Rs. 75,000/- to R.L. Verma. He also mentioned that he personally knew @ R.L. Verma. The number of Kisan Vikas Patra encahsed are numbers 35BB922551 to 35BB922560, each of which is of Rs. 5,000/- Thereafter on 05.07.1997 one Sushil Chandra Tripathi, son of Chhote Lal Tripathi, resident of Village and Post Lodhwara (Karvi), Dak-Assistant and the above Ayodhya Prasad Pandey again made payment of Rs. 2,25,000/- to aforesaid R.L. Verma against five years-Kisan Vikas Patra Nos. 35BB922561 to 35BB922590, value of each of which was Rs. 5,000/-, at Post Office Karvi. On these Kisan Vikas Patra shown encahsed, Ayodhya Prasad Pandey has obtained signature of a woman Smt. Vimla Devi, who is working as Waterer in Karvi Post Office stating that it is just a paper formality. Vimla Devi informed that the person who has taken payment of these Vikas Patra, was neither known to her nor she had ever seen him. Again on 07.08.1997 working as Dak-Assistant in Karvi Post Office itself, Sushil Chandra Tripathi and Ayodhya Prasad Pandey have shown payment of Rs. 1,50,000/- to above R.L. Verma and on the encahsed Vikas Patras, witness of Smt. Uma Tiwari, wife of Sriram Autar Tiwari was shown by Ayodhya Prasad Pandey. Smt.

Uma Tiwari has clarified that on 07.08.1997 when she came to Karvi Post Office, Ayodhya Prasad Pandey told her that this person is very close to him and asked her to witness him stating that it is his responsibility. Smt. Uma Tiwari informed that she said that she does not know R.L. Verma on which he (Ayodhya Prasad Pandey) said that he (R.L. Verma) is resident of Bankat Road. Reposing faith on Ayodhya Prasad Pandey, she witnessed R.L. Verma. That apart, on 26.05.1997 Sushil Chandra Tripathi, Dak-Assistant and Ayodhya Prasad Pandey, Supervisor, Karvi Post Office, have shown payment of Rs. 1,20,000/- to aforesaid R.L. Verma against Kisan Vikas Patra Nos. 31BB0155933 to 015948, each of Rs. 5,000/-. In this way, on 26.05.1997, 04.07.1997, 05.07,1997 and on 07.08.1997 payment of total Rs. 5,70,000/- was shown by Sushil Chandra Tripathi and Ayodhya Prasad Pandey at Karvi Post Office to R.L. Verma. It is further alleged that neither aforesaid Kisan Vikas Patra was issued from any Post Office in the name of R. L. Verma or any other person nor issuance thereof was mentioned in any Government record. Neither Ayodhya Prasad Pandey and Sushil Chandra Tripathi nor Smt. Uma Tiwari were able to tell address or whereabouts of alleged R.L. Verma nor they produced him. In this way R.L. Verma and the abovenamed persons have caused loss of Rs. 5,70,000/- to Postal Department. The aforesaid FIR was registered as Case Crime No. 211 of 1997.

5. Police made investigation and on interrogation of Ram Lakhan Verma found that his real name is Madhrakhan Singh and he has committed fraud along with one Prabhash Singh. On the pointing out of Ram Lakhan Verma alias Madhrakhan Singh and Prabhash Singh Police searched at applicant's house on 26.08.1997 when he was not present and only his wife was present and claimed to have recovered following articles from bed room of applicant:

Sl.	Details of the articles	Distinctive nos.	Qty. (nos.)	Value of Articles (Rs.) each
1.	Kishan Vikas Patra	34CC 579988	1	10,000/-
2.	Kishan Vikas Patra	35AA 605731-732	2	1,000/-
3.	Kishan Vikas Patra	31BB 010981-998	18	5,000/-
4.	Kishan Vikas Patra	31BB 011000	1	5,000/-
5.	Indira Vikas Patra	44C65 2146-170	25	5,000/-
6.	Plain non-judicial stamp papers		4	5,000/- each

6. Consequentially on the basis of aforesaid recovery, another FIR as Case Crime No. 216 of 1997 was registered on 27.08.1997 under Sections 419, 420, 467, 568, 471, 256, 257, 259, 379, 411, 413, 120B I.P.C. at P.S. Kotwali Karvi, District Chitrakoot and the allegations in the FIR are that the Informant, Sri R.P. Srivastava, Station House Officer, along with Police Team, on reaching Post Office Karvi, found Ramesh Chandra Upadhyay, Assistant Dak Pal and Shiv Ganesh Tripathi, Supervisor. There was also another person namely R.L. Verma and on being searched, from his possession 40

Kisan Vikas Patras of Rs. 5000/-each from Sl.No. 31BB010941 to 980, in the name of aforesaid R.L. Verma, maturity amount whereof was Rs. 3 lac, were found. On being enquired, he told that these Vikas Patra have been given to him by Prabhash Singh Patel who has come on Scooter and I have come here after leaving him on Station. Only he can tell about the Vikas Patras. On this information Police Team along with R.L. Verma proceeded in the search of Prabhash Singh Patel and after a hectic search, information was received that one person has run towards Khoh from the Post Office. On reaching Khoh, seeing the Police he tried to start his Scooter but was caught by employees. He disclosed his name Prabhash Singh, son of Ramesh Singh Patel, Village Rakshpalpur, Police Station Khakhred, District Fatehpur, present address House No. 777A/664, Sultanpur Bhawa, Khuldabad, Allahabad. He also told the name of R.L. Verma as Madhrakhan Singh Patel, son of Shambhoo Singh Patel, Resident of Prashidhpur, Police Station Dhata, District Fatehpur and present address Rajrooppur, Police Station Dhoomanganj, Allahabad. He told nothing about his Scooter UP71A/8414. On search being made, one pistol of 315 bore in working condition and four cartridges of 315 bore were found from his possession. In his Scooter, in a polythene bag 50 Kisan Vikas Patra of five and half years of the value of Rs. 5000/- Series No. 31BB015801 to 850 were found in respect of which he informed that he has been given these Vikas Patras by Irshad Ahmad, resident of Karailabad Colony, Allahabad and Jalaluddin, resident of G.T.B. Nagar, Kareli, Allahabad for payment on assurance of 25 per cent commission. If immediate search is made, Kisan Vikas Patras may be recovered from the house of Irshad and Jalaluddin. Prabhash Singh and Madhrakhan Singh also confirmed this information on the basis whereof in the presence of Madhrakhan Singh, his house was searched wherefrom S.B.B.L. Gun Licence No. 8364/77 and 26 live and 5 used cartridges were recovered. He informed that this gun belong to Prabhash Singh but kept in his (Madhrakhan Singh's) house. On further search, 50 Kisan Vikas Patras and 19 Indira Vikas Patras, each of Rs. 5000/- were recovered from an Attatche kept in inner room. On search of house of Prabhash Singh, one Kisan Vikas Patra of Rs. 10,000/- and one of Rs. 5,000/- in the name of Suneeta Singh, issued from Rajrooppur Post Office were found. Besides, 20 Kisan Vikas Patras, 25 Indira Vikas Patras each of Rs. 5000/-, one gold biscuit weighed about 93.80 gram, worth about Rs. 50,000, three stamps of Post Office, Sahatwar, Ballia, 5 piece date blocks, four non-judicial forged stamp papers each of Rs. 5,000/- and cash Rs. 4,34,544/- were recovered. In respect of the cash recovered, it was stated that it is the maturity amount of the Kisan Vikas Patras, encashsed last month at Karvi. On pointing out of Madhrakhan Singh and Prabhash Singh, search was made at the house of Irshad, at Karailabag Colony, Allahabad in presence of his wife Shahida Parveen, wherefrom one Kisan Vikas Patra of Rs. 10,000/- two Kisan Vikas Patras of Rs. 1000/- each, 19 Kisan Vikas Patras and 25 Indira Vikas Patras of Rs. 5000/, and four non judicial stamp papers of Rs. 5000/- which appeared to be forged, were recovered. On the search at the residence of Jalaluddin, at G.T.B. Nagar, karaily, Allahabad 49 Kisan Vikas Patras of Rs. 5000/- each, 30 Indira Vikas Patras each of Rs. 5000/- and 5 forged non judicial stamp papers of Rs. 5000/-, 80 revenue tickets and stamp of post office etc. were recovered. From the Maruti Suzuki Zen parked

adjacent to the house, service book, Insurance certificate, 50 Kisan Vikas Patras, Cheque Book and Pass Book of bank account were recovered. The Maruti Zen was allegedly purchased from the payment received from forged encashment of Kisan Vikas Patras in the name of Dr. S.J. Ahmad, 676, G.T.B. Nagar, Kareli, Allahabad. Further investigation revealed that aforesaid Madhrakhan Singh, Javed Ahmad, Jalaluddin, Irshad Ahmad, Prabhash Singh, and Bhupendra Singh have formed a gang and they used to obtain illegally stolen Kisan Vikas Patras and Indira Vikas Patras and by encashing them used to cause loss to Government revenue and in this way they have acquired crores of rupees. Their income is many times than their known sources of income. Request was lastly made to lodge FIR.

7. Police, after investigation, submitted charge-sheet No. 222 dated 18.11.1997 in Case Crime No. 211 of 1997 and another Charge Sheet No. 221 dated 18.11.1997 in Case Crime No. 216 of 1997.

8. On 28.11.1997, investigation was transferred to Economics Offences Wing of C.I.D. (hereinafter referred to as "EOW, CID, Lucknow") for further investigation under Section 173(8) Cr.P.C. There it was registered as EOW Investigation No. 71 of 1997 in both Crime No. 211 and 216 of 1997. EOW, CID, Lucknow during investigation recorded statements of applicant's wife, Smt. Shahida Parveen, applicant and one Sandeep Mishra. In Parcha No. 38, Investigating Officer (hereinafter referred to as 'I.O.') noted that the applicant, Jalaluddin and Javed Ahmad are not found involved in Crime and, therefore, submitted charge sheet under Sections 409, 419, 420, 467, 468, 471, 120B I.P.C. against Madhrakhan Singh, Prabhash Singh, Ayodhya Prasad, Shushil Chandra Tripathi and Bhupendra Singh. However, in Parcha No. 36 dated 15.11.2002, I.O. submitted charge sheet against R.L. Verma alias Madhrakhan Singh, Prabhash Singh, Bhupendra Singh, applicant, i.e. Irshad Hussain, Jalaluddin and Javed Ahmad under Sections 420, 468, 471, 257, 259, 379, 411, 413, 120B I.P.C. Magistrate, thereafter, has taken cognizance and issued warrants to applicant and others vide order dated 07.04.2004.

9. It is contended by learned counsel for applicant that search was conducted in the absence of independent witness and without complying with the provisions of Section 100 Cr.P.C. Kishan Vikas Patras and Indira Vikas Patras were recovered from the accused Madhrakhan Singh and Prabhash Singh but planted in the house of applicant to implicate him falsely and recovery is nothing but fake.

10. Learned Senior Counsel for applicant further submitted that once a Parcha was submitted and nothing was found against applicant, another charge-sheet submitted against applicant is patently illegal and applicant has been falsely implicated.

11. Record shows that statement of applicant's wife herself was recorded by I.O., EOW, CID, Lucknow. She admitted that Police came to her house for making search though did not find anything objectionable therefrom. Recovery memo shows that she refused to put her signature on the Fard.

12. Whether the defence taken by applicant that seizure is forged and nothing was found from applicant's house is correct or not is a matter of defence of applicant

and evidence is yet to be recorded in Trial. At this stage, it is impermissible to assess and examine the entire case as a Trial Court to find out whether applicant has been falsely implicated or not.

13. In exercise of jurisdiction under Article 482 Cr.P.C. this Court is not supposed to examine defence evidence as a Trial Court when after taking cognizance Magistrate has issued warrant and evidence is yet to be adduced in Trial.

14. The principles which justify interference under Section 482 Cr.P.C. by Court have been laid down in various authorities in which Supreme Court's judgment in **Bhajan Lal and others, 1992 Supp (1) SCC 335** was leading precedent and thereafter matter has been examined by even Larger Benches.

15. In **State of Haryana vs. Bhajan Lal and others (supra)** issue of jurisdiction of this Court under Section 482 Cr.P.C. has been considered and what has been laid down therein in paragraph 102 has been repeatedly followed and reiterated consistently. In very recent judgment in **Google India Private Limited Vs. Visakha Industries and Ors., AIR 2020 SC 350,** guidelines laid down in paragraph 102 in **Bhajal Lal's case (supra)** have been reproduced as under :

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

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

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

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

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

(5) Where the ***allegations made in the FIR or complaint are so absurd and inherently improbable*** *on the basis of*

which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the Accused.

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

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

16. Court has also reproduced note of caution given in paragraph 103 in **Bhajan Lal's case (supra)** which reads as under :

"103. We also give a note of caution to the effect that the ***power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases;*** *that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice." (emphasis added)*

17. What would be the scope of expression "rarest of rare cases" referred to in para 103 in **State of Haryana vs. Bhajan Lal (supra)** has been considered in **Jeffrey J. Diermeier and Ors. Vs. State of West Bengal and Ors. , 2010 (6) SCC 243.** Court has said that words "rarest of rare cases" are used after the words 'sparingly and with circumspection' while describing scope of Section 482 CrPC. Those words merely emphasize and reiterate what is intended to be conveyed by the words 'sparingly and with circumspection'. They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasize that the power under Section 482 Cr.P.C. to quash FIR or criminal proceedings should be used sparingly and with circumspection.

18. Supreme Court in Jeffrey **J. Diermeier (supra)** in fact referred to an earlier three Judges' Bench judgment in **Som Mittal Vs. State of Karnataka, 2008 (3) SCC 753,** to explain phrase "rarest of rare cases". In **Som Mittal (supra)**, Court also said that exercise of inherent power under Section 482 CrPC is not a rule but exception. Exception is applied only when it is brought to notice of Court that grave miscarriage of justice would be added if trial is allowed to proceed where accused would be harassed unnecessarily or if trial is allowed to linger when prima facie it appears to Court that trial would likely to be ended in acquittal. Whenever question of fact is raised which requires evidence, Courts always said that at pre trial stage i.e. at the stage of cognizance taken by Magistrate power under Section 482 CrPC

would not be appropriate to be utilized, since, question of fact has to be decided in the light of evidence which are yet to be adduced by parties.

19. In **Lakshman vs. State of Karnataka and others, 2019 (9) SCC 677** Court said that it is not permissible for High Court in application under Section 482 CrPC to record any finding wherever there are factual disputes. Court also held that even in dispute of civil nature where there is allegation of breach of contract, if there is any element of breach of trust with mens rea, it gives rise to criminal prosecution as well and merely on the ground that there was civil dispute, criminality involved in the matter cannot be ignored. Further whether there is any mens rea on part of accused or not, is a matter required to be considered having regard to facts and circumstances and contents of complaint and evidence etc, therefore, it cannot be said pre judged in a petition under Section 482 CrPC.

20. In **Chilakamarthi Venkateswarlu and Ors. Vs. State of Andhra Pradesh and Ors., AIR 2019 SC 3913**, Court reiterated that inherent jurisdiction though wide and expansive has to be exercised sparingly, carefully and with caution and only when such exercise would justify by tests specifically laid down in Section itself. In paragraph 14 of judgment, Court said :

"14. For interference Under Section 482, three conditions are to be fulfilled. The ***injustice which comes to light should be of a grave, and not of a trivial character; it should be palpable and clear and not doubtful and there should exist no other provision of law by which the party aggrieved could have sought relief.****" (emphasis added)*

21. Court also said that in exercise of jurisdiction under Section 482 CrPC it is not permissible for the Court to act as if it were Trial Court. Court has only to be prima facie satisfied about existence of sufficient ground for proceeding against accused. For that limited purpose, Court can evaluate material and documents on record but it cannot appreciate evidence to conclude whether materials produced are sufficient or not for convicting accused. High Court should not exercise jurisdiction under Section 482 CrPC embarking upon an enquiry into whether evidence is reliable or not or whether on reasonable apprehension of evidence, allegations are not sustainable, or decide function of Trial Judge. For the above proposition, Court relied on its earlier authority in **Zandu Pharmaceuticals Works Limited and others vs Mohd. Sharaful Haque and others, 2005 (1) SCC 122.**

22. Power under section 482 CrPC should not be exercised to stifle legitimate prosecution. At the same time, if basic ingredients of offfences alleged are altogether absent criminal proceedings can be quashed under Section 482 CrPC. Relying on **M.A.A. Annamalai Vs. State of Karnataka and Ors. , 2010 (8) SCC 524, Sharda Prasad Sinha Vs. State of Bihar, AIR 1977 SC 1754 and Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Ors., 1976 AIR 1976 SC 1947, Court in Chilakamarthi Venkateswarlu and Ors. Vs. State of Andhra Pradesh and Ors. (supra)** said that where allegations set out in complaint or charge sheet do not constitute any offence, it is open to High Court exercising its inherent jurisdiction under Section 482 CrPC to quash order passed by Magistrate taking cognizance of offence. Inherent power under Section 482 CrPC is intended to prevent abuse of

process of Court and to clear ends of justice. Such power cannot be exercised to do something which is expressly barred under CrPC. Magistrate also has to take cognizance applying judicial mind only to see whether prima facie case is made out for summoning accused persons or not. At this stage, Magistrate is neither required to consider FIR version nor he is required to evaluate value of materials or evidence of complainant find out at this stage whether evidence would lead to conviction or not.

23. It has also been so observed in **Rakhi Mishra Vs. State of Bihar and Ors., 2017 (16) SCC 772** and **Sonu Gupta Vs. Deepak Gupta and Ors. , 2015 (3) SC 424** and followed recently in **Roshni Chopra and others vs. State of U.P. and others, 2019 (7) Scale 152.** Here Court also referred to judgment in **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal and Ors., (2003) 4 SCC 139,** wherein paragraph 9, Court said that in determining the question whether any process has to be issued or not, Magistrate has to be satisfied whether there is sufficient ground for proceeding or not and whether there is sufficient ground for conviction; whether the evidence is adequate for supporting conviction, can be determined only at the trial and not at the stage of inquiry.

24. However, it is also true that at the stage of issuing process to the accused, Magistrate is not required to record reasons. In **U. P. Pollution Control Board vs. Mohan Meaking Limited and others, 2000 (3) SCC 745** after referring to a decision in **Kanti Bhadra Shah Vs State of West Bengal 2001 SCC 722,** Court said as under :

"Legislature has stressed the need to record reasons in certain situations such as dismissal of complaint without issuing process. There is ***no such requirement imposed on a Magistrate for passed detailed order while issuing summons. Process issued to accused cannot be quashed merely on the ground that Magistrate had not passed a speaking order."*** *(emphasis added)*

25. Same proposition was reiterated in **Nupur Talwar Vs Central Bureau of Investigation and others, 2012 (11) SCC 465.**

26. In a Three Judges' Bench in **Parbatbhai Aahir and Ors. Vs State of Gujarat and Ors, 2017 (9) SCC 641,** Court has observed that Section 482 CrPC is prefaced with an overriding provision. It saves inherent power of High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any court; or (ii) otherwise to secure the ends of justice. In Paragraph 15 of the judgment Court summarized as under :

"(i) 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;***

(ii) 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.

(iii) 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;***

(iv) 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;

*(v) T****he 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;*

(vi) 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;*

(vii) 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;*

(viii) 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;

*(ix) In such a case, the High Court may quash the criminal proceeding i****f 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***

(x) There is yet ***an exception to the principle set out in propositions (viii) and (ix) 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." (emphasis added)*

27. Above observations have been reiterated in **Arun Singh and other Vs State of U.P. passed in Criminal Appeal no.250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017)**, decided on 10.02.2020.

28. I do not propose to burden this judgment with similar catena of decisions, since all are in similar lines.

29. In the present case, the entire argument of applicant is basically his defence which cannot be examined at this stage.

30. Time and again it has been highlighted by Supreme Court that at the stage of charge sheet factual query and assessment of defence evidence is beyond purview of scrutiny under Section 482 Cr.P.C. The allegations being factual in nature can be decided only subject to evidence. In view of settled legal proposition, no findings can be recorded about veracity of allegations at this juncture in absence of evidence. Courts have highlighted repeatedly that jurisdiction under Section 482 Cr.P.C. be sparingly/rarely invoked with complete circumspection and caution.

31. In **Md. Allauddin Khan Vs. The State of Bihar and others (2019) 6 SCC 107,** Court observed as to what should be examined by High Court in an application under Section 482 Cr.P.C. and in paras 15, 16 and 17 said as under:

"15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379 read with Section 34 IPC, ***then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint.*** *In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.*

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the ***High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482*** *of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.")* ***because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties.*** *That stage is yet to come in this case." (emphasis added)*

32. Recently, above view has been reiterated by Apex Court in **Criminal Appeal No. 175 of 2020 (State of Madhya Pradesh Vs. Yogendra Singh Jadaun and another)** decided on 31.01.2020.

33. No material irregularity in the procedure followed by Court below has been pointed out. It is not a case of grave injustice justifying interference in this application at this stage.

34 In view of above discussion, I do not find any illegality or infirmity in impugned charge sheet or cognizance order of Magistrate.

35. This application lacks merit and is accordingly dismissed.

36. Interim order, if any, stands vacated.

(2021)01ILR A1006
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.11.2020

BEFORE

THE HON'BLE DEEPAK VERMA, J.

Application u/s 482 No. 11808 of 2020

Smt. Anita Agarwal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anat Ram Gupta

Counsel for the Opposite Parties:
A.G.A., Sri Anurag Dubey

A. Criminal Law – Application u/s 482 – For quashing of order – Code of Criminal Procedure: Section 311, 313 - Lacuna in the prosecution must be construed to be an inherent weakness in the case and a latest wedge in the prosecution case and advantage of it should normally go to the accused in the trial of the case. (Para 13)

B. Code of Criminal Procedure: Section 311 - In the first part, the word used is "may" and thereby giving jurisdiction to the Court to pass order as per its discretion and the second part uses the word "shall" which makes obligatory for the Court to pass such order. The provision of Section 311 Cr.P.C., thus, first is a supplementary provision enabling and in certain circumstances imposition on the Court with the duty of examining a material witness who could not brought before it. (Para 15)

It is true that the power of the Court under Section 311 Cr.P.C. is of a very wide in nature but in what manner such power should be exercised has been a matter of discretion before the superior Courts. (Para 16)

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 u/s 311 Cr.P.C. 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 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. (Para 23)

In the present case, it is clear that the document which are required to be summoned are in possession of the applicant-accused and they have got information under Right to Information Act and documents which relate to newspaper are not admissible in evidence not required to summon and further Hon'ble coordinate Bench of this Court had directed to expedite the trial. The applicant-accused have opportunity to put his case of alibi at the time of statement under section 311 Cr.P.C. and produce the documents as defence evidence. (Para 24, 26)

Application dismissed. (E-3)

Precedent followed:

1. Arslan Zaheer Vs St. of U.P. & anr., 2016 (2) JIC 189 (Allahabad) (Para 8)

2. Hanuman Ram Vs St. of Raj. & ors., 2009 (64) ACC 895 (Para 17)

3. Vijay Kumar Vs St. of U.P. & ors., (2011) 11 SCR Page 893 (Para 18)

4. Darya Singh & ors. Vs St. of Pun., AIR 1965 SC 328 (Para 21)

5. Moirangthem Tomba Singh Vs St. of Mani. 1984 Cr.L.J. 536 (Para 22)

6. Natasha Singh Vs C.B.I., 2013 (2) UPCr.R 605 (Para 23)

Precedent distinguished:

1. Union Territory of Dadra & Haveli & anr. Vs Fatehsingh Mohansingh Chauhan, 2006 (3) JIC 75 SC (Para 7)

Present application has been to quash the order dated 27.02.2020, passed by Additional Session Judge, Firozabad.

(Delivered by Hon'ble Deepak Verma , J.)

1. Heard Sri Anant Ram Gupta, learned counsel for the applicant, Sri Anurag Dubey, learned counsel for the opposite party no.2, learned AGA on behalf of the State and perused the record.

2. This application u/s 482 Cr.P.C. has been filed by applicant to quash the order dated 27.02.2020 passed by Additional Session Judge, Court No.3, Firozabad in application under section 311 Cr.P.C. in Session Trial No.5586 of 2016 (State vs. Rohan Singhal and others) arising out of Case Crime No.648 of 2016, under sections 364A, 302, 201, 404, 120B I.P.C., Police Station Tundla, District Firozabad has been rejected.

3. Learned trial court by order dated 27.02.2020 decided two applications i.e. Application No.143-B and Application No.144-B. Order in challenge before this Court by the present application is against rejection of Application No.144-B, not against 143-B, therefore, this Court has to consider the legality and illegality of the application of accused applicant under section 144-B.

4. Learned counsel for the applicant submits that on 24.08.2016 informant lodged FIR under section 364-A against three persons namely, Rohan Singhal, Pawan and Anuj Vij, alleged therein that he saw deceased Aditya, Rohan and Rohan's elder brother Pawan altogether were coming out from Orchid Green. Deceased Aditya on 22.08.2020 at about 8.30 went to Gim (Gymnasium) to exercise by his I-Ten Car No.UP 33A 1782 but he did not come back. At about 11.07 informant received SMS from unknown number that we caught your son and threatened them not to inform police. Thereafter again call came from Mobile No.9756674130 and they informed about deceased Aditya's car location and demanded Rs.10 crore and threatened if demand is not fulfilled, Aditya might be killed. When mother of Aditya enquired from Anuj, they did not talk properly.

5. Investigating officer after collecting evidence submitted chargesheet and charges were framed and trial started as S.T. No.5586 of 2016 under sections 364A, 302, 201, 404, 120-B I.P.C. started against applicant and other co-accused. Learned counsel for the applicant further submitted that the applicant has taken plea of alibi before trial court and at present prosecution examination is going on which is clear from the rejection order. During prosecution examination, applicant moved application under section 311 Cr.P.C. with the prayer to just decision of case, summon the noted witnesses and original record given below:-

(i) Compete detail of payment of original statement account no.344104000004633 of Sri Pavan Singhal by the manager of I.D.B.I. Bank Branch Station Road Ganesh Nagar firozabad from 15.08.2016 to 25.08.2016.

(ii) Compete detail of staying bill No.1373 folio no.4471 in register no.3608 room no.402 of the manager of Hotel Willo Bans Tourism near left Mal Road Shimla, Himachal Pradesh.

(iii) Complete original record with detail of Ticket of helicopter passenger namely (1) Aghira Singhal (2) Pawan Singhal (3) Anita Agrawal and (4) Richa Singhal, P.N.R. number M.V.D.H. 1716822 Booking dated 1.8.2018 travelling dated 23.01.2016 and cancellation of said Passengers of Officer Incharge Hemalayan Helicopter services Sri Mata Vaishanav Devi Shrine board Centre Office Katra, District Ricy Jammu-Kashmir.

(iv) Original record relating to travel on yamuna Express way about Car Registration no.U.C.S.0097884 from 20.8.2016 to 24.8.2016 Application filed by Pavan Singhal before Chief Executive Officer Yamuna Express way Industrial Development Authority first floor commercial complex Block P-2 Sector Amega-1, Greater Noida PIN Code No.201308 District Gautam Buddh Nagar dated 1.8.2017.

(v) Local editor of News paper "Amar Ujala" including copy of said News paper from "23.8.2016 and 24.8.2016" gopal Ashram market, Amar Ujala Office, Firozabad.

(vi) Local Editor of News paper "Dainik Jagaran (I.C.I. upper floor of A.T.M.) Suhag Nagar Firozabad including copy of said news paper dated 24.08.2016. For the proper and just decision and stay the further proceeding of S.S.t. No.5586 of 2016, Case Crime No.648 of 2016 under sections 364A, 302, , 404, 120B I.P.C., P.S. Tundla District Firozabad (State vs.Rohan Singhal and others) during the pendency of this Criminal Misc.Application (U/sa 482 Cr.P.c.) before this Hon'ble Court.

6. Learned counsel for the applicant further submitted that trial court after giving opportunity to opposite party and hearing both the parties, rejected the application of the applicant without applying his judicial mind and arbitrarily and without considering the fact that the applicant wanted to prove his alibi plea by summoning the witnesses and documentary evidence and witness having documents which are required to be proved the alibi as the case of the applicant is that he was not present at the place of incident she alongwith her son and daughter-in-law went to visit Mata Vasnaodevi at Jammu-Kashmir and documents which had been asked to be summoned are essential to just and fair decision of the case and file present application on following grounds which is clear from the provision of Section 311 Cr.P.C. that section in two parts. First part gives purely discretionary power to the courts and enables it to summon the material witness at any stage of enquiry, trial or proceedings, on the other hand second part is mandatory and compels to take any step if it is essential to do the justice. Hon'ble Apex Court held in various decision that the object of Section 311 Cr.P.c. is to avoid the failure of justice power provided under section 311 Cr.P.C. is to be exercised judiciously in this regard. It has been held that whether it is essential to be just decision of the case. He further submitted that it is well settled that exercising power under section 311 Cr.P.C. should be restored to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case. It is argued that it is a cardinal rule in the law of

evidence that the best available evidence should brought before the court to prove a fact or the points in issue but it is left either for the prosecution of for the defence to establish its respective case by adducing the best available evidence and the court is not empowered under the provisions of the code to compel either the prosecution or the defence to examine any particular witness or witnesses of their sides. It is the duty of a court not only to do justice but also to ensure that justice is being done.

7. Learned counsel for the applicant has placed reliance upon the judgments of Hon'ble Apex Court in **Union Territory of Dadra & Haveli & Anr. vs. Fatehsingh Mohansinh Chauhan reported in 2006(3) JIC 75 Supreme Court,** in which respondent accused raised the plea of alibi and claimed that he was present in the chamber of Sri S.P.Marwah, the then Collector, Dadra and Nagar haveli, Silvassa as a meeting has been called there being a prominent member of a political party he participated and he took plea of alibi under section 311 Cr.P.C. Hon'ble Apex Court allowed the application of the accused-applicant and summon the collector as witness. Hon'ble Apex Court considered various judgments of Hon'ble Apex court in paragraph 10, 11, and 12. The same is reproduced below:-

10. In Jamatraj Kewalji Govani v. State of Maharashtra AIR 1968 SC 178 after analysis of the provision of Section it was held as under in para 10 of the reports :

"Section 540 is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the court may act in one of three ways : (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to some thing in the interest of the accused only. The action may equally benefit the prosecution. ....."

11. 11. In Mohanlal Shamji Soni v. Union of India & Anr. AIR 1991 SC 1346 it was observed that it is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of a Court not only to do justice but also to ensure that justice is being done. It was further held that the second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to

the just decision of the case. It was emphasized that power is circumscribed by the principle that underlines Section 311 Cr.P.C., namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Further, that the power must be used judicially and not capriciously or arbitrarily. It was further observed that evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties and the discretion of the Court must obviously be dictated by exigency of the situation and fair play and good sense appear to be the safe guides and that only the requirement of justice command the examination of any person which would depend on the facts and circumstances of each case.

Rajendra Prasad v. Narcotic Cell (1999) 6 SCC 110 is a decision where the contention that the prosecution should not be permitted to fill in lacuna was examined having regard to the peculiar facts where the exercise of power under Section 311 Cr.P.C. second time was challenged and, therefore, it is necessary to notice the facts of the case in brief. The accused along with some other persons was facing trial for offences under Sections 21, 25 and 29 of the NDPS Act. The prosecution and the defence closed their evidence on 19.9.1997 and the case was posted for further steps and on 7.3.1998, after few more dates, at the instance of the prosecution two witnesses who had already been examined were reexamined for the purpose of proving certain documents for prosecution. After they had been examined and the evidence had been closed, the case was posted for hearing arguments, which was heard in piecemeal on different dates. Subsequently on 7.6.1998, the Public Prosecutor moved an application seeking permission to examine Dalip Singh, S.I. and two other persons. Though the application was strongly opposed by the counsel for the accused, the trial Court allowed the same in exercise of its power under Section 311 Cr.P.C. and summons were issued to the witnesses. The challenge raised to the order of the learned Sessions Judge by filing a revision was dismissed by the High Court. In appeal before this Court it was contended that in the garb of exercise of power under Section 311 Cr.P.C., a Court cannot allow the prosecution to re-examine prosecution witnesses in order to fill up lacuna in the case specially having regard to the fact that Dalip Singh witness was never tendered by the prosecution for cross-examination and PW.4 Suresh Chand Sharma had also not been cross-examined by the State. Repelling the contention raised on behalf of the accused it was held :

"7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the

prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

Finally, it was held that the proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, cannot be accepted nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during arguments. Similar view has been taken in P. Chhaganlal Daga v. M. Sanjay Shaw (2003) 11 SCC 486 where permission granted by the Court to a complainant to produce additional material after evidence had been closed and case was posted for judgment was upheld repelling the contention that production of the document at that belated stage would amount to filling in a lacuna.

12. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused resulting in miscarriage of justice.

8. This Court in **Arslan Zaheer vs.State of U.P. & another reported in 2016 (2) JIC 189 (Allahabad).** In this case allegation against the accused is that he kidnapped victim girl but the case of the accused was that victim girl went with the applicant on her own volition and stayed in Hotel at Allahabad and where she had filled hotel register in her own handwriting.

9. Per contra, learned AGA as well as learned counsel for the informant opposed the contention raised by the learned counsel for the applicant. Learned counsel for the opposite party no.2 opposed the application by way of filing reply inter-alia on the ground that application has been filed with a view to delay the proceeding and to fill up lacuna, as such, same deserves to be dismissed. Learned court below taking note of the pleadings, adduced on record by respective parties, dismissed the application by concluding that applicant-accused cannot be allowed to fill up lacuna in defence. He further submitted that by way of counter affidavit, he has given various facts which has not been disclosed by learned counsel for the applicant as in para 5 of the counter affidavit that many adjournments have been taken from the side of the applicant-deceased, which is evident from perusal of the order-sheet of the trial. He further pointed out that those

adjournments were being sought before spreading of pandemic Covid-19. He stated that intention of the accused persons is that they are not interested to conclude the trial. He further submitted in para 7 of the counter affidavit that accused persons moved various applications on different issues to delay the trial. An application moved before the learned trial court under section 311 Cr.P.c. to recall the P.W.-2 on the ground of changing the counsel for the accused and when the same was rejected vide order dated 20.03.2018, then that order was challenged before this Court with an affidavit. Thereafter opposite party no.2 moved an application by means of Criminal Misc.Application u/s 482 Cr.P.C. No.28264 of 2018 before this Court with a prayer that a direction be issued to the court below to decide S.S.T. No.5586 of 2016 (State vs. Rohan Singhal and others) within a definite period. The same was disposed of on 16.08.2018 with the direction to the court below to decide aforesaid case in accordance with law without granting unnecessary adjournments to either of the parties as expeditiously as possible preferably within a period of eight months from the date of production of certified copy of this order. When order dated 16.08.2018 passed by this Court was not complied with thereafter opposite party no.2 moved Contempt Application (Civil) No.3817 of 2019 before this Court and same was disposed of as the presiding officer to finalize the proceeding in question expeditiously preferably within three months without according even a single adjournment to either of the parties and if necessary day to day hearing may be ensured in the matter so that the order in question must be complied with.

10. Learned counsel for the opposite party no.2 submitted that applicant-accused by way of application under section 311 Cr.P.C. several documents have sought to be summoned. First is statement about bank account of Pavan Singhal which is in possession of Pavan Singhal and this is the banking record approved by the banking authorities, hence there is no need to call the banking authority before the learned court below to prove the same. With regard of her journey alongwith the co-accused Pavan Singh and family collected through the Right to Information Act they had been provided hence, there is no need to verify and prove the same by the authorities of the Yamuna Expressway and regarding service of Helicopter to Mata Vashno Devi which was booked on 9th thereafter it was cancelled. Booking online and obtaining PNR number is not the perfect evidence to prove that a person who booked the ticket boarded on the same because of the ticket of the service of the Helicopter. Ticket of the service of the Helicopter was booked through online and the said booking may be done from the home of anyone. Thereafter the applicant wanted to summon the original record relating to travel of Yamuna Expressway.

11. Learned counsel for the opposite party no.2 replied in para 12 of the affidavit that the applicant now claimed that she alongwith co-accused went to Shimla where she stayed in a Hotel. Thereafter other information are based on newspaper which are not admissible in evidence. He further submitted that statutory admissibility of records which are required by the applicant and co-accused are statement of the bank account, documents of the helicopter services, documents provided by the Yamuna Expressway authority under R.T.I. Act are procurable so there is no need to summon the officer concerned to proof the same. If the

applicant wants to produce defence witnesses then she or other co-accused has liberty to produce them as defence witnesses before the trial court and there is no need to call them as Court witnesses to prove the documents submitted by the applicant at the stage of prosecution witnesses. Applicant by way of this application only try to delay the trial.

12. I have heard learned counsel for the parties and gone through the record carefully.

13. It has been repeatedly held by the Hon'ble Apex Court as well as this Court that lacuna in the prosecution must be construed to be an inherent weakness in the case and a latest wedge in the prosecution case and advantage of it should normally go to the accused in the trial of the case.

14. To verify the fact, it is relevant to consider Section 311 Cr.P.C. which are reproduced here-in-below:-

"311. Power to summon material witness or examine person present - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

15. A bare perusal of Section goes to show that it is divided in two parts. In the first part, the word used is "may" and thereby giving jurisdiction to the Court to pass order as per its discretion and the second part uses the word "shall" which makes obligatory for the Court to pass such order. The provision of Section 311 Cr.P.C., thus, first is a supplementary provisions enabling and in certain circumstances imposition on the Court with the duty of examining a material witness who could not brought before it. It is couched in the widest possible terms and clause for non limitation either with regard to the stage of the trial nor with regard to the manner, it should be exercised.

16. It is true that the power of the Court under Section 311 Cr.P.C. is of a very wide in nature but in what manner such power should be exercised has been a matter of discretion before the superior Courts.

17. In the case of **Hanuman Ram vs. State of Rajasthan and others 2009 (64) ACC 895,** the Hon'ble the Apex Court has laid down as to what is the object of the Section 311 Cr.P.C and how the discretion provides thereunder should be exercised. Para 6 of the judgment reads as follows:

"The object underlying section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Court to issue

summons to any witness at any stage of such proceedings, trial or enquiry. In section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as wide the power the greater is the necessity for application of judicial mind."

18. Again in the case of **Vijay Kumar vs State of U.P and others (2011) 11 SCR Page 893,** the Hon'ble the Apex Court has held as follows:

"It is hardly needs to be emphasized that power under Section 311 should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the Section, power to summon any person as a witness can be exercised if the court forms an opinion that the examination of such a witness is essential for just decision of the case."

19. At another place of the same judgment the following observation has been made by Hon'ble the Apex Court:

"Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code of and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine."

20. The Apex Court while upholding as above observed that in the application to recall the witnesses, no specific reasons were mentioned as to how the examination of the witnesses proposed to be summoned was necessary and arrived at the conclusion and after discretion that the power under section 311 of the Code of Criminal Procedure 1973 were exercised arbitrarily by the Court."

21. In **Darya Singh and others Vs. State of Punjab, AIR 1965 SC 328** a Full Bench of the Apex Court has held as under:-

"In our opinion, this argument is entirely misconceived. It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story. It is obvious that a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The duty of the prosecutor is to assist the court in reaching a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the prosecutor not to examine witnesses who, in his opinion have not witnessed the incident, but normally he ought to examine all the eye-witnesses in support of his case. It may be that if a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the

witness-box. If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case if the ends of justice require, the Court may even examine such witnesses by exercising its power under Section 540; but to say that in every murder case, the Court must scrutinise the police diary and make a list of witnesses whom the prosecutor must examine is virtually to suggest that the Court should itself take the role of a prosecutor. The powers of the Court under Section 540 can and ought to be exercised in the interests of justice whenever the Court feels that the interests of justice so require, but that does not justify Mr. Bhasin's contention that the failure of the Court to have exercised its power under Section 540 has introduced a serious infirmity in the trial itself."

22. In **Moirangthem Tomba Singh Vs. State of Manipur, 1984 Cr.L.J. 536** it has been observed as under:-

"That apart as submitted by the learned public prosecutor, reviewing on the decision Darya Singh v. State of Punjab (AIR 1965 SC 328) : 1965 (1) Cri LJ 350). The duty of the prosecution is normally to examine all the eye-witnesses but if the selection was made fairly and honestly and not with a view to suppress inconvenient witness from the witness box no adverse inference could be drawn against the prosecution."

23. The Hon'ble Apex Court in the case of Natasha Singh Vs. C.B.I., reported in 2013 (2) UPCr.R 605, has stated that 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 Cr.P.C. 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 Cr.P.C. 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.

24. It is apparent from the impugned order passed by the court below that accused had enclosed the list of documents which he wanted to summon are related with Right to Information Act which legal admissibility is not doubtful and others are relating to newspaper which are not admissible in evidence and the documents which related bills of expenses of travel and hotels would not required to be summoned and further coordinate Bench of this Court directed the court below to expedite the matter and the accused-applicant would have opportunity to put all this in defence and thereafter prosecution will have to cross them. The accused having opportunity to state under section 313 Cr.P.C. Regarding his alibi as defence, thereafter he could produce documents as defence. No doubt, while exercising power

under section 311 Cr.P.C. Paramount consideration of the court should be to do justice to the case and the court can summon a witness at any stage, if same is filling up lacuna or loopholes. Similarly, this Court has also held that material essential for just decision of the case ought to be taken on record. However, in the case at hand, this court having carefully perused the explanation rendered in the application filed under section 311 Cr.P.C. as well as reasons recorded by the learned Special Judge in support of his decision finds no occasion to summon the documents as required by the applicant.

25. Learned counsel for the applicant has placed reliance upon the judgements of the Apex Court and this Court. In both the cases facts are totally different from the present case. In the case of Union Terretory of Dadra & Haveli (supra), the accused-applicant took a plea of alibi in his statement under section 313 Cr.P.C. which was recorded after close of prosecution evidence and submitted that he is a prominent member of political party and at the time of incident he was present in the chamber of Collector. In the present case, the applicant will have opportunity to take plea of alibi and thereafter he may produce evidence as per requirement. In the case of Arslan Zaheer (supra), the applicant moved an application under Section 311 Cr.P.C. to summon the register of the hotel for the purpose of cross examination as the accused has to proof his innocence because accused was trapped in kidnapping case, on his defence he had to prove that victim/girl was gone with her own volition along with co-accused and stayed in hotel and filled up hotel register documents in her own handwriting.

26. The power under section 311 Cr.P.C. is the discretion or the obligation of the Court to summon or recall a witness, but this discretion of the Court cannot be forced to be used by the accused or the prosecution. While considering the present case it is clear that the document which are required to be summoned are having in possession of the applicant-accused and they have got information under Right to Information Act and documents which relate to newspaper are not admissible in evidence not required to summon and further Hon'ble coordinate Bench of this Court had directed to expedite the trial. The applicant-accused have opportunity to put his case of *alibi* at the time of statement under section 311 Cr.P.C. and produce the documents as defence evidence.

27. Considering the facts of the cases and in the end, I do not find any illegality in the impugned order requiring any interference by this Court in exercise of inherent power under section 482 Cr.P.C. and consequently, the prayer for quashing the impugned order dated 27.02.2020 passed by Additional Session Judge, Court No.3, Firozabad in application under section 311 Cr.P.C. in Session Trial No.5586 of 2016 (State vs. Rohan Singhal and others) arising out of Case Crime No.648 of 2016, under sections 364A, 302, 201, 404, 120B I.P.C., Police Station Tundla, District Firozabad, is refused.

28. The present 482 application lacks merit and is, accordingly, dismissed.

(2021)01ILR A1017
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.01.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application u/s 482 No. 13804 of 2020

Anmol Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Hari Prakash Singh

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

A. Criminal Law – Application u/s 482 – Power and Jurisdiction of Magistrate while deciding application u/s 156(3) Cr.P.C. – Code of Criminal Procedure: Section 156(3), 202(1), 190 - The Magistrate empowered under section 190 Cr.P.C. may order an investigation by police under section 156(3) but he need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance he has to follow the procedure envisaged in Chapter XV of the code. (Para 6, 8)

It is true that every application under Section 156(3) Cr.P.C. disclosing commission of a cognizable offence may not be directed for investigation by police and the Magistrate has jurisdiction to treat the same as a complaint case but in exercise of such jurisdiction the Magistrate has to keep in view various factors. The exercise of jurisdiction is basically guided by interest of justice, from case to case. (Para 14)

B. The magistrate should apply judicial mind while exercising his powers u/s 156 (3) Cr.P.C. He could not act in a mechanical or casual manner and go on with the complaint after getting the report. The course adopted by the Magistrate i.e. direction to the police for registration of FIR and making investigation or to treat the application as a complaint case, must be supported by reasons. The order must also reflect that the Magistrate on relevant considerations has adopted one of these two modes open to him. Mere mention in the order that he has gone through the complaint and the police investigation is not required or otherwise, would not be sufficient compliance of application of judicial mind while deciding application u/s 156(3) Cr.P.C. (Para 8)

The direction u/s 156(3) Cr.P.C. 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 issuance of process and finds that a case is made out to proceed forthwith, direction under the 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 straightway direct investigation, such a direction is issued. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate is yet to determine existence of sufficient ground to proceed. (Para 10)

In the present case, perusal of the order clearly shows that the Magistrate has not applied judicious mind to the facts of the case, which not only made out commission of a cognizable offence but an offence of molestation and sexual assault on the mother of the applicant. The application clearly stated that the accused persons are related to influential persons and as such neither the FIR was being lodged nor the medical of the applicant's mother was carried out. In such matters the medical examination of the victim is necessary. Merely because the facts are in the knowledge of the applicant, direction to lodge FIR cannot be refused. The gravity/seriousness of the offence, the requirement of the evidence for the purpose of launching a successful prosecution, and basically the interest of justice depending on the facts of each case, need be considered in passing the order under Section 156(3) Cr.P.C. The offence, as per the contents of the application is not a matrimonial, commercial or family dispute, etc. The order does not assign any valid reason nor reflects application of judicious mind to relevant

considerations and does not stand the test of the law. (Para 15)

Writ Petition/Application allowed. (E-3)

Precedent followed:

1. Lalita Kumari Vs Govt. of India & ors., reported in (2014) (2) SCC 1 (Para 5)

2. Jitendra Kumar Vs St. of U.P. & ors., Criminal Revision No. 1768 of 2018, decided on 29.05.2018 (Para 5)

3. Shiv Mangal Singh Vs St. of U.P. & ors., Criminal Revision No. 715 of 2019, decided on 25.02.2019 (Para 5)

4. Ashok Kumar Pathak Vs St. of U.P. & anr., passed in application u/s 482 Cr.P.C. No. 43271 of 2018, decided on 30.11.2018 (Para 5)

5. Sukhwasi Vs St. of U.P. & ors., 2007 (59) ACC 739 (Allahabad) (D.B.) (Para 6)

6. Suresh Chandra Jain Vs St. of M.P. & anr. (2001) 2 SCC 628 (Para 8)

7. Mohd. Yusuf Vs Smt. Afaq Jahan & anr. (2006) 1 SCC 627 (Para 8)

8. Ram Babu Gupta Vs St. of U.P. & ors. [2001 (43) ACC 50 (FB) (Para 8)

9. Sukhwasi Vs St. of U.P. & ors., [2007] (9) ADJI (DB) (Para 8)

10. Ram Dev Food Products Vs St. of Guj., (2015) 6 SCC 439 (Para 8)

11. Gulab Chand Upadhyay Vs St. of U.P. & ors., (2002) SCC OnLine All 1221 (Para 11)

12. Lalaram Vs St. of U.P. & ors., passed in Criminal Revision No. 1611 of 2020, decided on 18.12.2020 (Para 12)

Present petition/application has been filed challenging the order dated 17.07.2020, passed by Chief Judicial Magistrate, Janupur u/s 156(3) Cr.P.C., whereby the said application has been registered as a complaint case.

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

1. Heard Shri Hari Prakash Singh, learned counsel for the applicant and learned A.G.A. 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 17.07.2020, passed by learned Chief Judicial Magistrate, Court No. 11, Janupur in Criminal Misc. Application No. 180 of 2020 (Anmol Singh versus Krishan Kumar Singh and others) under Section 156(3) Cr.P.C. Police Station-Sarai Khwaja, District- Jaunpur, whereby the said application has been registered as a complaint case.

3. Considering the nature of the order under challenge; the pre-cognizance stage of the case at which the proposed accused have no right of hearing, that keeping this application pending would serve no fruitful purpose which would delay the proceedings of the criminal case as well as the order proposed to be passed, the notice to the private respondents is dispensed with.

4. Briefly stated the facts of the case as per the application/petition are that on 05.05.2020 at about 8.30 a.m. the accused opposite party nos. 2 to 4 forcibly entered in the house of the applicant armed with lathi and danda, abused and misbehaved the applicant and her mother. They also threatened the applicant to kill him. The accused committed sexual assault on the mother of the applicant. The applicant was medically examined but no medical examination of the mother was conducted in spite of request. The accused are related to influential persons. The applicant's report was not being registered, therefore,

the application under Section 156(3) Cr.P.C. was filed on which the order under challenge was passed.

5. Learned counsel for the applicant submits that the application under Section 156(3) Cr.P.C. discloses commission of cognizable offence and as such the Magistrate must have directed the registration of the first information report and investigation by police, instead of treating the application as a complaint case. He further submits that the order under challenge has been passed mechanically and in a routine manner, which does not manifest the application of judicious mind to the facts of the case and law applicable therein. He has placed reliance on the cases of '***Lalita Kumari Vs. Government of India and others',*** reported in ***2014(2) SCC 1; '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 and ***'Ashok Kumar Pathak Vs. State of U.P. and another'***, passed in application under Section 482 Cr.P.C. No.43271 of 2018, decided on 30.11.2018.

6. 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.

7. I have considered the submissions as advanced by the learned counsel for the applicant, the learned AGA and perused the material brought on record.

8. In the cases of **Suresh Chandra Jain vs State of M.P. and another (2001) 2 SCC 628; Mohd. Yousuf Vs. Smt. Afaq Jahan & another another (2006) 1 SCC 627; Ram Babu Gupta Vs. State of U.P. & others [2001 (43) ACC 50 (FB); Sukhwasi Vs. State of U.P. & others [2007 (9) ADJI (DB) & Ram Dev Food Products Vs. State of Gujarat (2015) 6 SCC 439** it has been laid down that the Magistrate empowered under section 190 Cr.P.C. may order an investigation by police under section 156 (3) but he need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance he has to follow the procedure envisaged in Chapter XV of the code. The magistrate should apply judicial mind while exercising his powers under Section 156 (3) Cr.P.C. He could not act in a mechanical or casual manner and go on with the complaint after getting the report. The course adopted by the Magistrate i.e. direction to the police for registration of FIR and making investigation or to treat the application as a

complaint case, must be supported by reasons. The order must also reflect that the Magistrate on relevant considerations has adopted one of these two modes open to him.Mere mention in the order that he has gone through the complaint and the police investigation is not required or otherwise, would not be sufficient compliance of application of judicial mind while deciding application under Section 156(3) Cr.P.C.

9. In the case of **Lalita Kumari Vs. Government of India and others reported in 2014 (2) SCC 1** the Hon'ble Supreme Court has held as under:

"120) In view of the aforesaid discussion, we hold:

"i) 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.

ii) 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.

iii) 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.

iv) 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.

v) 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.

vi) 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.

vii) 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.

viii) 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."

10. The case of **Lalita Kumari (supra)** came to be considered in Ramdev Food Products Private Ltd. Vs. State of Gujarat (2015) 6 SCC 439 the first question as framed therein was "whether the discretion of the Magistrate to call for a report under Section 202 Cr.P.C. instead of directing investigation under Section 156(3) Cr.P.C. is controlled by any defined parameters? The Hon'ble Supreme Court answered the first question by holding that the direction under Section 156(3) Cr.P.C. 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 issuance of process and finds that a case is made out to proceed forthwith, direction under the 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 straightway direct investigation, such a direction is issued. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate is yet to determine existence of sufficient ground to proceed. The category of cases falling under para 120.6 in Lalita Kumari may fall under section 202 Cr.P.C. Subject to these broad guidelines available from the scheme of the Court, exercise of discretion by the Magistrate is guided by interest of justice from case to case. Para Nos. 22 to 22.3 of Ramdev Food Products (P) Ltd. (supra) is being reproduced as under:

"22. Thus, we answer the first question by holding that:

22.1. 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 the issuance 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.

22.2. 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 Kumar may fall under Section 202 Cr.P.C..

22.3. 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."

11. It would also be appropriate to refer to the judgment of this Court in the case of Gulab Chand Upadhyay Vs State of U.P. and others 2002 SCC OnLine All 1221 in which this Hon'ble Court has held as under:

"20. In these circumstances, the question arises that when a Magistrate is approached by a complainant with an application praying for a direction to the police under Section 156 (3) to register and investigate an alleged cognizable offence, why should he

(A) grant the relief of registration of a case and its investigation by the police under Section 156 (3) Cr.P.C. and when should he

(B) treat the application as a complaint and follow the procedure of Chapter XV of Cr.P.C.

21. 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 under whom statute has conferred the powers essential for investigation, for example

(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 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.

22. 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 thought of a limited nature (see para 7 of JT (2001) 2 (SC) 81: ((2001) 2 SCC 628: AIR 2001 SC 571)."

12. Recently, in the case of '**Lalaram Vs. State of U.P. and 13 others**' passed in Criminal Revision No.1611 of 2020, decided on 18.12.2020, this Court has summarized the well settled proposition of law on the scope of Section 156(3) Cr.P.C., the power and jurisdiction of the Magistrate while deciding such an application. It would be appropriate to reproduce

paragraph no.40 of the case of Lalaram (Supra), as under:-

"40. From the aforesaid judgments, some of the following proposition of law, well settled, may be summarized as under:-

(40.01). 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.

(40.02). 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.

(40.03). 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.,

(40.04). 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.

(40.05). 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.

(40.06). 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.

(40.07). The exercise of discretion by the Magistrate is basically guided by interest of justice, from case to case.

(40.08). 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.

(40.09). 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.

(40.10). 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 .

(40.11). 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.

(40.12). 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.

(40.13). 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.

(40.14). 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.

(40.15). 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."

13. In '**Jitendra Kumar'** (Supra), **'Shiv Mangal Singh'** (Supra) and '**Ashok Kumar Pathak'** (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.

14. It is true that every application under Section 156(3) Cr.P.C. disclosing commission of a cognizable offence may not be directed for investigation by police and the Magistrate has jurisdiction to treat the same as a complaint case but in exercise of such jurisdiction the Magistrate has to keep in view various factors as laid down in **Lalaram (supra),** which are only illustrative and not exhaustive. The exercise of jurisdiction is basically guided by interest of justice, from case to case.

15. Perusal of the order clearly shows that the Magistrate has not applied judicious mind to the facts of the case and in particular paragraph no.3 of the application, which not only made out commission of a cognizable offence but an offence of molestation and sexual assault on the mother of the applicant. The application clearly stated that the accused persons are related to influential persons and as such neither the FIR was being lodged nor the medical of the applicant's mother was carried out. In such matters the medical examination of the victim is necessary. The medical report of the victim is of importance. Merely because the facts are in the knowledge of the applicant, direction to lodge FIR cannot be refused. The gravity/seriousness of the offence; the requirement of the evidence for the purpose of launching a successful prosecution, and basically the interest of justice depending on the facts of each case, need be considered in passing the order under Section 156(3) Cr.P.C. The offence, as per the contents of the application is not a matrimonial, commercial or family dispute, etc. The order does not assign any valid reason nor reflects application of judicious

mind to relevant considerations and does not stand the test of the law as laid down in the cases of "**Ram Deo Food Products**' (Supra) and '**Gulab Chand Upadhyay**' (Supra).

16. The present petition/application is, therefore, allowed. The order under challenge is set-aside with the direction to the learned Magistrate to pass fresh orders on the application of the applicant after affording opportunity of hearing to him, in accordance with law, in the light of the observations made herein above, within a period of one month from the date of production of true/attested copy of this judgment before the learned Magistrate concerned.

17. No orders as to costs.

(2021)01ILR A1026
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Matter Under Article 227 No. 3189 of 2020

Gurmej Singh & Ors. ...Petitioners
Versus
Ranjit Kaur & Ors. ...Respondents

Counsel for the Petitioners:
Sri Praveen Kumar, Sri Onkar Nath Vishwakarma, Sri Pradeep Kumar

Counsel for the Respondents:
Sri Arvind Kumar Tiwari, Sri Arvind Srivastava

A. Civil Law – Constitution of India: Article 227 – Maintainability of appeal against order passed in exercise of powers under Proviso to Rule 3 of Order 39 CPC - Code of Civil Procedure, 1908: Order 39 Rule 3-A, Order 39 Rule 3, Order 43 Rule (1)(r) - In Order 43 Rule (1) (r) CPC, though Rule 3 (which necessarily include Proviso to Rule 3 of Order 39 CPC) has not been mentioned, however, in view of the authorities the appeal under the aforesaid provision would be maintainable.

Such appeal, if filed, would be maintainable only after expiry of thirty days, where the provision of added Rule 3-A to Order 39 CPC is in force. However, in the State of U.P., since the Circular dated 16.8.2017 has been issued providing for six months time for disposal of applications of interim injunction failing which the subordinate court must have to record reasons in the order-sheet, therefore, such misc. appeal would be maintainable only after expiry of six months. (Para 38)

In absence of any specific statutory provision, such appeal, if filed, on expiry of aforesaid time period can be entertained guided by the parameters set out in the judgment of A. Venkatasubbiah Naidu (infra) or in any other judgment on this issue.

In the present case, the defendant has not filed any application before the trial court to vacate the ex-parte temporary injunction and it is also not a case where plaintiff is aggrieved that the trial court is not deciding or has failed to decide the temporary injunction application. Therefore, as observed by Hon'ble Supreme Court in A. Venkatasubbiah Naidu (infra), the order dated 5.8.2020 passed by the trial court cannot be deemed to be final order in nature on the date of expiry of thirty days mentioned in Order 39 Rule 3-A CPC. The natural consequence whereof is that misc. appeal under Order 43 Rule 1(r) CPC would not be maintainable. (Para 16)

In the State of U.P. in absence of applicability of Rule 3-A thirty days time limit can be safely treated to be six months for disposal of temporary injunction application and also for the purpose of deemed inclusion of order passed in exercise of powers under Proviso to Rule 3 of Order 39 CPC (after six

months) in Order 43 Rule (1) (r) CPC. (Para 20)

B. Appellate Court is bound to record reasons - While entertaining such appeal the appellate court is bound to record reasons for entertaining such appeal, and such appeal must indicate the omission on the part of the trial court to decide such temporary injunction application finally, if filed, by the plaintiff or omission on the part of the trial court to decide an application filed by the defendant for vacating the interim order granted by the trial court within the said time period of six months (in the State of U.P.). (Para 17, 38)

No such action or omission on the part of the trial court exists in this case. On the contrary, in the light of Proviso to Rule 3 of Order 39 CPC reasons have been recorded by the trial court and directions were given to take steps, which were also taken by the plaintiff and defendant was duly served the notices. (Para 30)

Court further clarified that in case the temporary injunction application filed by the plaintiff or any other party to the suit interested in temporary injunction is not decided within the time period of six months in the State of U.P., he can file misc. appeal under the provisions of Order 43 Rule (1) (r) CPC, which can be entertained for the reasons recorded and in case of non-consideration of disposal of the stay vacation application filed by the defendant or any other party to the suit, he can also file misc. appeal under the aforesaid provision, which can also be considered for the reasons recorded as per the parameters set out by the Courts. (Para 29, 38)

There is a difference in "maintainability" and "entertainability". The misc. appeal may be 'maintainable' but the same can be 'entertained' only on the parameters set out in the relevant statutory provisions and if there is no such provision of law available, then as per the law laid down by the Courts. (Para 27)

C. Appeal can be considered only on the evidence already on record unless additional evidence is received as per the procedure prescribed - If any such misc. appeal is filed, the same can be considered only on the evidence already on record before the trial court unless the additional evidence is received by the appellate court under Order 41 Rule 27 CPC as per the law by recording reasons. In other words, in such misc. appeal the appellant cannot rely on the evidence filed by him in the appellate court without the same having not been allowed by the misc. court under Order 41 Rule 27 CPC. (Para 38)

In the present case, even before the date fixed by the trial court, without putting in appearance in the trial court, the misc. appeal was filed and from perusal of the lower appellate court order it is reflected that the evidence on affidavit was filed by the parties (including the defendant) and was accepted by the lower appellate court also as such, and not under Order 41 Rule 27 CPC by recording reasons for accepting the same. (Para 35)

Writ Petition allowed. (E-3)

Precedent followed:

1. Zila Parishad, Budaun & ors. Vs Brahma Rishi Sharma, 1970 AIR (Allahabad) 376 (FB) (Para 8)

2. Venkatasubbiah Naidu Vs S. Challappan & ors., (2000) (7) SCC 695 (Para 14)

3. M/s Lakshmiratan Engineering Works Ltd. Vs Asst. Comm. (Jud.) I, Sales Tax Kanpur Range Kanpur & anr., AIR 1968 SC 448 (Para 28)

Present petition challenges order dated 27.08.2020, passed by District Judge, Pilibhit.

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

1. Heard Sri Pradeep Kumar, learned Senior Counsel assisted by Sri Onkar Nath Vishwakarma, learned counsel for the

petitioners through video conferencing and Sri Arvind Srivastava along with Sri Arvind Kumar Tiwari, learned counsel for the caveator defendants-respondents and perused the record.

2. With the consent of learned counsel for the parties, present petition is being decided at this stage itself.

3. Present petition has been filed for setting aside the the order dated 27.8.2020 passed by District Judge, Pilibhit in Misc. Appeal No. 12 of 2020 (Ranjit Kaur and others vs. Gurmej Singh and others).

4. By the order dated 5.8.2020 the trial court has granted an ex-parte interim injunction by recording reasons. Defendant no. 1 is the purchaser of the property from one of the co-sharers. The order of ex-parte temporary injunction was granted and the plaintiff was directed to comply with the provision of Order 39 Rule 3 CPC and 28.8.2020 was fixed for hearing for temporary injunction application. The defendant after receiving the notice filed misc. appeal on 20.8.2020 prior to the date fixed by the trial court, which was decided by the lower appellate court vide impugned order dated 27.8.2020, whereby the order of trial court granting interim order was rejected.

5. By drawing attention to the prayer clause of the plaint Sri Pradeep Kumar, learned Senior Counsel submitted that the suit was for cancellation of the sale deed and for injunction both. This fact has been noticed by the lower appellate court at internal page 2 of the order. However, it is reflected from perusal of internal page 5 and internal page 13 (paragraph 23) that the lower appellate court proceeded as if the suit was injunction suit simplicitor and therefore, the order was set aside. Submission is that the order is wholly illegal.

6. Learned counsel for the defendant-respondent supported the impugned order.

7. That apart, this Court has put a pointed query to learned counsel appearing for the respondents that how the misc. appeal against the ex-parte injunction was maintainable and / or entertainable?

8. Learned counsel for the respondents by placing reliance on decision of Full Bench of this Court in the case of **Zila Parishad, Budaun and others vs. Brahma Rishi Sharma 1970 AIR (Allahabad) 376 (FB)** submitted that the misc. appeal filed by the defendants under Order 43 Rule (1) (r) CPC was maintainable. Paragraphs 9, 10, 11, 12, 13 and 16 of the aforsaid judgment are quoted as under:-

"9. Order 43, Rule (1) (r) pertinently reads:

"An appeal shall lie from ..... an order under Rule 1, Rule 2..... of Order XXXIX."

10. Re. Question (1): It is now to be seen whether an ex parte order of Injunction falls within the purview of Rule l(r) of Order 43.

11. Two things deserve notice at threshold. Firstly, the language of Rule l(r) is unhedged and broad. Secondly, courts should lean in favour of an interpretation which expands rather than shrinks a remedial right. A remedial provision of law is generally construed liberally. Rule 1 (r) creates a remedial right of appeal for protection of substantial and substantive rights.

12. An ad interim injunction may be granted under Order XXXIX or Section

151 in some cases. No appeal lies against an order under Section 151. be it ex parte or otherwise. An ex parte order of injunction made under Order XXXIX will fall either under Rule 1 or Rule 2. There is no other provision under which such an order can be made. Rule 1 (r) of Order 43 does not say that an appeal shall lie from a final order under Rule 1 or Rule 2 of Order XXXIX. No adequate reason is shown for interpolating the word 'final' before 'order' in Rule l(r). Courts do not ordinarily make additions in enactments. That is a legislative function.

13. Let us now examine the scheme of Rules 1 to 4 of Order XXXIX. Rules 1 and 2 provide for the making of an interim order of injunction. Rule 3 firstly provides that an interim injunction should ordinarily be granted after notice to the adversary party. Secondly, it provides that notice may be dispensed with where the court is satisfied that it would defeat the purpose of granting an injunction. Rule 4 provides that an order of injunction may be discharged or varied or set aside on an application made by the party dissatisfied with such order.

16. The language and the object of Rule 1(r) of Order 43 and the scheme of Rules 1 to 4 of Order 39 show that an appeal also lies against the ex parte order of injunction. As soon as an interim injunction is issued and the party affected thereby is apprised of it, he has two remedies: (1) he can either get the ex parte injunction order discharged or varied or set aside under Rule 4 of Order 39 and if unsuccessful avail the right of appeal as provided for under Order 43, Rule 1 (r), or (2) straightway file an appeal under Order 43, Rule 1 (r) against the injunction order passed under Rules 1 and 2 of Order 39. C.P.C. It is not unusual to provide for alternative remedies. For instance, when an ex parte decree is passed against a person, he has two remedies: either he may go up in appeal against the ex parte decree or he may seek to get the ex parte decree set aside by the same court."

(emphasis supplied)

9. Admittedly, the aforesaid judgment is of the year 1970 and amendments were made in the year 1976 Vide Section 86 of Act 104 of 1976 w.e.f. 1.2.1977, whereby Proviso to Rule 3 was added in Order 39 CPC providing powers to the trial court to grant injunction without giving notice to the opposite parties, Thus, with all respect at my command it is observed that judgment of the Hon'ble Full Court was based on the fact that at that point of time there was no specific provision giving power to the trial court for passing ex-parte order of temporary injunction.

10. By the same Section 86 of Amending Act 104 of 1976 Rule 3-A was also added to Order 39 CPC to provide that court is to dispose of application for injunction within 30 days.

11. Therefore, the Hon'ble Full Bench had no occasion to consider Rule 3 and Rule 3-A added to Order 39 CPC in the year 1976. May be, which could have substantially influenced the judgment of the Hon'ble Full Bench.

12. It would be appropriate to take note of relevant provision of CPC. Order 39 Rule 3 and 3A CPC and Order 43 Rule (1) (r) are quoted as under:-

"Order XXXIX CPC

3. **Before granting injunction, Court to direct notice to opposite party** - The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice

of the application for the same to be given to the opposite party:

Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant-

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

3A. Court to dispose of application for injunction within thirty days - Where an injunction has been granted without giving notice to the opposite party, the Court shall make an endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted; and where it is unable so to do, it shall record its reasons for such inability.

Allahabad - Rule 3-A shall be omitted (Vide Noti. No. 103/IV-h-360 dt. Feb. 3, 1981, w.e.f. Oct. 3, 1981.

Order XLIII CPC

1. Appeals from orders-

(r) an order under Rule 1, Rule 2, (Rule 2-A), Rule 4 or Rule 10 of Order XXXIX.

Rule 2-A Ins. By Act 104 of 1976, S. 89 (w.e.f. 1-2-1977)" (emphasis supplied)

13. As noticed above Rule 3-A stood omitted in State of Uttar Pradesh w.e.f. 3.10.1981.

14. Subsequently, Hon'ble Apex Court has held in A**. Venkatasubbiah Naidu vs. S. Challappan and others 2000 (7) SCC 695 (paragraph 21)** that the misc. appeal would not be maintainable before 30 days in case the injunction application is not decided, paragraphs 15, 21and 22 are quoted as under:-

"15. What would be the position if a court which passed the order granting interim ex parte injunction did not record reasons thereof or did not require the applicant to perform the duties enumerated in clauses (a) & (b) of Rule 3 of Order 39. In our view such an Order can be deemed to contain such requirements at least by implication even if they are not stated in so many words. But if a party, in whose favour an order was passed ex parte, fails to comply with the duties which he has to perform as required by the proviso quoted above, he must take the risk. Non-compliance with such requisites on his part cannot be allowed to go without any consequence and to enable him to have only the advantage of it. The consequence of the party (who secured the order) for not complying with the duties he is required to perform is that he cannot be allowed to take advantage of such order if the order is not obeyed by the other party. A disobedient beneficiary of an order cannot be heard to complain against any disobedience alleged against another party.

21. It is the acknowledged position of law that no party can be forced to suffer for the inaction of the court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1,2,2A, 4 or 10 of Order 39 of the Code in terms of Order 43 Rule 1 of the Code. He cannot approach the appellate or revisional court during the

pendency of the application for grant or vacation of temporary injunction. In such circumstances the party who does not get justice due to the inaction of the court in following the mandate of law must have a remedy. So we are of the view that in a case where the mandate of Order 39 Rule 3A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the appellate court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate court in complying with the provisions of Rule 3A. In appropriate cases the appellate court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex-parte temporary injunction shall, for the purposes of the appeal, be deemed to be the final order passed on the application for temporary injunction, on the date of expiry of thirty days mentioned in the Rule.

22. Now what remains is the question whether the High Court should have entertained the petition under Article 227of the Constitution when the party had two other alternative remedies. Though no hurdle can be put against the exercise of the constitutional powers of the High Court it is a well recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies one or the other before he resorts to a constitutional remedy. Learned single judge need not have entertained the revision petition at all and the party affected by the interim ex parte order should have been directed to resort to one of the other remedies. Be that as it may, now it is idle to embark on that aspect as the High Court had chosen to entertain the revision petition."

(emphasis supplied)

15. In the present case, admittedly, the appeal was filed without appearing before the trial court that too prior to the date fixed before the trial court, which was fixed for 28.2.2020. The misc. appeal was filed on 20.8.2020 and was decided on 27.8.2020. Therefore, the order passed in misc. appeal is totally without jurisdiction as in view of **A. Venkatasubbiah Naidu (supra)**, the misc. appeal itself was not maintainable.

16. The defendant has not filed any application before the trial court to vacate the ex-parte temporary injunction and it is also not a case where plaintiff is aggrieved that the trial court is not deciding or has failed to decide the temporary injunction application. Therefore, as observed by Hon'ble Supreme Court in **A. Venkatasubbiah Naidu (supra),** the order dated 5.8.2020 passed by the trial court cannot be deemed to be final order in nature on the date of expiry of thirty days mentioned in Order 39 Rule 3-A CPC. The natural consequence whereof is that misc. appeal under Order 43 Rule 1(r) CPC would not be maintainable.

17. It is also pertinent to note that as held by Hon'ble Supreme Court in **A. Venkatasubbiah Naidu (supra)** if any such appeal is filed, the appellate court shall be under obligation to take note of the omission of the subordinate court. Indisputably, no such observation regarding omission on part of the trial court has been made by the lower appellate court justifying entertaining misc. appeal, even

if, for the sake of arguments the same was maintainable (which, in fact, was not in the present case).

18. It is also pertinent to note that the Rule 3-A added to Order 39 CPC by way of amendment in 1976 has no application in the State of U.P. as the same stood omitted vide Notification No. 103/IV-h-360 dt. Feb. 3, 1981, w.e.f. Oct. 3, 1981 in the State of U.P. Therefore, no finality, on failure of trial court to decide temporary injunction application or vacate the same on the date of expiry of thirty days mentioned in Order 39 Rule 3-A CPC as held in **A. Venkatasubbiah Naidu (supra),** would be attracted in the State of U.P.

19. Further, this Court has issued a Circular Letter dated 16.8.2017 regarding time bound disposal of the interim injunction application, which is quoted as under:-

"Through Registered Post/E-mail
From,
Mohd. Faiz Alam Khan, HJS,
Registrar General,
High Court of Judicature at Allahabad.
To,
All the District & Sessions Judges,
Subordinate to the High Court of Judicature at
Allahabad.
C.L. No. 24/Admin. 'G-II' Dated: Allahabad 16.08.17
Sub: Time bound disposal of interim injunction application.

Madam/Sir

Hon'ble Court has directed that all the subordinate courts must ensure to dispose of applications of interim injunction within six months, failing which they shall have to record reasons in the order sheet.

I am, therefore, directed to request you to circulate the instant direction amongst all the Judicial Officers working under your supervision and control and to ensure strict compliance of the same in letter and spirit.

Yours faithfully,
Sd/-
(Mohd. Faiz Alam Khan)
No. /Admin.'G-II' Dated: Allahabad 2017.
Copy forwarded for information and necessary action to:
1. The Registrar, High Court of Judicature at Lucknow Bench, Lucknow.
2. P.S. to all the Hon'ble Judges at Allahabad and also at Lucknow Bench, Lucknow to place the same before their Lordships for kind perusal.
3. The Director, Judicial Training & Research Institute, Gomti Nagar, Lucknow.
4. All the Judicial Officers posted in the Registry in Allahabad High Court and Lucknow Bench, Lucknow.
5. The Member Secretary, U.P. State Legal Services Authority, III floor, Jawahar Bhawan, Annexe Lucknow.
6. Section Officer, Admin. 'H' Section for compliance of guard file."
(Emphasis supplied)

20. Thus, in a way, even if Order 39 Rule 3-A CPC is omitted in the State of UP, a direction to ensure disposal of interim injunction application within six months has been given by this Court. This direction appears to be to balance the equity between the parties, as on one hand, party enjoys the ex-parte temporary injunction order would be interested in prolonging the same and on the other hand, if temporary injunction is not granted, the other party would be

interested in prolonging the disposal of the same. Hence, in the State of U.P. in absence of applicability of Rule 3-A thirty days time limit can be safely treated to be six months for disposal of temporary injunction application and also for the purpose of deemed inclusion of order passed in exercise of powers under Proviso to Rule 3 of Order 39 CPC (after six months) in Order 43 Rule (1) (r) CPC.

21. The judgment of Hon'ble Full Bench in **Zila Panchayat, Budaun (supra)** was rendered in the year 1970 much prior to insertion of Proviso to Rule 3 of Order 39 CPC and Order 39 Rule 3-A CPC.

22. It is also pertinent to note that although amendments were made in Order 39 Rule 3 CPC by adding Proviso granting power to the trial court to grant ex-parte injunction without issuing notice to the opposite parties, however, no amendment was made in Order 43 Rule (1)(r) CPC by providing that the appeal would be maintainable under the aforesaid provision in case any order is passed in exercise of powers under Proviso to Rule 3. It may further be noticed that by means of Section 89 of amending Act 104 of 1976 Rule 2-A was added w.e.f. 1.2.1977 in Order 39 and also in Order 43 Rule (1)(r) CPC. Clearly, the legislature has no intention to provide for appeal under Order 43 Rule (1) (r) CPC in case any ex-parte injunction is granted before issuing notice to the opposite parties in exercise of powers under Proviso to Rule 3 of Order 39 CPC. The reason appears to be for not inserting Rule 3, wherein Proviso was added by Amending Act 1976, in Order 43 Rule (1) (r) CPC can be drawn from the insertion of Rule 3-A in Order 39 CPC by the same amending Act, whereby it was provided that the Court is to dispose of application for injunction within 30 days. Clearly, the legislature has no intention to provide for appeal from orders passed under Order 39 Rule 3 Proviso CPC. The Hon'ble Full Bench in **Zila Parishad, Budaun (supra)** and Hon'ble Supreme Court in **A. Venkatasubbiah Naidu (supra)** have held that such appeal is maintainable. The judgment in Zila Parishad, Budaun (supra) was rendered by Hon'ble Apex Court in the year 1970 and therefore, the Hon'ble Court had no occasion to consider the powers provided to the trial court under Proviso added to Rule 3 of Order 39 CPC in the year 1976. Insofar as maintainability of appeal against ex-parte injunction order under Order 43 Rule (1) (r) CPC is concerned, even Hon'ble Apex Court in the case of A. Venkatasubbiah Naidu (supra) has held that appeal is maintainable. However, in case any such appeal is preferred the appellate court shall be obliged to entertain the appeal as maintainable and further to take note of the omission of the subordinate court in complying with the provision of Order 39 Rule 3-A CPC. It is very pertinent to note that this observation has given after the observation made by Hon'ble Supreme Court in the aforesaid case that in a case where mandate of Order 39 Rule 3-A of the Code is flouted, the aggrieved party shall be entitled to right of appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction, against the order remaining in force. **A. Venkatasubbiah Naidu (supra)** is a case from State of Tamil Nadu, where provision of Order 39 Rule 3-A CPC are applicable, which is not so in the State of Uttar Pradesh. The observations of the Hon'ble Supreme Court are, therefore, heavily in favour of entertaining the appeal after 30 days in view of provision of Rule 3-A, which has been extensively considered by the Hon'ble

Supreme Court, which, in fact, is not applicable in the present case.

23. There is another aspect of the matter, no doubt, it cannot be held that the appeal against such ex-parte injunction or inaction on the part of the trial court in not deciding the application for grant of temporary injunction for long would not be maintainable. The same would be clearly maintainable in the light of judgments as noted above, however, such appeal can be entertained only when glaring facts are reflected on the part of the trial court in its action or omission as held in **A. Venkatasubbiah Naidu (supra).**

24. Thus, although Order 39 Rule 3 CPC is not included in Order 43 Rule (1) (r) CPC, however, same would be maintainable in view of law laid down in **Zila Parishad, Budaun (FB Alld) (supra) and A. Venkatasubbiah Naidu (supra)** by Hon'ble Supreme Court after 30 days in States, where Order 39 Rule 3-A CPC is applicable. However, in the State of U.P. after six months, in view of the Circular dated 16.8.2017 issued by this Court for ensuring the disposal of application of temporary injunction in six months as the language of first paragraph of the Circular dated 16.8.2017 reflects the same sentiments and intention as reflected in Order 39 Rule 3-A CPC.

25. Therefore, to my mind, maintainability of misc. appeal under Order 43 Rule (1) (r) CPC before six months cannot be claimed and hence, the same would not be maintainable.

26. Since, maintainability of such appeal against order passed in exercise of powers under Proviso to Rule 3 of Order 39 CPC does not come from the statutory provision i.e. Order 43 Rule (1) (r) CPC but is as per or comes from the judgments rendered, therefore, even if such appeal is maintainable, it has to be seen when it can be entertained.

27. To my mind, there is a difference in "maintainability" and "entertainability". The misc. appeal may be 'maintainable' but the same can be 'entertained' only on the parameters set out in the relevant statutory provisions and if there is no such provision of law available, then as per the law laid down by the Courts.

28. A reference may be made to a judgment of Hon'ble Supreme Court in the case of **M/s Lakshmiratan Engineering Works Ltd. vs. Asst. Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur and another AIR 1968 SC 448**, paragraphs 7 to 10 whereof are quoted as under:-

"(7) To begin with it must be noticed that the proviso merely requires that the appeal shall not be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due. A question thus arises what is the meaning of the word 'entertained' in this context? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and disposed of unless satisfactory proof is available? The dictionary meaning of the word 'entertain' was brought to our notice by the parties, and both sides agreed that it means either "to deal with or admit to consideration". We are also of the same opinion. The question, therefore, is at what stage can the appeal be said to be entertained for the purpose of the application of the proviso? It is 'entertained' when it is filed or is it

finally 'entertained' when it is admitted and the date is fixed for hearing or is it finally 'entertained' when it is heard and disposed of? Numerous cases exist in the law reports in which the word 'entertained' or similar cognate expressions have been interpreted by the courts. Some of them from the Allahabad High Court itself have been brought to our notice and we shall deal with them in due course. For the present, we must say that if the legislature intended that the word 'file' or 'receive' was to be used, there was no difficulty in using those words. In some of the statutes which were brought to our notice such expressions have in fact been used. For example, under Order 41, Rule 1 of the Code of Civil Procedure it is stated that a memorandum shall not be filed or presented unless it is accompanied etc., in S. 17 of the Small Causes Courts Act, the expression is 'at the time of presenting the application'. In Section 6 of the Court Fees Act, the words are 'file' or 'shall be received'. It would appear from this that the legislature was not at a loss for words if it had wanted to express itself in such forceful manner as is now suggested by counsel for the State. It has used the word 'entertain' and it must be accepted that it has used it advisedly. This word has come in for examination in some of the cases of the Allahabad High Court and we shall now refer to them.

(8) In Kundan Lal v. Jagannath Sharma, AIR 1962 All 547 the Court was concerned with Order 21, Rule 90, of the Code of Civil Procedure which had been amended by the Court by changing the provisions of the original Code. The changed rule is as follows:

"Provided that no application to set aside the sale shall be entertained:

(a) upon any ground which should have been taken by the applicant on or before the date on which the sale proclamation was drawn up:

(b) Unless the applicant deposits such amount not exceeding 12½% of the sum realised by the sale or furnishes such security as the court may in its discretion fix, except when for reasons to be recorded it dispenses with the requirements of this clause.

(9) The word 'entertain' is explained by a Divisional Bench of the Allahabad High Court as denoting the point of time at which an application to set aside the sale is heard by the court. The expression 'entertain', it is stated, does not mean the same thing as the filing of the application or admission of the application by the court. A similar view was again taken in Dhoom chand Jain v. Chamanlal Gupta, AIR 1962 All 543 in which the learned Chief Justice Desai and Mr. Justice Dwivedi gave the same meaning to the expression 'entertain'. It is observed by Dwivedi, J. that the word 'entertain' in its application bears the meaning 'admitting to consideration', and therefore when the court cannot refuse to take an application which is backed by deposit or security, it cannot refuse judicially to consider it. In a single bench decision of the same court reported in Bawan Ram v. Kunj Beharilal, AIR 1962 All 42 one of us (Bhargava J.) had to consider the same rule. There the deposit had not been made within the period of limitation and the question had arisen whether the court could entertain the application or not. It was decided that the application could not be entertained because proviso (b) debarred the court from entertaining an objection unless the requirement of depositing the amount or furnishing security was complied with within the time prescribed. In that case the word 'entertain' is not interpreted but it is held that the court cannot proceed to consider the application in the absence of deposit made within the time allowed by law. This case turned on the fact that the

deposit was made out of time. In yet another case of the Allahabad High Court reported in Haji Rahim Bux and Sons v. Firm Samiullah and Sons, AIR 1963 All 320 a Division Bench consisting of Chief Justice Desai and Mr. Justice S.D. Singh interpreted the words of O. 21, R. 90, by saying that the word 'entertain' meant not 'receive' or 'accept' but 'proceed to consider on merits' or 'adjudicate upon'.

(10) In our opinion these cases have taken a correct view of the word 'entertain' which according to dictionary also means 'admit to consideration'. It would therefore appear that the direction to the court in the proviso to S. 9 is that the court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be when the case is taken up by the court for the first time. In the decision on which the Assistant Commissioner relied, the learned Chief Justice (Desai C.J.) holds that the words "accompanied by" showed that something tangible had to accompany the memorandum of appeal. If the memorandum of appeal had to be accompanied by satisfactory proof, it had to be in the shape of something tangible, because no intangible thing can accompany a document like the memorandum of appeal. In our opinion, making 'an appeal' the equivalent of the memorandum of appeal is not sound. Even under O. 41 of the Code of Civil Procedure, the expressions "appeal" and "memorandum of appeal" are used to denote two distinct things. In Wharton's Law Lexicon, the word "appeal" is defined as the judicial examination of the decision by a higher Court of the decision of an inferior court. The appeal is the judicial examination; the memorandum of appeal contains the grounds on which the judicial examination is invited. For purposes of limitation and for purposes of the rules of the Court it is required that a written memorandum of appeal shall be filed. When the proviso speaks of the entertainment of the appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is satisfactory proof available of the making of the deposit of admitted tax."

(emphasis supplied)

29. From the discussions made hereinabove, such misc. appeal can be entertained only if it satisfies the parameters set by the judgments of the courts and not otherwise as the appellate court is under obligation to record reasons for entertaining the same as set out in **A. Venkatasubbiah Naidu (supra).**

30. No such action or omission on the part of the trial court exist in this case. On the contrary, in the light of Proviso to Rule 3 of Order 39 CPC reasons have been recorded by the trial court and directions were given to take steps, which were also taken by the plaintiff and defendant was duly served the notices. Hence, in view of the observation made in **A. Venkatasubbiah Naidu (supra)** not only the appeal was not maintainable but also there was no occasion to entertain the misc. appeal by the lower appellate court.

31. In my opinion, in any case, such appeal cannot be entertained in a routine manner and in no manner if filed by the defendant when after service of notice he has not put in appearance before the trial court to contest the temporary injunction application and has not filed objection to the same.

32. There is yet another aspect of the matter. Before Hon'ble Full Bench in **Zila Parishad, Budaun (supra)** two following

questions were referred for consideration by the Full Bench:-

"(1) Whether the ex parte order issuing injunction against the defendants is appealable in the circumstances of this case?

(2) If the order is appealable can the appellant rely on fresh evidence which was not before the trial court?"

33. The question no. 1 was held in affirmative. The question no. 2 was answered as under:-

"The appellant as a matter of right cannot rely on fresh evidence in appeal which was not before the trial court until it is admitted by the appellate Court under Order 41, Rule 27, CPC."

(emphasis supplied)

34. Thus, there is yet another aspect of the matter insofar as merit of the case is concerned. In the case of **Zila Parishad, Budaun (supra)** while answering the Court question no. 2 it was held that the appellant as a matter of right cannot rely on fresh evidence in appeal which was not before the trial court until it is admitted by the appellate court under Order 41 Rule 27 CPC.

35. In the present case, even before the date fixed by the trial court, without putting in appearance in the trial court, the misc. appeal was filed and from perusal of the lower appellate court order it is reflected that the evidence on affidavit was filed by the parties (including the defendant) and was accepted by the lower appellate court also as such, and not under Order 41 Rule 27 CPC by recording reasons for accepting the same. This is clearly contrary to the intention as reflected in the answer given by the Hon'ble Full Bench to question no. 2 as already noted above in this judgment.

36. During course of argument learned counsel for the respondents sought to argue on the merits for grant of interim injunction and maintainability of the suit. All such issues can be raised before the trial court by the defendants-respondents herein.

37. Since this petition is being decided on the legal question involved in the present case and more so, when the defendants are represented before this Court and I have heard learned counsel for the parties at length, I find that the impugned order dated 27.8.2020 is not sustainable in the eye of law

38. From the discussions made hereinabove, it can, therefore, safely be held as under:-

I. Though in Order 43 Rule (1) (r) CPC Rule 3 (which necessarily include Proviso to Rule 3 of Order 39 CPC) has not been mentioned, however, in view of the judgment of Hon'ble Full Bench in Zila Parishad, Budaun (supra) and in **A. Venkatasubbiah Naidu (supra)** the appeal under the aforesaid provision would be maintainable.

II. Such appeal, if filed, would be maintainable only after expiry of thirty days, where the provision of added Rule 3-A to Order 39 CPC is in force. However, in the State of U.P., since the Circular dated 16.8.2017 has been issued providing for six months time for disposal of applications of interim injunction failing which the subordinate court must have to record reasons in the order-sheet, therefore, such misc. appeal would be maintainable only after expiry of six months.

III. In absence of any specific statutory provision, such appeal, if filed, on expiry of aforesaid time period can be entertained

guided by the parameters set out in the judgment of **A. Venkatasubbiah Naidu (supra)** or in any other judgment on this issue.

IV. While entertaining such appeal the appellate court is bound to record reasons for entertaining such appeal, and such appeal must indicate the omission on the part of the trial court to decide such temporary injunction application finally, if filed, by the plaintiff or omission on the part of the trial court to decide an application filed by the defendant for vacating the interim order granted by the trial court within the said time period of six months (in the State of U.P.).

V. At the cost of repetition it may further be clarified that in case the temporary injunction application filed by the plaintiff or any other party to the suit interested in temporary injunction is not decided within the time period of six months in the State of U.P., he can file misc. appeal under the provisions of Order 43 Rule (1) (r) CPC, which can be entertained for the reasons recorded and in case of non-consideration of disposal of the stay vacation application filed by the defendant or any other party to the suit, he can also file misc. appeal under the aforesaid provision, which can also be considered for the reasons recorded as per the parameters set out by the Courts.

VI. If any such misc. appeal is filed, the same can be considered only on the evidence already on record before the trial court unless the additional evidence is received by the appellate court under Order 41 Rule 27 CPC as per the law by recording reasons. In other words, in such misc. appeal the appellant cannot rely on the evidence filed by him in the appellate court without the same having not been allowed by the misc. court under Order 41 Rule 27 CPC as per the law laid down by the Hon'ble Full Bench in the case of **Zila Parishad, Budaun (supra).**

39. Accordingly, for the discussions made hereinabove, the impugned order dated 27.8.2020 is hereby set aside.

40. At this stage, learned counsel for the respondents submits that the court below may be directed to decide interim injunction application within time bound period.

41. In the light of Circular dated 16.8.2017 as already noted above no further direction is required for disposal of interim injunction application.

42. It is expected that the Court below shall follow the directions as noted above in its letter and spirit provided the functioning of the court is not affected due to COVID-19 Pandemic.

43. Present petition stands allowed, however, with the observations as made above. No order as to costs.

(2021)01ILR A1038
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

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

Matter Under Article 227 No. 3462 of 2020

Govardhan & Ors. ...Petitioners
Versus
Smt. Jaldhara Devi Maha Vidyalaya, Hathras & Anr. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Kumar Mishra

Counsel for the Respondents:

A. Civil Law – Jurisdiction under Article 227 - Constitution of India: Article 227; Civil Procedure Code, 1908 – Order XXXIX Rule 1 and 2, Order XXXIX Rule 1(r), Order XLIII Rule 1(r); Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950: Section 143, 176/182 – The order ought not be interfered with if it is one that does substantial justice, and the flaw even about jurisdiction is one merely about the form of remedy. (Para 10)

An interim injunction granting prohibitory relief to preserve the property in dispute pending suit could be granted, where the relief claimed is for mandatory injunction. (Para 6)

An interim injunction is designed to act in aid of the final relief and to eschew *pendente lite* injury by the wrongful action of one party against the other, before their rights are determined. The purpose of an interim injunction under Order XXXIX Rule 1 and 2 of the Civil Procedure Code, 19082 is to preserve the property in dispute pending suit, where the property is in danger of being wasted, damaged or alienated by any party to the suit, or where the defendants threaten to dispossess the plaintiff, or otherwise cause injury to the plaintiff, in relation to the suit property. Rule 2 particularly postulates an injunction to restrain repetition or continuation of breach. (Para 7)

The purpose is to preserve the property in its existing form and curtail as much mischief at an interlocutory stage as can be, before rights of parties to the property subject matter of the suit are determined. There is, therefore, no warrant to conclude that in a suit where the final relief is a mandatory injunction, preventive relief by way of temporary injunction cannot be granted. If the Court finds that a prima facie case is made out and the other two ingredients to grant a temporary injunction established, it matters little whether the final decree claimed in the suit is a mandatory injunction alone with no prohibitory injunction sought. In this view of the matter, the impugned order passed by the Revisional Court cannot be faulted. (Para 8)

B. Civil Procedure Code, 1908: Section 115 (as amended in its application to the State of U.P.) - Power to revise an order of a subordinate court - Essence of this Court's jurisdiction under Article 227 of the Constitution - It is true that the power to revise an order of a subordinate court is available to a superior court, where no appeal lies against that order. The impugned order here is an order rejecting a temporary injunction application and that order is clearly appealable under Order XLIII Rule 1(r) of the Code. Going by the provisions of Section 115 of the Code, a revision against the order passed by the Civil Judge would not lie to any superior court, including the District Judge.

The impugned order made by the learned Additional District Judge is flawless on merits, may be passed in proceedings that were not competent. He could have required the plaintiffs to convert the revision into a miscellaneous appeal under Order XLIII Rule 1(r) of the Code and decided the same, may be, reaching the same conclusions. It is the essence of this Court's jurisdiction under Article 227 of the Constitution that interference with orders of subordinate courts and Tribunals is not to be made on grounds of illegality or even patent illegality alone. The order impugned should also be unjust and iniquitous. Even if the plaintiffs were compelled to choose the remedy of an appeal under Order XLIII Rule 1(r) of the Code, it would lie before the same forum. Had the wrong remedy chosen made a difference in forum, different principles would apply. (Para 10)

Writ Petition disposed off. (E-3)

Precedent followed:

1. Shiv Ram Singh, Appellant Vs Smt. Mangara & ors,. Respondents 1988 All. L.J. 1516 (Para 6)

2. Meera Chauhan Vs Harsh Bishnoi & anr., (2007) 12 SCC 201 (Para 6)

Present petition assails the order dated 31.01.2020, passed by Additional Sessions Judge, Hathras.

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

1. This petition under Article 227 of the Constitution is directed against an order dated 31.01.2020 passed by learned Additional Sessions Judge, Court No. 5, Hathras passed in Civil Revision No. 10 of 2016, allowing the said revision and setting aside an order of the Civil Judge (Senior Division), Hathras made in Original Suit No. 715 of 2013, rejecting the temporary injunction application made by the plaintiff. The learned Additional Sessions Judge has, by the impugned order, directed parties to maintain status quo regarding the property in dispute, pending suit.

2. Heard Mr. Rakesh Kumar Mishra, learned counsel for the petitioners.

3. O.S. No. 715 of 2013 was filed by the plaintiff-respondent nos. 1 and 2 against the defendant-petitioner nos. 1 to 4, arrayed as the defendants first set, and petitioner no. 5 along with four other defendants, arrayed as the defendants second set, seeking a mandatory injunction to the effect that defendant nos. 1 to 4 be ordered to remove their constructions standing over the suit property, denoted by letters 'A' 'B' 'C' 'D' in the plaint map and shown in red colour, and further that they should, after removal of the illegal constructions, remove debris of the demolished building, vacating the suit property within time, to be specified by the court; and upon failure to comply with the decree, the decree be ordered to be carried into execution through process of Court at the defendants' expense.

4. A temporary injunction application was made in the said suit, where it was alleged that the defendants are attempting to raise constructions over the suit property, in addition to the existing ones, in respect of which, a decree of mandatory injunction has been claimed. The basis of the suit appears to be that the plaintiffs are owners in possession of Khasra No. 52/5, admeasuring 0.5 hectares, situate in Kasba Hasayan. This land was originally a part of Khasra No. 52, admeasuring 1.405 hectares. Khasra No. 52 had a number of co-sharers. A suit for partition was filed by a co-sharer, being Suit No. 205 of 2010-2011, under Section 176/182 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 19501. The suit was decreed, where a preliminary decree was passed by the Revenue Court, on 24.08.2011. A final decree followed on 27.08.2011. In the final decree, lots were drawn and Khasra No. 52/5 fell to the plaintiff's lot. It is land bearing Khasra No. 52/5, admeasuring 0.55 hectares, which is the property in dispute.

5. After the Revenue Court passed a final decree for partition and Khas possession to be delivered to parties, an application was made by the plaintiff-petitioner no. 2 Durga Prasad, seeking that the land in dispute be declared an abadi under Section 143 of the Act of 1950. This application of the second petitioner's was registered as Case No. 15 on the file of the Sub-Divisional Magistrate concerned and the land in dispute was declared an abadi. Thus, the petitioners became owners in possession of the abadi. About two years ago, the plaintiffs established over the land in dispute an educational institution known as the Jaldhara Devi Inter College, Hasayan, District - Hathras. It was claimed that defendant nos. 1 to 4 to the suit, who are in connivance with the defendant nos. 5 to 9, are land grabbers and intended to usurp the property in dispute. The defendants first and second set are all kinsmen. About an year anterior to the

institution of the suit, defendants first set, in connivance with the defendants second set, encroached upon a part of the property in dispute, the encroachment being 103 meters in length, running from East to West, and 4 meters in width, running from North to South. They illegally and forcibly constructed a pucca room and a kachcha boundary wall around that room. It is to remove the aforesaid encroachment that the suit for mandatory injunction was brought. Since the defendants intended to raise some further constructions in order to consolidate their possession and usurp a larger area of the plaintiffs' land, the temporary injunction application was made. The Trial Court rejected the temporary injunction application by an order dated 02.02.2016. The Trial Court went by the reasoning that the suit was one for mandatory injunction, where the defendants were in possession, wrongfully or rightfully. There was no relief by way of permanent prohibitory injunction, seeking to raise further constructions or doing further encroachment. In the opinion of Trial Court, in the absence of there being a permanent injunction claimed by way of prohibitory relief, the temporary injunction, prohibitory in nature, could not be granted in a suit where the relief sought was one for mandatory injunction alone.

6. The plaintiffs went up in revision to the learned District Judge, Hathras. The revision was numbered on the file of the learned Sessions Judge, Hathras as Civil Revision No. 10 of 2016. It was assigned to the learned Additional District Judge, Court No. 5, Hathras. The revision came up for determination before the learned Additional Judge, Hathras on 31.01.2020. The learned Additional Judge, Hathras by his jugdment and order dated 31.01.2020, allowed the revision and ordered both the parties to maintain status quo regarding the property in dispute, pending suit. The Revisional Court held that it is yet to be determined whether constructions raised by the defendants are ones that encroach into Khasra No. 52/5 on its southern side, or located in Khasra No. 50. This determination would have to await trial. The learned Additional District Judge held, however, that an interim injunction granting prohibitory relief to preserve the property in dispute pending suit could be granted, where the relief claimed is for a mandatory injunction. For the purpose, the Revisional Court relied on the decision of this Court in **Shiv Ram Singh, Appellant v. Smt. Mangara & Others, Respondents2** and a decision of the Supreme Court in **Meera Chauhan v. Harsh Bishnoi & Another3**.

7. In the opinion of this Court, the purpose of an interim injunction under Order XXXIX Rule 1 and 2 of the Civil Procedure Code, 19084 is to preserve the property in dispute pending suit, where the property is in danger of being wasted, damaged or alienated by any party to the suit, or where the defendants threaten to dispossess the plaintiff, or otherwise cause injury to the plaintiff, in relation to the suit property. Rule 2 particularly postulates an injunction to restrain repetition or continuation of breach. Fundamentally, an interim injunction is designed to act in aid of the final relief and to eschew pendente lite injury by the wrongful action of one party against the other, before their rights are determined. In this connection, the provisions of Rule 1 and 2 of Order XXXIX may be quoted with profit :

1**. Cases in which temporary injunction may be granted**.- Where in any Suit it is proved by affidavit or otherwise--

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to 5[defrauding] his creditors,

6[(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]

the court may by Order grant a temporary injunction to restrain such act, or make such other Order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property 7[or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the court thinks fit, until the disposal of the suit or until further orders.

2. **Injunction to restrain repetition or continuance of breach.-(**1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

8. The Revisional Court, or for that matter, the Trial Court, do not doubt the fact that prima facie, the plaintiffs have title to and possession of Khasra No. 52/5. The dispute is whether on the southern boundary, there is an encroachment by the defendant-petitioners. The constructions sought to be removed by mandatory injunction are there, but the fact whether these constructions have been raised by the defendants in some part of Khasra No. 52/5 or in their own land, is yet to be determined. In case, during this period of time, the defendants raise further constructions there, or make more encroachment, it would complicate rights of parties and also cause more injury to the defendants, if at the hearing, it were found that in fact, the defendants are trespassers and have to be removed. Clause (c) of Rule 1 of Order XXXIX is designed to prevent the defendant from dispossessing the plaintiff or otherwise causing injury to the plaintiff vis-à-vis the suit property, until time that rights are determined. Rule 2 primarily relates to a remedy about restraining the defendants from committing a breach of contract or other injury of any kind. Rule 2 may relate primarily to cases of injuries flowing from breach of contract, but the scope of Rule 1 is wide enough to preserve immovable property in the state that it exists pending hearing of the suit, where a prima facie case is made out. The purpose is to preserve the property in its existing form and curtail as much mischief at an interlocutory stage as can be, before rights of parties to the property subject matter of the suit are determined. There is, therefore, no warrant to conclude that in a suit where the final relief is a mandatory injunction, preventive relief by way of temporary injunction cannot be granted. If the Court finds that a prima facie case is made out and the other two ingredients to grant a temporary injunction established, it matters little whether the final decree claimed in the suit is a mandatory injunction alone with no prohibitory injunction sought In this view of the matter,

the impugned order passed by the Revisional Court cannot be faulted.

9. It was argued by learned counsel for the petitioners that an order disposing of a temporary injunction application is appealable as an order, under Order XXXIX Rule 1 (r) of the Code and that, therefore, a revision would not lie. He has relied upon the provisions of Section 115 of the Code, as amended, in their application to the State of U.P. vide Act No. 14 of 2003. Section 115 of the Code (as amended in its application to the State of U.P.) reads thus :

" 115. Revision.-(1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court **where no appeal lies against the order** and where the subordinate court has-

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under sub-Section (1), when filed in High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the district court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district court.

(3) The superior court shall not, under this section, vary or reverse any order made except where,-

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the superior court.

Explanation I. - In this section,-

(i) the expression "superior court' means-

(a) the district court, where the valuation of a case decided by a court subordinate to it does not exceed five lakh rupees;

(b) the High Court, where the order sought to be revised was passed in a case decided by the district court or where the value of the original suit or other other proceedings in a case decided by a court subordinate to the district court exceed five lakh rupees;

(ii) the expression "order' includes an order deciding an issue in any original suit or other proceedings.

Explanation II.-The provisions of this section shall also be applicable to orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement. [Vide U.P. Act 14 of 20038, S.2] **(emphasis by Court)**

10. It is true that the power to revise an order of a subordinate court is available to a superior court, where no appeal lies against that order. The impugned order here is an order rejecting a temporary injunction application and that order is clearly appealable under Order XLIII Rule 1 (r) of the Code. Going by the provisions of Section 115 of the Code, a revision against the order passed by the Civil Judge would not lie to any superior court, including the District Judge. In that view of the matter, the learned Additional District Judge would not have jurisdiction to entertain and decide the civil revision, where the order

impugned has been passed. But that is not the end of the matter in a case like the present one. If this Court were to technically hold the revision not maintainable and set aside the impugned order, the Court would, in fact, be restoring an illegal order on the merits of the parties' case. The impugned order made by the learned Additional District Judge is flawless on merits, may be passed in proceedings that were not competent. He could have required the plaintiffs to convert the revision into a miscellaneous appeal under Order XLIII Rule 1(r) of the Code and decided the same, may be, reaching the same conclusions. It is the essence of this Court's jurisdiction under Article 227 of the Constitution that interference with orders of subordinate courts and Tribunals is not to be made on grounds of illegality or even patent illegality alone. The order impugned should also be unjust and iniquitous. If the order is one that does substantial justice, and the flaw even about jurisdiction is one merely about the form of remedy, in the opinion of this Court, the order ought not be interfered with. Even if the plaintiffs were compelled to choose the remedy of an appeal under Order XLIII Rule 1(r) of the Code, it would lie before the same forum. Had the wrong remedy chosen made a difference in forum, different principles would apply. But, this is not the case here.

11. In the circumstances, this Court does not find the case to be one at all where the order impugned ought to be interfered with by this Court in exercise of its jurisdiction under Article 227 of the Constitution.

12. However, looking to the entirety of the circumstances that the parties are in strife, where there is apparently little dispute about title, but one over demarcation of their properties, giving rise to the cause of action involved, it would be in the interest of justice that the Trial Court may be required to expedite hearing and endeavour to conclude the trial within a period of eight months of the receipt of a copy of this order, in accordance with law.

13. This petition stands **disposed of** in terms of the aforesaid orders.

14. Let this order be communicated to the learned Additional District Judge, Court No. 5, Hathras through the learned District Judge, Hathras by the Joint Registrar (Compliance).

(2021)01ILR A1044
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2020

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Crl. Misc. Appl. u/s 482 No. 11058 of 2020

Vivek Jain ...Applicant
Versus
C.B.I., ACB Ghaziabad ...Opp. Party

Counsel for the Petitioner:
Sri Kuldeep Saxena, Sri Vijit Saxena

Counsel for the Respondents:
Sri Sanjay Kumar Yadav

Criminal Law-Section 17 of prevention of Corruption Act-Investigation conducted in execution and implementation of National Rural Health Mission and utilisation of funds-chargesheet submitted and cognizance was taken-objection is raised as investigation conducted by officer below rank of Inspector of Police and is violative of section 17 of P.C. Act -no pleadings regarding any prejudice or miscarriage of justice on account of such

enquiry-such investigation was entrusted to the Officer by Special Judge-impugned order is not illegal.

Application rejected. (E-7)

Held, the question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. The trial follows cognizance and cognizance is preceded by investigation. This is the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. The court is not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity. A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 of Cr.P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the court to take cognizance. Clauses (a), (b) and (c) of Section 190(1) Cr.P.C. are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. **(Para 20)**

List of Cases cited:-

1. St. of M.P. Vs Mubarak Ali, 1959 AIR (SC) 707

2. H.N. Rishbud & Singh Vs The St. of Delhi, (1955) 1 SCR 1150

3.U.O.I. Vs Prakash P. Hinduja & anr., (2003) 6 SCC 195

4. Prabhu Vs Emperor, AIR 1950 PC 26

5. Lumbhardar Zutshi Vs The King, AIR 1950 PC 26: (1950) 51 Cri LJ 644

6. Abhinandan Jha Vs Dinesh Mishra, AIR 1963 SC 447: (1963) 1 Cri LJ 341

7. Vineet Narain & ors. Vs U.O.I, (1998) (1) SCC 226

8. St. of Bih. Vs J.A.C. Saldanha, (1980) 1 SCC 554

9. Kanwal Tanuj Vs St. of Bih. & ors., (2020) SCC OnLine SC 395

10. M/s Fertico Marketing & Investment Pvt. Ltd. & ors. Vs C.B.I. & anr., Criminal Appeal Nos. 760-764 of 2020 arising out of SLP (Crl.) Nos. 8342-46 of 2019 decided on November 17, 2020

11. St. of U.P. Vs Bhagwant Kishore Joshi, AIR 1964 SC 221

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

1. Heard Sri Kuldeep Saxena, learned counsel for the applicant, Sri Gyan Prakash, Assistant Solicitor General of India appearing for the CBI assisted by Shri Sanjay Kumar Yadav, Advocate and perused the record.

2. Applicant by the instant petition under Section 482 of Code of Criminal Procedure, 19731, seeks quashing of the charge sheet dated 29 August 2014 and cognizance order dated 16 December 2014, passed in Criminal Misc. Case No. 10 of 2014, under Sections 120-B read with sections 409, 420, 468 & 471 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 19882, and substantive offence under Sections 409, 420, 468 & 471 IPC arising from the F.I.R. No. RC No. 1202013A0017 pending in the court of Special Judge, Anti Corruption, CBI, Ghaziabad.

3. The facts giving rise to the petition, briefly stated, is that pursuant to an order dated 15.11.2011, passed by this Court at Lucknow, in Writ Petition Nos. 3611 (MB) of 2011 (PIL), 3301 (MB) of 2011 (PIL)

and No. 2647 (MB) of 2011 (PIL), inter alia, directed Central Bureau of Investigation3 to conduct a preliminary enquiry in the matter of execution and implementation of the National Rural Health Mission (for short "NRHM') and utilization of funds at various levels in the entire State of Uttar Pradesh commencing 2005-2006. In compliance thereof, on 31 January 2013, CBI registered a preliminary enquiry against the officers of Health and Family Welfare Department of District Moradabad, and unknown private persons. The enquiry was conducted by the Additional Superintendent of Police, CBI, ACB, Ghaziabad, for the period 2005-06 till 15.11.2011. The enquiry revealed that bogus/forged tender papers were submitted and used in the tender process on behalf of certain firms for completing the tender proceedings by the suspect officials in conspiracy with the firms. The enquiry further revealed that most of the purchases under National Blindness Control Programme ralated to NRHM Scheme, at district Moradabad, were made by three sister concerns. The forged and bogus bids were submitted and used by the suspected accused to show artificial competitive rates.

4. The enquiry, prima facie, exposes Dr. N.K. Gupta, Dr. R.K. Saxena, Dr. S.K. Malik, the then CMOs/DPO, Moradabad and Dr. S.K. Singh, the then DPM and officiating CMO Moradabad, in criminal conspiracy with co-accused Narendra Kumar Jain, Prop. M/s Jain Medical Hall, Moradabad, applicant Vivek Jain, Prop. M/s Kapil Medical Agencies, Moradabad, and other unknown persons of having committed offence regarding purchase of medicines during the period 2008-09, 2009-10 & 2010-11 from NRHM funds. The conspirators are alleged to have violated the norms and guidelines for purchase of medicines at exorbitant rates, prepared and utilized forged documents and by abusing their official position have caused loss at Rs.4,56,484/- to the government and corresponding gains to themselves.

5. On the strength of preliminary enquiry, F.I.R. came to be lodged on 4 July 2013, on the complaint filed by Additional Superintendent of Police, CBI, ACB, Ghaziabad. After investigation, a report (charge sheet) under Section 173 of Cr.P.C. was submitted on 4 July 2013, against the applicant and other co-accused. It is alleged in the charge sheet that applicant, owner of M/s Kapil Medical Agencies, Moradabad, supplied medicines to CMO Moradabad, during 2007-2011 with respect to National Programme for Control of Blindness and was ultimate beneficiary. Investigation further revealed that medicines worth Rs.1,61,257/- was purchased after expiry of the tender period from the firm of the applicant without getting permission from the competent authority. Payments thereof was also made. The investigation shows that bogus tenders were submitted by the applicant to show competitive rates of the firms. In the said fraud and forgery, involvement of wife of the applicant has also been found.

6. Special Judge, Ghaziabad took cognizance on 16 December 2014, against all the accused persons except Narendra Jain and Shikla Jain and directed the CBI to make further investigation with regard to their role and culpability in this case by the competent officer.

7. The sole submission advanced by learned counsel for the applicant is that the entire investigation conducted by an officer below the rank of Inspector of police is

vitiated and void in view of the mandate under Section 17 of P.C. Act. It is urged that the investigation was carried out by the Sub Inspector of Police, CBI, ACB, Ghaziabad. In support of his submission, reliance has been placed on the decision rendered by the Supreme Court in **State of Madhya Pradesh vs. Mubarak Ali**, to submit that investigation carried out by an officer of a lower rank as mandated under the statute would render the investigation illegal and void.

8. In rebuttal, learned counsel appearing for C.B.I. submits that investigation was made pursuant to the direction of this Court in PIL, followed by preliminary enquiry. The preliminary enquiry was conducted by an officer of the rank of Additional Superintendent of Police, CBI. It is stated in the counter affidavit that Special Judge, was pleased to grant permission under Section 17 of the P.C. Act to conduct investigation by the Sub Inspector vide order dated 9 July 2013. The Investigating Officer after investigation submitted charge sheet against the applicant and other accused persons. The allegation in the charge sheet and material/evidence in support thereof, prima facie, makes out a case with regard to the involvement of the applicant in commission of the offence. In any case since the Special Judge, has taken cognizance, any irregularity committed in the investigation or during the investigation would not set at naught the cognizance order which is independent of the investigation.

9. Rival submissions fall for consideration.

10. The only point pressed by the learned counsel for the applicant is that the investigation pursuant to the preliminary enquiry could not have been conducted by an officer below the rank mandated under Section 17 of the P.C. Act. Section 17 reads thus:

17. Persons authorised to investigate.--Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank,--

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;

(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank, shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:

Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant:

Provided further that an offence referred to in clause (e) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.

11. Sub clause (c) and the first proviso of Section 17 of the P.C. Act is applicable to the facts of the instant case. The provision provides that notwithstanding anything contained in the

Cr.P.C., no police officer below the rank of Deputy Superintendent of Police or a police officer of equivalent rank, shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant. Proviso provides if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant.

12. In the given facts, preliminary enquiry came to be instituted on the direction of this Court, which was duly conducted by an officer of the rank of Additional Superintendent of Police. On the strength of the preliminary enquiry, an F.I.R. came to be lodged. Investigation was carried out by an officer of the rank of Sub Inspector of police.

13. The question that arises is as to whether the investigation carried out against the provisions contained in Section 17 of the P.C. Act would vitiate the cognizance taken by the Special Judge.

14. It would be apposite to examine the law on the point.

15. A similar question was raised wayback in 1955 to consider the effect of investigation carried out by a police officer below the rank of Deputy Superintendent of Police contrary to the mandate of P.C. Act without the order of the Magistrate of first class, whether it is mandatory or directory. The Supreme Court in **H.N. Rishbud and Inder Singh v. The State of Delhi**5 observed that cognizance taken on police report, vitiated by breach of mandatory provisions relating to investigation, cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. The relevant observation is extracted:

"If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial ..... invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination., the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

16. **H.N. Rishbud (supra)** came to be considered in the case of **Union of India vs. Prakash P. Hinduja and another**6, wherein, the question raised was as follows:

"10. The principal question which, therefore, requires consideration is whether the Court can go into the validity or otherwise of the investigation done by the authorities charged with the duty of investigation under the relevant statutes and whether any error or illegality committed

during the course of investigation would so vitiate the charge-sheet so as to render the cognizance taken thereon bad and invalid."

17. The Supreme Court relying on the decision rendered in **Prabhu v. Emperor7 and Lumbhardar Zutshi v. The King**8 held that that if cognizance is in fact taken on a police report initiated in breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial, which follows it, cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. An illegality committed in the course of investigation does not affect the competence and the jurisdiction of the court for trial. The Court in the facts arising therein held that this being the legal position, even assuming for the sake of argument that the CBI committed an error or irregularity in submitting the charge sheet without the approval of Chief Vigilance Commissioner9, the cognizance taken by the learned Special Judge on the basis of such a charge sheet could not be set aside nor could further proceedings in pursuance thereof be quashed, (Refer: **Abhinandan Jha v. Dinesh Mishra10; Vineet Narain & others v. Union of India11; and State of Bihar v. J.A.C. Saldanha**12).

18. In **Kanwal Tanuj v. State of Bihar and others**13 when an offence committed in the Union Territory and one of the accused residing/employed in some other State outside the said Union Territory. The question posed was whether C.B.I. under the provisions of Delhi Special Police Establishment Act, 1946 (in short "DSPE Act'), could appear to investigate the same, unless there was a specific consent given by the concerned State under Section 6 of the DSPE Act. The Supreme Court rejected the said contention holding that if the offence is committed in Delhi, merely because the investigation of the said offence incidentally transcends to the territory of State of Bihar, it cannot be held that the investigation against an officer employed in the territory of Bihar cannot be permitted, unless there was specific consent under the DSPE Act.

19. The principle spelled out in the authorities referred to hereinabove was again reiterated by the Supreme Court in **M/s Fertico Marketing and Investment Pvt. Ltd. And others v. Central Bureau of Investigation and another**14.

20. The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. The trial follows cognizance and cognizance is preceded by investigation. This is the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. The court is not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity. A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 of Cr.P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the court to take cognizance. Clauses (a),

(b) and (c) of Section 190(1) Cr.P.C. are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity.

21. In Mubarak Ali (supra) relied upon by the learned counsel for the applicant is of no assistance in the facts of the present case. The Court observed that the statutory safeguard provided under Section 5A of the P.C. Act must be strictly complied with, for they were conceived in public interest and were provided as a guarantee against frivolous and vexatious prosecution. The Magistrate's status gives assurance to the bona fide of the investigation. The Court expressed the view that it hopes and trust that investigations under the P.C. Act would be conducted in strict compliance with the provisions of the P.C. Act. The decision is not an authority on the proposition of law that the cognizance and the consequential trial pursuant to the charge sheet would vitiate merely for the reason that the investigation was not carried out by the competent officer as mandated under the P.C. Act.

22. **Mubarak Ali** was considered in **State of U.P. v. Bhagwant Kishore Joshi**15, wherein, question posed before the Supreme Court was as to whether High Court was justified in setting aside the conviction on the ground that the first stage of investigation was contrary to the provisions of the P.C. Act. The facts arisen therein was that initially an officer below the rank of Deputy Superintendent of Police had conducted the investigation, on realization that Investigating Officer is not competent, subsequently, an order was obtained from the concerned Magistrate to investigate the offence. High Court set aside conviction on the ground that there was a breach of the mandatory safeguard of the P.C. Act in as much as that the first stage of the investigation was contrary to the provisions of the P.C. Act. But the court was of the view that it (High Court) did not consider the other question whether the said breach caused prejudice to the accused in the matter of' his trial. The Court reversed the judgment of the High Court on being satisfied no prejudice has been caused to the accused.

23. In the facts of the case at hand, applicant is not a public servant and there is no pleadings with regard to prejudice caused to him or miscarriage of justice on account of the enquiry being conducted by an officer of the rank below that of the Deputy Superintendent of Police/Inspector. The assertion of the C.B.I. that an order to that effect was obtained from the Special Judge to entrust the investigation to a officer of the the rank of Sub Inspector has not been denied. Even otherwise the applicant has not alleged any prejudice or illegality in the course of investigation that brought about miscarriage of justice or caused prejudice to the applicant.

24. On specific query, learned counsel for the applicant has failed to point out any illegality, infirmity or jurisdictional error either in the impugned charge sheet or impugned order.

25. The application under Section 482 is, hereby, rejected.

(2021)01ILR A1050
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2020

BEFORE

THE HON'BLE DINESH PATHAK, J.

Crl. Misc. Appl. u/s 482 No. 12620 of 2020

Dinesh @ Ganeshi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Shahabuddin, Sri Syed Mohammad Nawaz

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

Criminal Law-Offence u/s 506 I.P.C. was initially treated as cognizable and non-bailable offence vide a government notification-such notification held illegal-at present section 506 IPC is non cognizable and bailable-case filed u/s 506 IPC cannot be proceeded as Police Case-Magistrate to treat it as complaint case.

Held,

Section 2 (d) Cr.P.C. clearly denotes that after investigation if it is found that the offence in question is a non-cognizable offence then the matter should be treated as a complaint and police office by whom such report is made shall be deemed to be the complainant. In light of the aforesaid provision there is no room to doubt for considering the commission of non-cognizable offence as a complaint case. (Para 11 and 12)

List of Cases cited: -

1. Virendra Singh & anr. Vs St. of U.P. & anr., 2000 (45) ACC 609

2. Rakesh Kumar Sharma Vs St. of U.P. & anr., reported in 2007 (9) ADJ 478

3.Keshav Lal Thakur Vs St. of Bih. reported in (1996) (II) SCC, 557

4. Mohd. Yusuf Vs Afaq Jahan reported in (2006) 1 SCC, 627

(Delivered by Hon'ble Dinesh Pathak, J.)

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

2. No notice is being issued to the private respondent in view of the order proposed to be passed today. Liberty is reserved for the private respondent to seek modification of the order passed herein below, if so advised.

3. The present 482 Cr.P.C. application has been filed to quash the charge-sheet dated 25.06.2017 as well as Non-bailable Warrant dated 12.06.2019 in Criminal Case No. 1069 of 2018 arising out of Case Crime No. 21 of 2017 under Sections 323, 504 & 506 IPC, P.S. Civil Lines, District Rampur, pending in the Court of Chief Judicial Magistrate, Rampur.

4. With respect to the incident dated 01.02.2017, an NCR has been lodged by opposite party no. 2 (informant) against the present applicants alleging therein that they abused the informant and on resistant they have beaten him up badly. While the wife of the informant had came to his rescue, the accused persons have beaten her up as well. Investigative Officer had moved an application dated 23.02.2017 under Section 155 (2) Cr.P.C. before the Chief Judicial Magistrate for permission to investigate the matter. On the medical examination simple injuries have been found over the body of the informant and his wife. During the course of investigation, I.O. had recorded the statement of injured persons and submitted charge-sheet No. Nil/17 dated 25.06.2017 in Case Crime No. 21 of 2017 under Sections 323, 504 & 506 IPC, P.S. Civil Lines, District Rampur against the accused/present applicants. Learned Magistrate has taken cognizance on the aforesaid charge-sheet vide order dated 13.02.2018 and registered a case i.e. Criminal Case No. 1069 of 2018 (State vs. Dinesh). The aforesaid case was committed for trial on 14.09.2018 and non-bailable warrants were issued against the present applicants.

5. Learned counsel for the applicants submits that the present proceeding has arisen out of NCR which was filed for non-cognizable offence under Sections 323, 504 & 506 IPC. It is stated that the offence as alleged are non-cognizable and, therefore, neither the charge-sheet could have been submitted by the Investigating Officer nor the learned Magistrate could have taken cognizance in view of the explanation to Section 2(d) of Cr.P.C. It is further stated that the only course open to the learned Magistrate was to have treated the case as a complaint case and to have proceeded with, in accordance with law.

6. The submission is that the applicant has been charge sheeted under Section 506 I.P.C. which is non-cognizable offence as per the judgment of this court in the case of **Virendra Singh and another vs. State of U.P. and another, 2000 (45) ACC 609.**

7. The offence under Section 506 I.P.C. was made cognizable and non-bailable vide U.P. Government notification promulgated on August 02, 1984. This notification was declared illegal by the aforesaid judgment of this Court and, therefore, the offence under Section 506 I.P.C. is also non-cognizable. It has been submitted that the charge-sheet against the applicants is unwarranted in an offence under Section 506 I.P.C.

8. Reliance has been placed on the decision of this Court dated 15.05.2018 passed in Application U/S 482 No. 5917 of 2006 wherein this Court has taken view that neither the charge sheet could have been submitted by the Investigating Officer nor the learned Magistrate could have taken cognizance on the same, treating it as a State case.

9. Learned A.G.A. on the other hand submits that while the learned Magistrate may not have taken cognizance on the charge sheet treating it to be a State case, however, it was open to the learned Magistrate to follow the complaint case procedure.

10. Vexed question is involved as to whether the Magistrate can proceed under Sections 323, 504 & 506 IPC as a police case whereas these are non-cognizable offence and the same could have utmost be treated as a complaint under Explanation to Section 2(d) Cr.P.C. The provisions of Section 2(d) Cr.P.C. defines complaint and is reproduce below :-

*"**2(d)** "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. **Explanation**:- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."*

11. Aforesaid Section clearly denotes that after investigation if it is found that the offence in question is a non-cognizable offence then the matter should be treated as a complaint and police office by whom such report is made shall be deemed to be the complainant.

12. In light of the aforesaid provision there is no room to doubt for considering the commission of non-cognizable offence as a complaint case. In the case of **Rakesh Kumar Sharma vs. State of U.P. & Another reported in 2007 (9) ADJ 478**, specifically paragraph nos. 5 & 6, the Coordinate Bench of this Court has considered the matter wherein F.I.R. was lodged under Section 307 IPC but subsequently charge-sheet was submitted

under Section 504 IPC and the Court concluded that it should not be proceeded as a police case which is barred under Explanation to Section 2(d) Cr.P.C. The relevant paragraph nos. 5 & 6 of the aforesaid judgment are hereunder :-

"5. He submitted that in the present case originally the F.I.R. was lodged under Section 307 IPC but after investigation the Investigating Officer came to the conclusion that no offence under Section 307 IPC was made out and only a case under Section 504 IPC was made out against the applicant and so a charge-sheet under Section 504 IPC was submitted against the applicant. He contended that in view of the aforesaid Explanation to Section 2 (d) Cr.P.C., the case could not proceed as a police case in respect of an offence punishable under Section 504 IPC. Because the offence under Section 504 IPC is non-cognizable and so the case could proceed only as a complaint case in view of the aforesaid Explanation.

6. The above contention of the learned counsel for the applicant is correct. I, therefore, allow this application under Section 482 Cr.P.C. to this extent that the cognizance taken by the Magistrate in the case on the basis of the report of the police for the offence punishable under Section 504 IPC and the orders passed by him for issuing warrant against the applicant are hereby quashed. The Magistrate shall not proceed with the case as a State case but he shall proceed with it as a complaint case as provided in the Explanation 2 (d) Cr.P.C. and he shall follow the procedure prescribed for hearing of a complaint case."

13. In the case of **Keshav Lal Thakur vs. State of Bihar** reported in **1996 (II) SCC, 557**, the Apex Court has held in paragraph 3 which is as under :-

"We need not go into the question whether in the facts of the instant case the above view of the High Court is proper or not for the impugned proceeding has got to be quashed as neither the police was entitled to investigate into the offence in question nor the Chief Judicial Magistrate to take cognizance upon the report submitted on completion of such investigation. On the own showing of the police, the offence under Section 31 of the Act is non-cognizable and Section 154 Cr.P.C. Of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate under Section 155(2) Cr.P.C. but, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking cognizance could have arisen. While on this point, it may be mentioned that in view of the Explanation to Section 2(d) Cr.P.C., which defines 'complaint', the police is entitled to submit, after investigation, a report relating to a non-cognizable offence in which case such a report is to be treated as a 'complaint', of the police officer concerned, but that explanation will not be available to the prosecution here as that relates to a case where the police initiates investigation into a cognizable offence - unlike the present one - but ultimately finds that only a non-cognizable offence has been made out."

14. There is no particular format for a complaint. The Apex Court has also expounded in **Mohd. Yusuf vs. Afaq Jahan** reported in **(2006) 1 SCC, 627** that there is no particular format for a complaint, even nomenclature is also inconsequential. A petition addressed to Magistrate containing an allegation that an

offence has been committed and prayed for suitable action against the culprits, is sufficient to treat the same as a complaint.

15. It is clear that initially vide notification dated 02.08.1984 Government of U.P. has treated the offence under Section 506 I.P.C. as cognizable and non-bailable. The aforesaid promulgation of Government of U.P. was declared illegal by the Court in the case of Virendra Singh (Supra). At present there is no doubt that the offence under Section 506 IPC is non-cognizable and bailable. In light of proposition of law as mentioned above, there is no room to doubt that case filed under Section 506 IPC cannot be proceeded as police case and the learned Magistrate should treat it as a complaint case.

16. In view of the observations made above, learned court below has illegally proceeded on the police report without applying his judicial mind inasmuch as all the offence as mentioned in the NCR as non-cognizable and proper course of action for the Magistrate is to treat the matter as a complaint under the provision as enshrined under Explanation to Section 2(d) Cr.P.C.

17. Considering the above, no useful purpose would be served in keeping the present application pending any further. The charge sheet dated 14.04.2015 is hereby quashed and the matter is remitted to the learned Magistrate to pass a fresh order, strictly in accordance with law, keeping in mind the observations made above.

18. The aforesaid exercise may be concluded as expeditiously as possible, preferably within a period of two months from the date of production of a certified copy of this order.

19. With the aforesaid observations, the present application is **allowed.**

(2021)01ILR A1054
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Crl. Misc. Appl. u/s 482 No. 13262 of 2020

Aman Pandey ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Rajesh Kumar, Sri Shiv Nath Singh

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

A. Criminal Law – Application u/s 482 – Quashing of order on the ground of jurisdiction - Code of Criminal Procedure: Section 202; Indian Penal Code: Section 420, 504, 506 – The inquiry or the investigation as the case may be, by the Magistrate is mandatory where the accused is residing beyond the area of exercise of his jurisdiction. It is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. (Para 14, 18)

The expression 'shall' is ordinarily read as mandatory. Lack of material particulars and non-application of mind as to the materials cannot be brushed aside as a procedural irregularity. A bare perusal of S.202 Cr.P.C. shows that in a case in which the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, he shall postpone issue of process against the accused and shall hold an enquiry either by himself or direct investigation to be made by a Police Officer or by such other person as the Magistrate thinks fit, for the purpose of deciding whether or not there is

sufficient ground for proceeding against the accused. The use of the expression 'shall' makes it mandatory for the Magistrate to hold the inquiry contemplated by the section where the accused resides beyond the territorial jurisdiction of the concerned Magistrate. The inquiry may be made by the Magistrate himself or he may direct investigation to be carried by the Police Officer or by such other person as he thinks fit. (Para 11)

In the inquiry envisaged u/s 202 Cr.P.C. the witnesses are examined and this exercise by the Magistrate is an inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused. If witnesses have been examined it cannot be said that any inquiry as contemplated by amended S.202 Cr.P.C. was not held. (Para 18)

In the present case, two witnesses were examined u/s 202 Cr.P.C. Therefore, the present is not a case of no inquiry or no investigation as mandated by S.202 Cr.P.C. (Para 21, 25)

B. Code of Criminal Procedure: Section 2(g), 202 – "Inquiry" – Every inquiry other than a trial conducted by the Magistrate or Court. No specific mode or manner of inquiry is provided u/s 202 Cr.P.C. In the inquiry envisaged u/s 202 Cr.P.C. the witnesses are examined and this exercise by the Magistrate for the purpose of deciding, whether or not there is sufficient ground for proceeding against the accused, was held, nothing but an enquiry u/s 202 of the Code. The order of the Magistrate must indicate that he has made inquiry and on such inquiry he is prima facie satisfied that a case for summoning is made out. (Para 15, 23, 27)

C. It is not proper for the High Court to embark upon an enquiry in respect of the accusations. While exercising inherent jurisdiction u/s 482 Cr.P.C. or revisional jurisdiction u/s 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of the accusations. (Para 29)

Writ Petition dismissed. (E-3)

Precedent followed:

1. National Bank of Oman Vs Barkara Abdul Aziz & anr., (2013) 2 SCC 488 (Para 5)

2. Mohammad Illiyas and Others Vs St. of U.P. & anr., Application u/s 482 Cr.P.C. No. 30477 of 201, decided on 18.09.2018 (Para 5)

3. Vijay Dhanuka Vs Najzma Mamtaj, (2014) 14 SCC 638 (Para 7)

4. Birla Corporation Ltd. Vs Advertez Investments and Holdings, (2019) 16 SCC 610 (Para 7)

5. Smt. Parvender Kaur & anr. Vs St. of U.P. & anr., Application u/s 482 Cr.P.C. No. 27369 of 2018, decided on 12.09.2018 (Para 19)

6. Arvind Kumar Chaurasiya and another Vs St. of U.P. & anr., Application u/s 482 Cr.P.C. No. 27788 of 2018, decided on 27.08.2018 (Para 19)

7. R.R. Kaur Vs St. of Pun., AIR 1960 SC 866 (Para 27)

8. St. of Har. Vs Bhajan Lal, (1992) SCC 426 (Para 27)

9. Sonu Gupta Vs Deepak Gupta, (2015) 3 SCC 424 (Para 28)

10. Harshendra Kumar Vs Rebatilata Koley & others, (2011) 3 SCC 351 (Para 29)

Present application has been filed for quashing the summoning order dated 08.08.2019, passed by Chief Judicial Magistrate, Maharajganj.

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

1. Heard Shri Shiv Nath Singh, Senior Advocate assisted by Shri Rajesh Kumar, learned counsel for the applicant, Shri Pankaj Saxena, learned A.G.A. for the State and perused the material on record.

2. This application under Section 482 Cr.P.C. has been filed by the applicant for quashing the summoning order dated

08.08.2019 passed by learned Chief Judicial Magistrate, Maharajganj in Complaint Case No. 265 of 2019 (Razabuddin Khan versus Aman Pandey) under Sections 504 and 506 I.P.C., Police Station-Sonauli, District-Maharajganj and also the impugned order dated 05.03.2020 passed by learned Sessions Judge, Maharajganj in Criminal Revision No. 113 of 2019 (Razabuddin versus State of U.P. and others), pending before the court of learned Chief Judicial Magistrate, Maharajganj.

3. The facts of the case in brief are that the applicant is the Manager of Satyamev Educational Services. The opposite party no. 2 requested the applicant for education of his daughter in M.B.B.S., whereupon the applicant produced the list of the institutions and the opposite party no. 2 had chosen PASCOV University Russia which has recognition from the Medical Council of India and W.H.O. The daughter of the opposite party no. 2 in all awareness of the conditions of admission applied for admission of M.B.B.S. Course in PASCOV University Russia on 08.07.2017 and the said University issued a letter for her admission. She took admission but she did not fulfil the conditions of that University during the course of her studies and also did not attend the classes. Later on, the opposite party no. 2 filed complaint with malafide intention and on incorrect facts that the applicant deceived the complainant as in the said University the education as desired by the complainant in a particular course was not being imparted.

4. The Magistrate after recording the statement of the complainant and of the witnesses passed the summoning order dated 08.08.2019 summoning the applicant under Sections 504 and 506 I.P.C. The complainant filed Criminal Revision No. 113 of 2019 (Rajabuddin versus State of U.P. and another) challenging the summoning order on the ground inter alia that the accused should also have been summoned under Section 420 I.P.C. on the material available on record. The criminal revision was allowed by judgment dated 05.03.2020 and thereby the summoning order dated 08.08.2019 was set aside and the trial court was directed to pass summoning order afresh in accordance with the directions given in that judgment, after hearing the complainant in accordance with law.

5. Learned counsel for the applicant submits that the summoning order is bad in as much as the Magistrate at Maharajganj had no jurisdiction in the matter since the alleged offence was committed not at Maharajganj but at Lucknow. He further submits that the accused persons are residents of a place outside the territorial jurisdiction of the Magistrate, Maharajganj and as such enquiry under Section 202 Cr.P.C. must have been held which has not been held and therefore, the order is bad. Learned counsel for the applicant has placed reliance on the judgment of Hon'ble the Supreme Court in **National Bank of Oman versus Barakara Abdul Aziz & Another (2013) 2 SCC 488** and of this Court in **Mohammad Illiyas and 2 Others versus State of U.P. and another** in Application under Section 482 Cr.P.C. No. 30477 of 2018 decided on 18.09.2018.

6. Learned counsel for the applicant further submits that there are contradictions in the statement of the complainant and the witnesses. The complaint has been lodged in the year 2019 with respect to the incident of 2017. The daughter of the complainant

studied for one year in the concerned University at Russia but when she could not complete her education she on her own left the University and took admission in some other Institution. It is only after one year that the daughter of the complainant came to know what kind of studies was being imparted at the University of Russia which, as per the submission, is highly improbable. His further submission is that the complaint has been lodged maliciously and with malafide intention.

7. Learned A.G.A. submits that as per the averments of the complaint, the incident for the alleged offence is also at Sonauli which is part of District Maharajganj. With respect to the enquiry under Section 202 Cr.P.C., it has been submitted by the learned A.G.A. that such enquiry was held as two witnesses were examined under Section 202 Cr.P.C. He submits that no particular mode of enquiry is prescribed under the Code. The statement of the witnesses recorded under Section 202 Cr.P.C. is also an enquiry. Learned A.G.A. has placed reliance on the judgment in the case of **Vijay Dhanuka versus Najzma Mamtaj (2014) 14 SCC 638 and in ''Birla Corporation Ltd versus Adventz Investments And Holdings (2019) 16 SCC 610.**

8. I have considered the submissions advanced by the learned counsel for the applicant and the learned A.G.A. and perused the material on record.

9. So far as the jurisdiction of the Magistrate at Maharajganj is concerned, from perusal of the complaint and the statement recorded, it is evident that it has been stated that the incident started at Sonauli. Some money was also transferred from the account of the complainant which is at Maharajganj. In view of the specific averments to the above effect, the submission of the learned counsel for the applicant that the Magistrate at Maharajganj had to jurisdiction has no substance and is accordingly rejected.

10. So far as, the question of holding of an inquiry by the learned Magistrate under section 202 Cr.P.C. in cases where the accused persons are residing at a place beyond the area of the territorial jurisdiction of the Magistrate, is concerned, it is relevant to reproduce section 202 Cr.P.C. as amended w.e.f 23.06.2006 which reads as under:-

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 Session; or

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

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

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant

to produce all his witnesses and examine them on oath.

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

11. A bare perusal of section 202 Cr.P.C. shows that in a case in which the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, he shall postpone issue of process against the accused and shall hold an inquiry either by himself or direct investigation to be made by a Police Officer or by such other person as the Magistrate thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused. The use of the expression "shall' makes it mandatory for the Magistrate to hold the inquiry contemplated by the section where the accused resides beyond the territorial jurisdiction of the concerned Magistrate. The expression "shall' is ordinarily read as mandatory. The inquiry may be made by the Magistrate himself or he may direct investigation to be carried by the police Officer or by such other person as he thinks fit. The scope of inquiry under section 202 Cr.P.C. is limited to ascertain the truth or falsehood of the allegations made in the complaint for the limited purpose of finding out whether a prima facie case for issue of process is made out or not. The issuance of process to the accused calling upon him to appear in the criminal cases is a serious matter. The law imposes a serious responsibility on the Magistrate to decide, if, there is sufficient ground for proceeding against the accused. Issuance of process should not be mechanical nor should it be made as an instrument of harassment to the accused. Lack of material particulars and non-application of mind as to the materials cannot be brushed aside as a procedural irregularity.

12. In "**National Bank of Oman Vs. Barakara Abdul Aziz reported in 2013 (2) SCC 488**" the facts were that the accused was residing out side the jurisdiction of the Chief Judicial Magistrate concerned and he failed to carry out any inquiry or order investigation as contemplated under the amended section 202 Cr.P.C. which amendment was not noticed by the learned Magistrate, and the process was issued on perusal of the complaint and the documents attached thereto, the Hon'ble Supreme Court held that the order passed by the Magistrate was illegal and the High Court acted in accordance with law in setting aside the said order. It is relevant to reproduce paragraph nos. 8, 9, 10 , 11 and 12 of ***National Bank of Oman (Supra)*** as under:-

"8. We find no error in the view taken by the High Court that the CJM, Ahmednagar had not carried out any enquiry or ordered investigation as contemplated under Section 202 CrPC before issuing the process, considering the fact that the respondent is a resident of District Dakshin Kannada, which does not fall within the jurisdiction of the CJM, Ahmednagar. It was, therefore, incumbent upon him to carry out an enquiry or order investigation as contemplated under Section 202 CrPC before issuing the process.

9. The duty of a Magistrate receiving a complaint is set out in Section 202 CrPC and there is an obligation on the Magistrate to find out if there is any matter

which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 CrPC is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202 CrPC is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

(i) on the materials placed by the complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have.

10. Section 202 CrPC was amended by the Code of Criminal Procedure (Amendment) Act, 2005 and the following words were inserted:

"and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,"

The notes on clauses for the abovementioned amendment read as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

The amendment has come into force w.e.f. 23-6-2006 vide Notification No. S.O. 923(E) dated 21-6-2006.

11. We are of the view that the High Court has correctly held that the abovementioned amendment was not noticed by the CJM Ahmednagar. The CJM had failed to carry out any enquiry or order investigation as contemplated under the amended Section 202 Cr.P.C. Since it is an admitted fact that the accused in residing outside the jurisdiction of the CJM, Ahmednagar, we find no error in the view taken by the High Court.

12. All the same, the High Court instead of quashing the complaint, should have directed the Magistrate to pass fresh orders following the provisions of Section 202 Cr.P.C. Hence, we remit the matter to the Magistrate for passing fresh orders uninfluenced by the prima facie conclusion reached by the High Court that the bare allegations of cheating do not make out a case against the accused for issuance of process under Section 418 or 420 I.P.C. The CJM will pass fresh orders after complying with the procedure laid down in Section 202 Cr.P.C. within two months from the date of receipt of this order. "

13. In "***Vijay Dhanuka etc Vs. Nazima Mamtaj etc reported in 2014 (14) SCC 638***" wherein also the residence of the accused was shown at a place beyond the territorial jurisdiction of the Magistrate and the Magistrate had issued process after examination of the complainant and two witnesses, questions arose for determination (i) whether it was mandatory to hold inquiry or investigation for the purpose of deciding whether or not there

was sufficient ground for proceeding, and (ii) whether the learned Magistrate before issuing summons had held the inquiry as mandated by section 202 Cr.P.C.

14. In ***Vijay Dhanuka etc. (Supra)*** the Hon'ble Supreme Court held that in a case where accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry or investigation as the case may be, by the Magistrate is mandatory, which is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints.

15. On the point, if inquiry as mandated by section 202 Cr.P.C was held by the Magistrate, the Hon'ble Supreme Court in Vijay Dhanuka etc (Supra) held that "inquiry" as defined under section 2(g) of the Code of Criminal Procedure means every inquiry other than a trial conducted by the Magistrate or Court. No specific mode or manner of inquiry is provided under section 202 Cr.P.C. In the inquiry envisaged under section 202 Cr.P.C. the witnesses are examined and this exercise by the Magistrate for the purpose of deciding, whether or not there is sufficient ground for proceeding against the accused, was held, nothing but an inquiry under section 202 of the Code.

16. It is relevant to reproduce paragraph nos. 11 to 16 of ***Vijay Dhanuka (Supra)*** as under:-

"11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to

prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.

13. In view of the decision of this Court in Udai Shankar Awasthi v. State of U.P. [(2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708] , this point need not detain us any further as in the said case, this Court has clearly held that the provision aforesaid is mandatory. It is apt to reproduce the following passage from the said judgment: (SCC p. 449, para 40)

"40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 CrPC, though the appellants were outside his territorial jurisdiction. The provisions of Section 202 CrPC were amended vide the Amendment Act, 2005, making it [Ed.: The matter between the two asterisks has been emphasised in original as well.] mandatory to postpone the issue of process [Ed.: The matter between the two asterisks has been emphasised in original as well.] where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases."

14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2(g) of the Code, the same reads as follows:

"2. (g) "inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;"

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code.

15. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process.

16. In view of what we have observed above, we do not find any error in the order impugned [Vijay Dhanuka, In re, Criminal Revision No. 508 of 2013, order dated 19-2-2013 (Cal)] . In the result, we do not find any merit in the appeals and the same are dismissed accordingly."

17. In the Case of "***Birla Corporation limited Vs. Adventz Investments and holdings 2019 (16) SCC 610***" the Hon'ble Supreme Court has reiterated the same proposition of law that at the stage of

inquiry under section 202 Cr.P.C the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused.

18. Thus, the law as settled is that the inquiry or the investigation as the case may be, by the Magistrate is mandatory where the accused is residing beyond the area of exercise of his jurisdiction. In the inquiry envisaged under section 202 Cr.P.C the witnesses are examined and this exercise by the Magistrate is an inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused. If witnesses have been examined it cannot be said that any inquiry as contemplated by amended section 202 Cr.P.C. was not held.

19. In the case of ***Smt. Parvender Kaur and Another versus State of U.P. and Another*** passed in Application under Section 482 Cr.P.C. No. 27369 of 2018 decided on 12.09.2018", and in the case of "***Arvind Kumar Chaurasiya and another versus State of U.P. and Another*** passed in Application under Section 482 Cr.P.C. No. 27788 of 2018 decided on 27.08.2018", this Court held that the Magistrate before issuing process after invoking this provision should satisfy himself that the complaint filed against the person residing outside the jurisdiction of the court is not for his harassment. How the Magistrate has satisfied himself in this regard must be reflected from the proceedings conducted by him. Therefore, a conscious decision has to be taken. Specific order is required to be passed regarding postponement of issuing process and for initiation of inquiry either by himself or ordering investigation, as the case may be. If the Magistrate decides to inquire himself he should put necessary questions with the witnesses and also to the complainant, like, identity of accused, acquaintance of complainant and witness with the accused, relationship in between accused and complainant and in between complainant and witnesses etc. If, the Magistrate decides to order investigation then purpose of investigation and person to whom investigation is entrusted should be clearly mentioned by giving a reasonable time to complete the investigation.

20. In ***Smt. Parvinder Kaur and another (Supra)*** this court has held as under in paragraph nos. 5, 6 and 7 :-

"5. To fulfil the intention of the statue, a Magistrate before issuing process after invoking this provision should satisfy himself that the complaint filed against the person residing outside the jurisdiction of the court is not for his harassment. How the magistrate has satisfied himself in this regard must be reflected from the proceedings conducted by him. Therefore, a conscious decision has to be taken. Specific order is required to be passed regarding postponement of issuing process and for initiation of enquiry either by himself or ordering investigation, as the case may be. If the Magistrate decides to enquire himself he should put necessary questions with the witnesses and also to the complainant, like; identity of accused, acquaintance of complainant and witness with the accused, relationship in between accused and complainant and in between complaint and witnesses etc.

6. If, however, the Magistrate decides to order investigation then purpose of investigation and person to whom investigation is entrusted should be clearly mentioned by giving a reasonable time to

complete the investigation. It is also important to note that this investigation under section 202 Cr.P.C. is different from the investigation under section 156 Cr.P.C. Therefore, the Magistrate before ordering investigation must ensure that the investigating officer or any other person shall not be allowed to arrest the accused in such investigation. The Magistrate should also keep in mind the proviso added to sub-section(1) of section 202, which deals with cases wherein investigation could not be directed.

7. In the present case, it is not reflected from the proceedings that the Magistrate has exercised his jurisdiction after complying with the mandatory provisions of Section 202 Cr.P.C. To the contrary, the Magistrate has summoned accused person, as is evident from the impugned summoning order without complying with the mandatory provisions of Section 202 Cr.P.C."

21. The aforesaid judgments in ***Smt. Parvinder Kaur and another (supra), Arvind Kumar Chaurasiya (supra) and Mohd. Illiyas (supra)*** have considered the Apex Court judgment in ***National Bank of Oman (Supra),*** which was a case where any inquiry as mandated by section 202 Cr.P.C. was not held by the Magistrate, as the amended section 202 Cr.P.C. was not noticed by the concerned Magistrate. In ***National Bank of Oman (supra)***, the Magistrate had not examined the witnesses. The process was issued on perusal of the complaint, the statement of the complainant and the documents attached to the complaint. A perusal of the judgments of this Court, aforesaid, shows that in those cases the Magistrate had not exercised the jurisdiction after complying with the mandatory provisions of section 202 Cr.P.C. In the present case two witnesses were examined under sections 202 Cr.P.C. Therefore, the present case is not a case of no inquiry or no investigation as mandated by section 202 Cr.P.C.

22. The cases of ***Smt. Parvinder Kaur and another (supra), Arvind Kumar Chaurasiya (supra) and Mohd. Illiyas (supra*)** have also not taken into consideration the Apex Court judgment in Vijay Dhanuka etc. (Supra) which clearly lays down that in the inquiry envisaged under section 202 Cr.P.C. the witnesses are examined. No specific mode or manner of inquiry is provided by section 202 of the Code.

23. It may be open for the Magistrate to put necessary questions to the witnesses and also to the complainant like identity of accused, acquaintance of complainant and witnesses with the accused, their relationship, etc, in holding inquiry under section 202 Cr.P.C., but if he does not hold inquiry in that particular manner it would not vitiate the order of summoning, in as much as the object of the inquiry is only for the purpose of deciding whether or not there is a sufficient ground for proceeding against the accused and at this stage the Magistrate is not holding any trial. He is holding an "inquiry" which means an inquiry other than trial. However, the order of the Magistrate must indicate that he has made inquiry and on such inquiry he is prima facie satisfied that a case for summoning is made out.

24. In view of the above, the cases of ***Smt. Parvinder Kaur and another (Supra), Arvind Kumar Chaurasiya (Supra) and Mohd. Illiyas (supra)*** are of no help to the applicants.

25. In the present case the statements of the witnesses were recorded under section 202 Cr.P.C. It is also admitted to the applicants vide para no. 16 of the affidavit that the statements of PW-1 Kanhaiyalal and PW-2 Masallah were recorded under section 202 Cr.P.C. by the court concerned. The statement of the complainant was recorded on 02.04.2019 and the statement of the witnesses were recorded on 07.06.2019 & 11.07.2019. Therefore, there is also time gap in recording the statements of the complainant and the witnesses, which shows that after recording the statement of the complainant, issuance of process was postponed and the enquiry was held under Section 202 Cr.P.C. before passing the summoning order.

26. This Court is therefore, not convinced with the submission of learned counsel for the applicants that any inquiry as contemplated by section 202 Cr.P.C. was not held by the Magistrate.

27. At the stage of summoning, the Magistrate is required to apply his judicial mind only with a view to find out whether a prima facie case has been made out for summoning the accused persons. At this stage, the Magistrate is not required to consider the defence version or materials or arguments nor is he required to evaluate the merits of the materials or evidence of the complainant, as has been laid down by the Hon'ble Supreme Court in the cases of ***R.R. Kapur Vs. State of Panjab, reported in AIR 1960 SC 866 and State of Haryana Vs. Bhajan Lal, reported in 1992 SCC 426***. It is also settled that the power under Section 482 Cr.P.C. is exercised by the High Court only in exceptional circumstances and only when a prima facie case is not made out against the accused persons.

28. In ***Sonu Gupta versus Deepak Gupta reported in (2015) 3 SCC 424***, the Hon'ble Supreme Court has held as under in paragraph no. 8:-

"8. ...At the stage of cognizance and summoning the Magistrate is required to apply his judicial mind only with a view to take cognizance of the offence or in other words to find out whether a prima facie case is made out for summoning the accused persons. At this stage, the learned Magistrate is not required to consider the defence version or materials or arguments nor is he required to evaluate the merits of the materials or evidence of the complainant, because the Magistrate must not undertake the exercise to find out at this stage whether the materials would lead to conviction or not."

29. The submission of the learned counsel for the applicant that the complaint case is highly improbable, is in the nature of the defence of the applicant which being disputed question of fact and requiring evidence cannot be gone into at this stage of summoning by this Court in the exercise of jurisdiction under Section 482 Cr.P.C. In ***Harshendra Kumar versus Rebatilata Koley & others (2011) 3 SCC 351***, the Hon'ble Supreme Court has held that it is fairly well settled that while exercising inherent jurisdiction under Section 482 Cr.P.C. or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of the accusations.

30. Any contradiction in the statement of the complainant and the witness, could not be brought to the notice of this Court by the learned counsel for the applicant so as

to establish that on the material before the Magistrate any case for summoning of the applicant was not made out prima facie.

31. This Court finds that the revisional court has set aside the summoning order dated 08.08.2019 passed by the Magistrate under Sections 504 and 506 I.P.C., as it found that there was sufficient material available on record to show that the accused had cheated the complainant and the trial court had committed illegality in only summoning the accused under Section 504 and 506 I.P.C. and in not summoning the accused under Section 420 I.P.C. also. The learned revisional court directed the learned Magistrate to pass summoning order afresh in accordance with the directions given in the revisional judgments.

32. In view of this judgment, as discussed above this Court finds that the direction given by the revisional court to pass fresh orders cannot be faulted with in as much as the summoning order dated 08.08.2019 passed under Sections 504 and 506 I.P.C. could not be supplemented by the Magistrate but he was required to pass fresh orders under all the applicable sections. The summoning order to the extent the accused was summoned under Sections 504 & 506 I.P.C. has not been set aside by the revisional court on merit. This Court also finds that the said order dated 8.08.2019 as challenged in the present petition does not suffer from any illegality to the extent of summoning of the accused under Sections 504 and 506 I.P.C. on the grounds of challenge made by the learned counsel for the applicant.

33. However, as the order dated 08.08.2019 has already been set aside with direction to pass fresh orders, prayer of the applicant to set aside the order dated 08.08.2019 cannot be granted. It is observed that the grounds of challenge made to the said order have no substance. So far as the revisional order dated 05.03.2020 is concerned no illegality could be pointed out by the learned counsel for the applicant. This Court is also of the considered view that the revisional court after having found that there was material for summoning the accused applicant under Section 420 I.P.C. as well has rightly remitted the matter to the Magistrate for passing fresh orders. The order dated 05.03.2020 passed by the Sessions Judge Maharajgan is therefore maintained with direction to the learned Magistrate to pass fresh orders in pursuance of the judgment of the revisional court in accordance with the directions given there under, in accordance with law.

34. This 482 petition having no merit is dismissed with the aforesaid observations.

(2021)01ILR A1065
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2021

BEFORE

THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Crl. Misc. Appl. u/s 482 No. 15174 of 2020

Rajesh Kumar Yadav ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Ravi Ratn Kumar Sinha

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

A. Criminal Law – Application u/s 482 – Application for release of seized vehicle - Essential Commodities Act: Section 3/7, 6-A, 6-E; Code of Criminal Procedure: 5, Section 451 to 457 - The provisions of special statute will prevail over general provisions of the Code of Criminal Procedure in case of any conflict. (Para 10, 13)

There is no dispute that The Essential Commodities Act, 1955 is a Special Act, therefore, in view of S. 5 of Cr.P.C., the general provisions of Cr.P.C. will not affect any special statute or any local law for the time being in force. In other words, where special provisions have been provided for any particular thing under special law, the general provision of Cr.P.C. to that extent will not be applicable. (Para 10)

B. The Essential Commodities Act: Section 6E - bar to the jurisdiction of criminal Court - U/s 6A The Essential Commodities Act, there is specific provisions of confiscation of essential commodities, etc. The provision of opportunity of show cause before confiscation of food grains, etc. u/s 6B as well as right of appeal by a person aggrieved against the order of confiscation are also there u/s 6C of the said Act. The provisions contained under Section 6E of The Essential Commodities Act, clearly bar the jurisdiction of the criminal Court with regard to possession delivery, disposal, release or distribution of essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance during pendency of confiscation proceedings. (Para 11)

So long as the confiscation proceedings u/s 6A of The Essential Commodities Act are pending, release of vehicle, etc and essential commodities involved in the commission of an offence under Section 3/7 of The Essential Commodities Act is not maintainable in view of statutory bar contained u/s 6E of The Essential Commodities Act. (Para 17)

C. Jurisdiction of High Court - **The High Court has no jurisdiction to release the vehicle u/s 482 Cr.P.C., when a confiscation proceeding is pending before the designated authority.** (Para 14)

D. Power and Jurisdiction of Magistrate u/s 451, CrPC - The jurisdiction u/s 451, CrPC is not available to the Magistrate, once the authorized Officer initiated the confiscation proceedings on account of clear bar of jurisdiction in certain cases under the Act. (Para 18)

There is no doubt that an application u/s 451 Cr.P.C., for release of vehicle seized under Essential Commodity Act, during pendency of confiscation proceedings before the collector under Section 6A of The Act is not maintainable before the Magistrate. (Para 19)

In the present case, the learned Magistrate has considered and followed the legal position as expounded by the Hon'ble Apex Court and concluded that during pendency of confiscation proceedings before Collector u/s 6A of Essential Commodities Act, Magistrate has no jurisdiction to entertain the application for release of vehicle, is correct and proper in the eye of law. (Para 23)

Application dismissed. (E-3)

Precedent followed:

1. Suresh Nanda Vs C.B.I., (2008) (3) SCC 174 (Para 13)

2. Manju Kumari & anr. Vs St. of Bih. & ors., (2006) Cr.L.J 3014 (Para 13)

3. Rajendra Vs St. of Mah. & anr., Criminal Writ Petition No. 846 of 2016 decided on 10.10.2016 (Para 13)

4. Divisional Forest Officer & oth. Vs G.V. Sudhakar Rao & ors., (1985) (4) SCC 573 (Para 14)

5. Shambhu Dayal Agarwal Vs St. of W.B. & anr., (1990) 3 SCC 549 (Para 15)

6. Oma Ram Vs St. of Raj. & ors., AIR 2008 SC (Supp.) 1844 (Para 16)

7. State of Bih. & anr. Vs Arvind Kumar & anr., (2012) 12 SCC 395 (Para 17)

8. State of M.P. & ors. Vs Uday Singh & ors., (2019) SCC Online SC 420 (Para 18)

9. Vishnu Prasad Vaishnav Vs St. of Chatt., Cr.M.P. No. 1068 of 2014 decided on 17.12.2014 (Para 23)

Precedent distinguished:

1. Kailash Prasad Yadav Vs St. of Jhar., 2007 LawSuit (SC) 540 (Para 20)

2. Sunderbhai Ambalal Desai Vs St. of Guj., 2003 (3) JIC 615 (Para 21)

Present application has been filed to set aside order dated 25.08.2020, passed by Chief Judicial Magistrate, Chandauli u/s 3/7 Essential Commodities Act, 1955, whereby the application for release of seized vehicle has been rejected.

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

1. Heard Shri Ravi Ratan Kumar Sinha, learned counsel for the applicant, learned A.G.A. for the State and perused the record.

2. This application u/s 482 Cr.P.C. has been filed by the applicant Rajesh Kumar Yadav with a prayer to set-aside the impugned order dated 25.08.2020 passed by Chief Judicial Magistrate, Chandauli on the release application in Case No. Nil of 2020 (Rajesh Kumar Yadav Vs. State of U.P.) arising out of Crime No. 68 of 2020, under Section 3/7 Essential Commodities Act, 1955, Police Station Alinagar, District Chandauli, whereby the application for release of seized vehicle has been rejected.

3. Factual Matrix of the case is as under.

Applicant Rajesh Kumar Yadav moved an application for release of vehicle (tanker) bearing no. U.P.62 B.T.1335 alleging himself to be its registered owner. On 01.04.2020, Inspector Police Station Alinagar, District Chandauli reported that near Sareshar village Vijay Yadav r/o Domanpur, P.S. & District Bhadohi with three gallons each having capacity of 20 liters and one pipe to be used for extracting oil from the tanker, was found present and from the tanker theft of oil was attempted. All the upper lids of tanker were opened. Supply Inspector Rajeev Kumar along with his staff went to Police Station Alinagar and inspected the tanker, it was found that the tanker contained 20,000 (twenty thousand) liters diesel. Locks of all chambers were found opened, which was illegal. The tanker was registered in favour of Rajesh Kumar Yadav r/o Junwani Road, Bhilai Road, Chhattisgarh. Driver of the tanker was not present. Vijay Shankar Yadav stated that he was brother of owner of the tanker. The driver of tanker drove it from Indian Oil to Shiv Enterprises, Rae Bareli on 31.3.2020 at 3 O'clock, having 20,000 (twenty thousand) liters of diesel. He parked the tanker near Sareshar Village and went to his home. On 1.4.2020 in the morning, police saw the opened seal and made query with him, it was found that 20,000 (twenty thousand) liters diesel was being black-marketed by Vijay Shankar Yadav. As a result, tanker bearing no. U.P.62BT1335 containing 20,000 (twenty thousand) liters diesel and two empty gallons of twenty liters capacity and one other gallon filled with twenty liters diesel alongwith oil extracting pipe was seized and thereafter First Information Report under Section 3/7 Essential Commodities Act was lodged as Crime No. 68 of 2020, Police Station Alinagar, District Chandauli.

4. The owner of vehicle/ applicant Rajesh Kumar Yadav moved an application before learned Chief Judicial Magistrate,

Chandauli for release of vehicle which was rejected. As a result Criminal Revision No. 21 of 2020 was preferred before the court of Ist Additional Sessions Judge, Chandauli which was allowed and order passed by learned Chief Judicial Magistrate dated 6.6.2020 was set-aside. Matter was returned back to the learned Chief Judicial Magistrate for passing order afresh in the light of observations made by the learned Ist Additional Sessions Judge.

5. Again applicant moved an application before the learned Chief Judicial Magistrate, Chandauli for release of the seized vehicle in the light of the order passed by the learned Additional Sessions Judged which was again rejected by learned Chief Judicial Magistrate on 25.8.2020 on the ground of non-maintainability of the application on account of confiscation proceedings pending before the court of District Magistrate, Chandauli under Section 6A of Essential Commodities Act. Being aggrieved with this order this Criminal Misc. Application u/s 482 Cr.P.C. has been preferred before this Court.

6. Learned counsel for the applicant submits that applicant is a businessman and has a tanker bearing no. UP62BT1335 for doing transportation work. On 4.1.2020 his tanker was not involved in any Essential commodities Act but the Inspector, in-charge, Alinagar for taking bribe implicated the applicant's tanker containing 20,000 (twenty thousand) liters diesel in a false case. Learned Chief Judicial Magistrate, Chandauli rejected the application of the applicant without considering the real facts and circumstances of the case on 6.6.2020 against which he filed revision which was allowed by Ist Additional Sessions Judge and matter was remanded back for reconsideration but again learned Chief Judicial Magistrate has rejected the application without application of mind which is against the eye of law. He misinterpreted the order dated 13.8.2020 passed by the Additional Session Judge, Chandauli. Applicant's vehicle is detained in the concerned police station and condition of the aforesaid vehicle is being damaged as it is not functioning, therefore, requested to set-aside the order dated 25.8.2020 passed by learned Chief Judicial Magistrate on the release application in Case No. Nil of 2020 and to direct the court concerned to release the applicant's vehicle.

7. Learned A.G.A. opposed the prayer for release of vehicle and submitted that vehicle has been seized in a case under Section 3/7 Essential Commodities Act. Confiscation proceedings are pending before the court of District Magistrate, Chandauli under Section 6-A of Essential Commodities Act. In this situation, the court of Chief Judicial Magistrate has no jurisdiction to entertain the application for release under Section 451 to 457 Cr.P.C. as has been provided under Section 6-E of Essential Commodities Act. Learned Magistrate has passed the impugned order having taken into consideration the relevant provisions of law and legal position as propounded by the Apex Court as well as this Court regarding release of vehicle. There is no illegality in the impugned order but it is based on the sound principles of law. So, this application is devoid of merit.

8. Considering the submissions made by learned counsel for the parties, the issue for consideration before this Court is " whether an application under Section 451 Cr.P.C. for release of seized vehicle is maintainable during pendency of

confiscation proceedings before the collector under Section 6A of The Essential Commodities Act, 1955?"

9. Before delving into the issue, it would be useful to quote the relevant provisions of The Essential Commodities Act, 1955 with regard to confiscation of seized essential commodities including vehicles as well as relevant provisions of Cr.P.C., which are as under:-

"6A. Confiscation of Essential Commodity

Where any essential Commodity is seized in pursuance of an order made under Sec. 3 in relation thereto a report of such seizure shall, without unreasonable delay, be made to the Collector of the district or the Presidency-town in which such essential commodity is seized and whether or not a prosecution is instituted for the contravention of such order, the Collector may, if he thinks it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied that there has been a contravention of the order may order confiscation of,-(a) the essential commodity so seized;

(b) any package, covering or receptacle in which such essential commodity is found; and

(c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity :

Provided that without prejudice to any action which may be taken under any other provision of this Act, no food grains or edible oilseeds in pursuance of an order made under Sec. 3 in relation thereto from a producer shall, if the seized food grains or edible oilseeds have been produced by him, be confiscated under this section:

Provided further that in the case of any animal, vehicle, vessel or other conveyance used for the carriage of goods or passengers for hire, the owner of such animal, vehicle, vessel or other conveyance shall be given an option to pay, in lieu of its confiscation, a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried by such animal, vehicle, vessel or other conveyance.

Where the Collector, on receiving a report of seizure or on inspection of any essential commodity under sub-section (1), is of the opinion that the essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do, he may, -

(i) order the same to be sold at the controlled price, if any, fixed for such essential commodity under this Act or under any other law for the time being in force; or

(ii) where no such price is fixed order the same to be sold by public auction :

Provided that in the case of any such essential commodity the retail sale price whereof has been fixed by the Central Government or a State Government under this Act or under any other law for the time being in force, the Collector may. for its equitable distribution and availability at fair prices, order the same to be sold through fair price shops at the price so fixed.

(3) Where any essential commodity is sold, as aforesaid, the sale proceeds thereof, after deduction of the expenses of any such sate or auction or other incidental expenses relating thereto, shall, -

(a) where no order of confiscation is ultimately passed by the Collector,

(b) where an order passed on appeal under sub-section (1) of Sec. 6-C so requires, or

(c) where in a prosecution instituted for the contravention of the order in respect

of which an order of confiscation has been made under this section, the person concerned is acquitted, be paid to the owner or the person from whom it is seized.

6B. Issue of Show-Cause Notice before Confiscation of Essential Commodity.

No order confiscating any essential commodity package, covering, receptacle, animal, vehicle, vessel or other conveyance shall be made under section 6A unless the owner of such essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance or the person from whom it is seized.

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the essential commodity, package, covering, receptacle. animal, vehicle, vessel or other conveyance ;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(c) is given a reasonable opportunity of being heard in the matter.

Without prejudice to the provisions of sub-section (1) no order confiscating any animal, vehicle, vessel or other conveyance shall be made under section 6A if the owner of the animal, vehicle, vessel or other conveyance proves to the satisfaction of the Collector that it was used in carrying the essential commodity without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the animal, vehicle, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

No order confiscating any essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance shall be invalid merely by reason of any defect or irregularity in the notice given under clause (a) of sub-section (1), if, in giving such notice, the provisions of that clause have been substantially complied with.

6C Appeal.

(1) Any person aggrieved by an order of confiscation under section 6A may, within one month from the date of the communication to him of such order, appeal to any judicial authority appointed by the State Government concerned and the judicial authority shall, after giving an opportunity to the appellant to be heard, pass such order as it may think fit, confirming, modifying or annulling the order appealed against.

(2) Where an order under section 6A is modified or annulled by such judicial authority, or where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made under section 6A, the person concerned is acquitted, and in either case it is not possible for any reason to return the essential commodity seized such persons shall, except as provided by sub-section (3) of section 6A, be paid] the price therefore as if the essential commodity, had been sold to the Government with reasonable interest calculated from the day of the seizure of the essential commodity and such price shall be determined—

(i) in the case of food grains, edible oilseeds or edible oils, in accordance with

the provisions of sub-section (3B) of section 3;

(ii) in the case of sugar, in accordance with the provisions of subsection (3C) of section 3 ; and

(iii) in the case of any other essential commodity, in accordance with the provisions of sub-section (3) of section 3.

6E. Bar of Jurisdiction in Certain Cases.

Whenever any essential commodity is seized in pursuance of an order made under Sec. 3 in relation thereto, or any package, covering or receptacle in which such essential commodity is found, or any animal, vehicle, vessel or other conveyance used in carrying such essential commodity is seized pending confiscation under Sec. 6-A, the Collector, or, as the case may be, the State Government concerned under section 6C shall have. and, notwithstanding anything to the contrary contained in any other law for the time being in force, any Court, Tribunal or other authority shall not have, jurisdiction to make orders with regard to the possession, delivery, disposal, release or distribution of such essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance.

Section 5 Cr.P.C.

Saving-

"Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

Section 451 CrPC

Order for custody and disposal of property pending trial in certain cases. When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of. Explanation.- For the purposes of this section," property" includes

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

Section 457 Cr.P.C.

Procedure by police upon seizure of property.

(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a

proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

10. There is no dispute that The Essential Commodities Act, 1955 is a Special Act, therefore, in view of Section 5 of Cr.P.C, the general provisions of Cr.P.C. will not affect any special statute or any local law for the time being in force. In other words, where special provisions have been provided for any particular thing under special law, the general provision of Cr.P.C. to that extent will not be applicable. The provisions of special statute will prevail over general provisions of the Code of Criminal Procedure in case of any conflict.

11. It is also not disputed that under Section 6A The Essential Commodities Act, there is specific provisions of confiscation of essential commodities, etc. The provision of opportunity of show cause before confiscation of food grains, etc. under Section 6B as well as right of appeal by a person aggrieved against the order of confiscation are also there under Section 6C of the said Act. The provisions contained under Section 6E of The Essential Commodities Act, clearly bar the jurisdiction of the criminal Court with regard to possession delivery, disposal, release or distribution of essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance during pendency of confiscation proceedings.

12. Considering the aforesaid provisions, it is clear that the legislature has purposely inserted the said provisions of confiscation under The Essential Commodities Act and saving clause under Section 5 of the Cr.P.C. with a laudable object. The authority concerned under The Essential Commodities Act has been granted a wide discretion and power with regard to confiscation of essential commodities, etc. The object of inserting Section 5 of Cr.P.C. is to give effect the provisions of special Act/local laws in case of any conflict.

13. The Hon'ble Apex Court in the case of **Suresh Nanda vs. C.B.I, 2008 (3) SCC 174**, has held that the provision of Special Act prevail over the general provisions of the code of criminal procedure. The aforesaid dictum of the Hon'ble Apex Court has been further relied upon by Patna High Court in the case of **Manju Kumari and another vs State of Bihar and others, 2006 Cr.L.J 3014** as well as Bombay High Court in Rajendra vs. State of Maharashtra and another, (Criminal Writ Petition No. 846 of 2016 decided on 10.10.2016).

14. The Hon'ble Apex Court in case of **Divisional Forest Officer and other Vs. G.V. Sudhakar Rao and others 1985 (4) SCC 573** has held that the High Court has no jurisdiction to release the vehicle under Section 482 Cr.P.C., when a confiscation proceeding is pending before the designated authority.

15. The law with regard to release of essential commodities and seized vehicle etc. during pendency of confiscation proceedings under Section 6A of The Essential Commodity Act has been explained by the Hon'ble Apex Court in case of **Shambhu Dayal Agarwala Vs. State of West Bengal and another (1990) 3 SCC 549** in para 7.

Section 6A empowers confiscation of the seized essential commodity, the package, covering and receptacle in which the essential commodity was found and the animal, vehicle or other conveyance in which such essential commodity was carried. The words 'may order confiscation' convey that the power is discretionary and not obligatory. Sub-section (2) thereof confers a special power to deal with any essential commodity which, in the opinion of the Collector, is subject to speedy and natural decay or it is otherwise expedient in public interest to be disposed of in the manner indicated therein. Section 6A, therefore, merely confers power of confiscation and not the power of release, disposal, distribution, etc., except to the limited extent permitted by Sub-section (2) thereof. Of course the second proviso to Sub-section (1) of Section 6A permits the grant of an option to pay, in lieu of confiscation of any animal, vehicle, vessel or other conveyance, a fine equal to its market price at the date of seizure. Section 6E was first enacted to debar courts from making any order with regard to the possession, delivery, disposal or distribution of any essential commodity seized in pursuance of an order made under Section 3 in relation thereto. By the substituted Section 6E as it presently stands the scope of the provision has been enlarged by extending the bar of jurisdiction of the Court, tribunal or other authority to the release, etc., of packages, coverings or receptacles as well as animals, vehicles, vessels or other conveyances also. It provides that whenever any essential commodity is seized under an order made in exercise of power conferred by Section 3 in relation thereto no court, tribunal or other authority shall have jurisdiction to make any order with regard to the possession, delivery, disposal, release or distribution of such essential commodity save and except the Collector pending confiscation under Section 6A, or the State Government concerned under Section 6C.

16. In the Case of **Oma Ram Vs. State of Rajasthan and others AIR 2008 SC(Supp.) 1844** their lordships observed in Para 13.

Certain provisions of the Essential Commodities Act, 1955 have relevance. Section 6A deals with confiscation of food grains, edible oil seeds and edible oils. Section 6B deals with issue of show cause notice before confiscation of food grains etc. Section 6E deals with bar of jurisdiction in certain cases. Section 6E has been substituted to provide that except Collector or State Government, all other authorities, judicial or otherwise, would be debarred from making any order with regard to the possession, delivery, disposal or distribution of any essential commodity, seized in pursuance of an order made under Section 3. Thus a Magistrate has no jurisdiction to grant relief against seizure under Section 457 Cr.P.C.

17. In **State of Bihar and another Vs. Arvind Kumar and another (2012) 12 SCC 395**, wherein the Hon'ble Apex Court has again considered the view taken in the cases of Shambhu Dayal Agarwala & Oma Ram and held that so long as the confiscation proceedings under Section 6A of The Essential Commodities Act are pending, release of vehicle, etc and essential commodities involved in the commission of an offence under Section 3/7 of The Essential Commodities Act is not maintainable in view of statutory bar contained under Section 6E of The Essential Commodities Act.

18. Recently, the Hon'ble Apex Court in the case of **State of M.P. and others Vs. Uday Singh and others 2019 SCC Online SC 420** has considered the power and jurisdiction of the Magistrate under Section 451 Cr.P.C. during pendency of confiscation proceedings under the Forest Act and held that the jurisdiction under Section 451 of the Code of Criminal Procedure is not available to the Magistrate, once the authorized Officer initiated the confiscation proceedings on account of clear bar of jurisdiction in certain cases under the Act.

19. After the aforesaid analysis in the light of dictum of the Hon'ble Apex Court, there is no doubt that an application under Section 451 Cr.P.C., for release of vehicle seized under Essential Commodity Act, during pendency of confiscation proceedings before the collector under Section 6A of The Act is not maintainable before the Magistrate.

20. Learned counsel for the applicant has specifically relied on the judgment propounded by the Hon'ble Apex Court in the case of **Kailash Prasad Yadav Vs. State of Jharkhand 2007 LawSuit(SC)540** in which the issue of jurisdiction of the Magistrate under Section 6E of Essential Commodities Act was not in question but appeal under Section 6C was preferred before the Additional Session Judge against the confiscation order made by the Deputy Commissioner which was dismissed by the Additional Session Judge, that order was under challenge before the Hon'ble Court and was set aside.

21. Another case of **Sunderbhai Ambalal Desai vs State Of Gujarat, 2003(3)JIC615** has also been relied on by learned counsel but the question involved in that case was not related to provisions of Essential Commodities Act but it was specifically related to the provisions of Section 451/457 Cr.PC. Hon'ble Court had no any occasion to examine the affect of Section 6E of the Essential Commodities Act on the power of Magistrate to release seized vehicle in view of Section 5 of Code of Criminal Procedure.

22. A careful scrutiny of the decision of their Lordships in Sundarbhai Ambalal Desai (supra) clearly indicates that the decision is an authority about the general law regarding release of vehicles seized in connection with any criminal case, but the same does not answer the issue whether in a case where there are special provisions under a local or special Act, like the Essential Commodities Act, relating to seizure and confiscation of vehicles, the powers under Section 451 or for that matter under Section 457, would still be available with the Magistrate pending confiscation proceedings under the special or the local law. In fact, the decision of their Lordships in Sundarbhai Ambalal Desai (supra) arose in the context of a challenge to an order of police remand for the petitioners granted to the prosecuting agency, where the petitioners were police personnel involved in offences punishable under Sections 429, 420, 465, 468, 477A and 114 IPC. The allegations against them were that while working at different police stations, they had committed offences over a period of time involving replacement of valuable articles retained as case property by other spurious articles, misappropriation of money also seized in connection with cases, unauthorized auction of property seized and kept at the police station, pending investigation or trial. In short, the offences that engaged the attention of their Lordships were all offence to which the

Code, including the provisions of Sections 451 and 457 wholesomely applied, therefore, ***Sunderbhai Ambalal Desai*** can at best be said to be an authority on the general law regarding release of vehicle seized in connection with any criminal case.

23. From the perusal of impugned order dated 25.08.2020 passed by learned Chief Judicial Magistrate, it transpires that learned Magistrate has considered and followed the legal position as expounded by the Hon'ble Apex Court in the Case of Shambhu Dayal Agarwala, Oma Ram and followed in the case of ***Vishnu Prasad Vaishnav Vs. State of Chattisgarh Cr.M.P. No. 1068 of 2014*** decided on 17.12.2014 and concluded that during pendency of confiscation proceedings before Collector under Section 6A of Essential Commodities Act, Magistrate has no jurisdiction to entertain the application for release of vehicle, is correct and proper in the eye of law.

24. In view of above, there is no any manifest error of law or perversity in the impugned order passed by learned Chief Judicial Magistrate, therefore, it does not warrant any interference by this Court.

25. The present application u/s 482 Cr.P.C. being devoid of merits is hereby ***dismissed*** accordingly.

(2021)01ILR A1075
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2020

BEFORE

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

Crl. Misc. W.P. No. 11367 of 2020

Salamat Ansari & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Kumar Mishra

Counsel for the Respondents:
A.G.A., Sri Ritesh Kumar Singh

Criminal Law-Couple have attained age of majority-contracted marriage and living together-no offence made out-F.I.R. quashed.

W.P. allowed. (E-7)

List of Cases cited:-

1. Shafin Jahan Vs Asokan K.M (2018) 16 SCC 368

2. Shakti Vahini Vs U.O.I. (2018) 7 SCC 192

3. NandaKumar Vs St. of Ker., (2018) 16 SCC 602

4. KS Puttaswamy Vs U.O.I. (2017) 10 SCC 1

5. Smt Noor Jahan Begum @ Anjali Mishra & anr. Vs St. of U.P. & oth., Writ C No. 57068 of 2014 **(distinguished)**

6.Priyanshi @ Km. Shamren & ors. Vs St. of U.P. & anr., Writ C No. 14288 of 2020 **(distinguished)**

(Delivered by Hon'ble Pankaj Naqvi, J.)

Heard Sri Rakesh Kumar Mishra, learned counsel for the petitioners, Sri Ritesh Kumar Singh, learned counsel for the informant and Sri Deepak Mishra, the learned A.G.A.

Learned AGA and the learned counsel for the informant do not propose to file any counter affidavit. With the consent of all, the petition is being heard and finally decided under the rules of the Court.

This writ petition has been filed, seeking a writ of mandamus, directing the respondent concerned, not to arrest the petitioners, with a further prayer for quashing the impugned F.I.R. dated 25.08.2019 registered as Case Crime No. 0199 of 2019, under Sections 363, 366, 352, 506 I.P.C. and Section 7/8 POCSO Act, Police Station- Vishnupura, District Kushi Nagar.

1. Salamat Ansari and Priyanka Kharwar @ Alia along with two others have invoked the extraordinary jurisdiction of this Court for seeking quashment of an FIR dated 28.08.2019 as Case Crime No. 0199 of 2019 under Sections 363, 366, 352, 506 IPC and Section 7/8 POCSO Act, Police Station Vishnupura, Kushinagar on the premise that the couple is of the age of majority, competent to contract a marriage, performed Nikah on 19.08.2019 as per muslim rites and rituals, after Priyanka Kharwar renounced her Hindu identity and embraced Islam. It is further submitted that the couple has been living together as husband and wife since last one year peacefully and happily. It is finally submitted that the FIR lodged by father of petitioner no. 4/Priyanka Kharwar @ Alia is prompted by malice and mischief only with a view to bring an end to martial ties, no offences are made out, FIR be quashed.

2. Learned AGA and learned counsel for the informant vehemently opposed the submissions on the premise that conversion per se for contracting a marriage is prohibited, said marriage has no sanctity in law, thus this Court should not exercise its extra-ordinary jurisdiction in favour of such a couple. They relied on a judgment of a Learned Single Judge in Writ C No. 57068 of 2014 *(Smt Noor Jahan Begum @ Anjali Mishra and Another vs. State of U.P. and others*) decided on 16.12.2014 and its recent reiteration in Writ C No. 14288 of 2020 (Priyanshi @ Km. Shamren and others Vs. State of U.P. and Another) decided on 23.09.2020.

3. There is no dispute that the couple has attained the age of majority as Priyanka Kharwar @ Alia's date of birth as per High School Certificate (annexure 3) is 07.07.1999 which is an enlisted document in Juvenile Justice Act, 2015 for determining the age of an individual coupled with the fact that the entry of the date of birth is not under challenge. The mere fact that this petition is filed and supported by an affidavit of Priyanka Kharwar @ Alia alleged victim, goes to show that she is voluntarily living with Salamat Ansari as a married couple.

4. Once age of Priyanka Kharwar @ Alia is not in dispute as she is reported to be around 21 years, petitioner nos. 1 to 3 cannot be made accused for committing an offence under Section 363 IPC or 366 IPC as victim on her own left her home in order to live with Salamat Ansari. Similarly once Priyanka Kharwar @ Alia is found not to be a juvenile, the offence under Seciton 7/8 POCSO Act is also not made out. Allegations relating to offence under Section 352, 506 IPC qua petitioner no. 2 and 3 prima facie, in view of above background, appear to be exaggerated and malafidely motivated with a view to implicate the family of petitioner no. 1 as petitioner no. 2 and 3 are mother and brother of petitioner no. 1 respectively.

5. We do not see Priyanka Kharwar and Salamat as Hindu and Muslim, rather as two grown up individuals who out of their own free will and choice are living together peacefully and happily over a year.

The Courts and the Constitutional Courts in particular are enjoined to uphold the life and liberty of an individual guaranteed under Article 21 of the Constitution of India. Right to live with a person of his/her choice irrespective of religion professed by them, is intrinsic to right to life and personal liberty. Interference in a personal relationship, would constitute a serious encroachment into the right to freedom of choice of the two individuals. We fail to understand that if the law permits two persons even of the same sex to live together peacefully then neither any individual nor a family nor even State can have objection to relationship of two major individuals who out of their own free will are living together. Decision of an individual who is of the age of majority, to live with an individual of his/her choice is strictly a right of an individual and when this right is infringed it would constitute breach of his/her fundamental right to life and personal liberty as it includes right to freedom of choice, to choose a partner and right to live with dignity as enshrined in Article 21 of the Constitution of India.

6. The Apex Court in **Shafin Jahan v. Asokan K.M (2018) 16 SCC 368**, decided on April 9, 2018, held as under:

"74. The principles which underlie the exercise of the jurisdiction of a court in a habeas corpus petition have been reiterated in several decisions of the Court. In Gian Devi v Superintendent, Nari Niketan, Delhi31, a three-judge Bench observed that where an individual is over eighteen years of age, no fetters could be placed on her choice on where to reside or about the person with whom she could stay:

"7. Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is sui juris no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter." (emphasis supplied)

75. The ambit of a habeas corpus petition is to trace an individual who is stated to be missing. Once the individual appears before the court and asserts that as a major, she or he is not under illegal confinement, which the court finds to be a free expression of will, that would conclude the exercise of the jurisdiction. In Girish v Radhamony a two judge Bench of this Court observed thus:

"3 In a habeas corpus petition, all that is required is to find out and produce in court the person who is stated to be missing. Once the person appeared and she stated that she had gone of her own free will, the High Court had no further jurisdiction to pass the impugned order in exercise of its writ jurisdiction under Article 226 of the Constitution."

76. In Lata Singh v State of U.P, Bench of two judges took judicial notice of the harassment, threat and violence meted out to young women and men who marry outside their caste or faith. The court observed that our society is emerging through a crucial transformational period and the court cannot remain silent upon such matters of grave concern. In the view of the court:

"17 This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or

girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law." (emphasis supplied)

77. Reiterating these principles in Bhagwan Dass v State (NCT OF DELHI), this Court adverted to the social evil of honour killings as being but a reflection of a feudal mindset which is a slur on the nation.

78. In a more recent decision of a three judge Bench in Soni Gerry v Gerry Douglas, this Court dealt with a case where the daughter of the appellant and respondent, who was a major had expressed a desire to reside in Kuwait, where she was pursuing her education, with her father. This Court observed thus:

"9 She has, without any hesitation, clearly stated that she intends to go back to Kuwait to pursue her career. In such a situation, we are of the considered opinion that as a major, she is entitled to exercise her choice and freedom and the Court cannot get into the aspect whether she has been forced by the father or not. There may be ample reasons on her behalf to go back to her father in Kuwait, but we are not concerned with her reasons. What she has stated before the Court, that alone matters and that is the heart of the reasoning for this Court, which keeps all controversies at bay.

10. It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of parens patriae. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation."

79. These principles emerge from a succession of judicial decisions. Fundamental to them is the judgment of a Constitution bench of this Court in Kanu Sanyal v District Magistrate, Darjeeling.

7. A perusal of the aforesaid judgment manifests that the Apex Court has consistently respected the liberty of an individual who has attained the age of majority.

8. The Apex Court in **Shakti Vahini Vs. Union of India (2018) 7 SCC 192** came down heavily on the perpetrators of "honour killings", which the Court found not only horrific and barbaric but also interfering with the right to choose a life partner and the dignity of an individual. The Apex Court held as under:-

"44. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and

the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person. (emphasis supplied)

45. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation...

46. It has been argued on behalf of the "Khap Panchayats" that it is a misnomer to call them by such a name. The nomenclature is absolutely irrelevant. What is really significant is that the assembly of certain core groups meet, summon and forcefully ensure the presence of the couple and the family members and then adjudicate and impose punishment. Their further submission is that these panchayats are committed to the spreading of awareness of permissibility of inter-community and inter-caste marriages and they also tell the people at large how "Sapinda" and "Sagotra" marriages have no sanction of law. The propositions have been structured with immense craft and advanced with enormous zeal and enthusiasm but the fallacy behind the said proponements is easily decipherable. The argument is founded on the premise that there are certain statutory provisions and certain judgments of this Court which prescribe the prohibitory degrees for marriages and provide certain guidelines for maintaining the sex ratio and not giving any allowance for female foeticide that is a resultant effect of sex determination which is prohibited under the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex Selection) Act, 1994 (for short 'PCPNDT Act') (See : Voluntary Health Association of Punjab v. Union of India and others12 and Voluntary Health Association of Punjab v. Union of India and others13)

47. The first argument deserves to be rejected without much discussion.

Suffice it to say, the same relates to the recognition of matrimonial status. If it is prohibited in law, law shall take note of it when the courts are approached. Similarly, PCPNDT Act is a complete code. That apart, the concern of this Court in spreading awareness to sustain sex ratio is not to go for sex determination and resultantly female foeticide. It has nothing to do with the institution of marriage." (emphasis supplied)

9. We are conscious that above observations were made in connection with "honour killings" but we are of the firm view that the said principle would apply in the present context too where a relationship of two matured individuals is sought to be jeopardized at the whim and caprice of a parent.

10. We find from para 46 and 47 of **Shakti Vahini (supra)** that even if a marriage is prohibited in law, same shall be taken note of only when the courts are approached for recognition of such marriage, which finds further corroboration in the case of **NandaKumar vs. State of Kerala, (2018) 16 SCC 602** which after relying upon Shafin Jahan (supra) held that on attaining majority an individual is entitled to make his/her choice which is pivotal and cannot be infringed by anyone. The relevant paragraphs are quoted hereunder:-

"7. A neat submission which is made by the learned counsel for the appellants is that the High Court has adopted an approach which is not permissible in law by going into the validity of marriage. It is submitted that when Thushara is admittedly a major i.e., more than 18 years of age, she has right to live wherever she wants to or move as per her choice. As she is not a minor daughter of respondent No. 4, "custody" of Thushara could not be entrusted to him.

8. Learned counsel for the appellants is right in his submission. Even the counsel for the State did not dispute the aforesaid position in law and, in fact, supported this submission of the learned counsel for the appellants.....

12. The Court also emphasised due importance to the right of an adult person, which the Constitution accords to an adult person as under, (Shafin Jahan's case para 52)

"Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition."

11. Right to choose a partner irrespective of caste, creed or religion, is inhered under right to life and personal liberty, an integral part of the Fundamental Right under Article 21 of the Constitution of India. The Apex Court in **KS Puttaswamy vs Union of India (2017) 10 SCC 1** while deciding the issue of right to privacy, held as under:-

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is

an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms Under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion Under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate Article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and

freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination. (emphasis supplied)

299. Privacy represents the core of the human personality and recognises the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community. (emphasis supplied)

323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being; (emphasis supplied)

12. We now propose to deal with the judgment passed by learned Single Judge of this Court in **Noor Jahan (supra).** Noor Jahan along with her alleged husband approached this Court for claiming protection as it was alleged that she had embraced Islam after renouncing her Hindu identity to contract a Nikah with her Muslim husband. There were four more petitions filed by married couples, wherein the identity of a lady in each case was analogous to that of Noor Jahan. The writ Court recorded the following statements of the ladies who appeared in person before the Court.

Statement of Petitioner No.1 (girl) in Writ C No. 58129 of 2014

''सशपथ बयान किया कि मेरा नाम किरन पुत्री जयंत्री प्रसाद निवासी जंगलीपुर थाना भावानीगंज जिला सिद्धार्थनगर। याची सं0 1 ने समक्ष न्यायालय सशपथ बयान किया कि आज दिनॉक 3–11–14 को निम्नलिखित बयान दे रही हूँ। मेरे पिता जी का नाम जयंत्री प्रसाद है मैं जंगलीपुर जिला सिद्धार्थनगर की रहने वाली हूँ। मैं इण्टर मीडिएट तक पढ़ी हूँ। मैं इलाहाबाद दिनॉक 20 अक्टूबर सन् 2014 को 5 बजे सायंकाल आई थी। मैं इलाहाबाद अकेली आई थी। मेरा निकाह नौ बजे दिन में इलाहाबाद में अब्दुल रहीम ने बबलू उर्फ इरफान के साथ करा दिया । यह निकाह अकबर पुर जिला इलाहाबाद में कराया गया था। मेरा धर्म परिवर्तन अब्दुल रहीम नि0 अकबरपुर जिला इलाहाबाद में कराया गया था। यह धर्म परितर्वन उन्होंने शादी करने के लिए कराया था। यह धर्म परिवर्तन उन्होंने बबलू उर्फ इरफान जो कि याची संख्या दो है के कहने पर कराया था। धर्म परिवर्तन प्रमाण पत्र जो कि इस याचिका का संलग्नक तीन है मुझे अब्दुल रहीम ने अकबरपुर इलाहाबाद में दिया था। इस कागज के विषय में मैं कुछ नहीं जानती हूँ। इस्लाम के बारे में मैं कुछ

नहीं जानती हूॅ। कथित निकाहनामा जो याचिका का संलग्नक चार है में निकाह का स्थान नर्द हाईकोर्ट इलाहाबाद अर्थात् हाईकोर्ट के करीब लिखा हुआ है। यहॉ मेरा निकाह नहीं हुआ। ब्यान पढ़ व सुनकर तस्दीक किया''

Statement of Petitioner No.1 (Girl) in Writ C No. 62587 of 2014

''याची सं0 1 सोनम उर्फ प्रियंका ने समक्ष न्यायालय सशपथ बयान किया कि आज दिनॉक 21–11–14 को निम्नलिखित बयान दे रही हूॅ। मेरा नाम सोनम उर्फ प्रियंका है। मेरे पिता जी का नाम भगवान सिंह है। वह एक कृषक है। वह नगला लोधई गांव मे खेती करते है। मेरा निकाह कब हुआ, मुझे याद नही है।

Statement of Petitioner No.1 (Girl) in Writ C No. 60494 of 2014

याची सं0–1 ने समक्ष न्यायालय सशपथ बयान किया कि आज दिनॉक 13–11–14 को निम्नलिखित बयान दे रही हूॅ। मेरा नाम आयसा बेगम उर्फ अनीता विश्वकर्मा मेरे पिता जी का नाम श्री शिव सरन लाल है। वो कुण्डा प्रतापगढ में रहते हैं। मैं बी0ए0 तक पढ़ी हूॅ। मेरा धर्म परिवर्तन मो0 सलीम ने करवाया था । ये धर्म परिवर्तन श्री सलमान के साथ शादी करवाने के लिए करवाया था। मेरा निकाह सलमान ने कचहरी, में करवाया । निकाह में क्या हुआ मुझे मालूम नहीं । मुझे इस्लाम के बारे में पता नहीं है।

Statement of Petitioner no. 1(girl) in Writ C No. 57068 of 2014 :-

''नूरजहॉ बेगम उर्फ अंजली मिश्रा एवं एक अन्य बनाम स्टेट आफ यू0पी0 एवं अन्य याची सं0 1 अंजली मिश्रा समक्ष न्यायालय सशपथ बयान किया –

श्री अखिलेश मिश्रा मेरे पापा का नाम है। यह देवरिया में रहते हैं मैं इन्हीं के साथ रहती थी। मैं इण्टर तक पढ़ी हुई हूॅ। मैं इस्लाम धर्म के बारे में कुछ नहीं जानती हूॅ। दि0 23 सितम्बर 2014 को मेरा धर्म परिवर्तन मो0 सलीम याची सं0 2 के घर पर कराया गया था। जब यह धर्म परिवर्तन कराया गया तब मैं अलग कमरे में बैठी थी और बाहर मौलवी निजाम अहमद बैठे थे उसी समय निकाह हो गया था मौलवी साहब ने कराया था। श्री मो0 सलीम साड़ी का ब्यापार करते हैं। शादी करने के लिए यह धर्म परिवर्तन हुआ था।''

Statement of Petitioner no. 1(girl) in Writ C No. 58910 of 2014 :-

''मेरा नाम सोनी उर्फ साबिया, पत्नी सगीर अहमद है। मेरे पिता का नाम रमेश चन्द्र है। मैं इस याचिका में याचिनी सं0 1 हूॅ। मैं 217 सम्भल गेट चंदौसी जिला सम्भल की रहने वाली हूॅ।

मै सशपथ बयान करती हूॅ कि– मेरे पिता जी मेंथा फैक्ट्री में नौकरी करते हैं। मैं स्नातक की छात्रा हूॅ। मैं इस्लाम धर्म के बारे में नहीं जानती हूॅ। मुझे शादी के लिए इस्लाम धर्म कुबुल करवाया गया। मुझे सगीर अहमद याची सं0 2 के उपस्थिति में इस्लाम धर्म कुबुल करवाया गया। यह कुबूलनामा 15 जुलाई 2014 को हुआ। सगीर अहमद जी ने मेरे साथ निकाह 1 अगस्त 2014 को किसी काजी से कराया। उन्होंने यह निकाह मौहम्मद हुसैन के घर पर करवाया। मुझे नहीं मालूम कि निकाहनामा जो याचिका संलग्नक सं0 2 है के अनुसार निकाह 10 अगस्त 2014 को करवाया गया । सगीर अहमद शीशे का काम मजदूरी पर करते हैं।''

13. We find from the judgement in Noor Jahan's case that no doubt the ladies in question could not authenticate their alleged conversion as they were unable to show the knowledge regarding the basic tenets of Islam, the writ court against the above background held that the alleged marriage was illegal as it was performed after a conversion which could not be justified in law.

14. We lest not forget that couples in Noor Jahan and other cognate petitions preferred a joint petition on the basis of alleged conversion of one of the partners. Once the alleged conversion was under clout, the Constitutional Court was obliged to ascertain the wish and desire of the girls as they were above the age of 18 years. To disregard the choice of a person who is of the age of majority would not only be antithetic

to the freedom of choice of a grown up individual but would also be a threat to the concept of unity in diversity. An individual on attaining majority is statutorily conferred a right to choose a partner, which if denied would not only affect his/her human right but also his/her right to life and personal liberty, guaranteed under Article 21 of the Constitution of India. We say so for the reason that irrespective of the conversion being under clout, the mere fact that the couple was living together, the alleged relationship can very well be classified as a relationship in the nature of marriage distinct from the relationship arising out of marriage, in view of the provisions of Protection of Women from Domestic Violence Act, 2005.

15. The judgment in **Priyanshi (supra)** followed **Noor Jahan (supra).** None of these judgments dealt with the issue of life and liberty of two matured individuals in choosing a partner or their right to freedom of choice as to with whom they would like to live. We hold the judgments in **Noor Jahan** and **Priyanshi** as not laying good law.

16. We before parting wish to reiterate that we are quashing the FIR primarily on the ground that no offences are made out, as discussed above, as also the fact that two grown up individuals are before us, living together for over a year of their own free will and choice. The ultimate contention on behalf of the informant was that he be afforded visiting rights to meet his daughter. Once petitioner no. 4 has attained majority, then it is her choice, as to whom she would like to meet. We, however expect the daughter to extend all due courtseys and respect to her family.

17. We clarify that while deciding this petition, we have not commented upon the validity of alleged marriage/conversion.

18. In view of above discussion, the writ petition succeeds and is **allowed**. The F.I.R. dated 25.08.2019 registered as Case Crime No. 0199 of 2019, under Sections 363, 366, 352, 506 IPC and Section 7/8 POCSO Act, Police Station-Vishunpura, District Kushi Nagar as well as all consequential proceedings are hereby quashed.

(2021)01ILR A1084
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Crl. Misc. W.P. No. 16767 of 2020

Mohd. Gufran @ Gufran ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kshitiz Shailendra

Counsel for the Respondents:
A.G.A., Sri Dileep Singh Yadav

Civil Law-Matrimonial dispute-both party want to bury their differences-Parties-Muslim religion-both have accepted talaq (Khula Talaq)- Complaint quashed.

W.P. disposed. (E-7)

List of Cases cited: -

1. Bitan Sengupta Vs St. of W.B., AIR 2018 SC (Supp) 1217,

2. Kamlesh Kalra Vs Shilpika Kalra & ors., 2020 0 Supreme (SC) 605

3. B.S. Joshi & ors. Vs St. of Har. & anr., 2003 0 Supreme (SC) 332

4. Application U/s 482 No. 13797 of 2020

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Gautam Chowdhary, J.)

1. Heard Sri Kshitij Shailendra, learned counsel for the petitioner and learned A.G.A. for the State.

2. The accused is facing commission of offence u/s 498-A, 494, 323, 504, 506 I.P.C., 3/4 Dowry Prohibition Act, 1961 and 3/4 Muslim Women (Protection of Rights on Marriage) Act, 2019, lodged as Case Crime No. 460 of 2020, at Police Station-Gursahaiganj, District Kannauj.

3. The petitioner, Mohd. Gufran @ Gufran, is present before this Court. Respondent No.4, Smt. Huma, who is wife of Gufran and daughter of Visiuddin, is also present in this Court.

4. At this stage it is stated by both that they want to bury their differences and as this is a petition under Article 226 of Constitution of India and as the parties belong to Muslim religion and as now they have accepted the talaq which would now be turned and termed to be a khula talaq as per the Muslim Personal Law (Shariat) Application Act, 1937 and as per the Muslim Women (Protection of Rights on Divorce) Act, 1986.

5. The petitioner faces investigation as the F.I.R. culminated into case crime No. 460 of 2020. The husband faces some offences which can be said to be in the realm of non-compoundable offences.

6. Learned counsels for the parties have requested the Court that we may show indulgence and put at end to this litigation.

7. Learned counsel for the petitioner has relied on the judgements of the Apex Court reported in **Bitan Sengupta v. State of W.B., AIR 2018 SC (Supp) 1217, Kamlesh Kalra v. Shilpika Kalra & others, 2020 0 Supreme(SC) 605 and B.S. Joshi & Ors. v. State of Haryana & another, 2003 0 Supreme(SC) 332** and also on judgement of this High Court passed in Application U/s 482 No. 13797 of 2020.

8. We do not opine whether it was a pressure technique or whether it was a genuine complaint. The parties have undertaken not to indulge in any litigation against each other in future and, therefore, we feel it proper to rely on the recent judgement of the Apex Court reported in **Bitan Sengupta (supra)** and reliance is also placed on order of this High Court passed in application U/s 482 No. 13797 of 2020 (Shokeen and Ors. vs. State of U.P. & another).

9. The petition is allowed. The complaint is quashed and set aside.

10. We thank both the learned Advocates for their support in seeing that this petition is amicably settled and disposed of.

11. Though the State counsel has his own reservations but as it is a private dispute and it does not affect public domain or public policy of the State, he states that this may not be treated as precedent in future.

12. With these observations, the petition stands **disposed of.**

13. The joint affidavit is taken on record as we would not like to burden the Registry when the matter is over.

(2021)01ILR A1086
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.01.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 581 of 2021

C/M Ramnidhi Vidyalaya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Gopal Pandey

Counsel for the Respondents:
C.S.C., Akash Shukla, Azad Khan, Dilip Kumar Pandey

Civil Law-Impugned order finalized proceedings u/s 67 of U.P. Revenue Code against Petitioner-as upon survey-he found to encroached Gaon sabha land- Tehsildar considered each and every point-including objection-Appellate Court also considered Petitioner's Appeal -no factual or legal infirmity in impugned orders-Petitioner's grievance that several other persons have encroached upon Gaon Sabha land and no proceeding initiated against them-not sustainable-Article 14 is not a negative concept-no parity can be claimed in illegality.

W.P. dismissed. (E-7)

List of Cases cited: -

1. Jagpal Singh & ors. Vs St. of Pun. & ors.; (2011) (11) SCC 396

2. M.I. Builders (P) Ltd. Vs Radhey Shyam Sahu; (1999) (6) SCC 464

3. Hinch Lal Tiwari Vs Kamala Devi, AIR 2001 SC 3215,

4. C/M S.N. Public School through its Manager Smt. Sumitra Vs St. of U.P. & ors., Writ Petition No.25735 (M/S) of 2020

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

1. Heard learned counsel for the petitioner and Sri Dileep Kumar Pandey, learned counsel for the Gaon Sabha.

2. This petition has been filed challenging the order dated 08.12.2020 passed by the District Magistrate/ Collector, District Ayodhya and the order dated 26.08.2020 passed by the Tehsildar, Milkipur, District Ayodhya, by which proceedings under Section 67 of the U.P. Revenue Code were finalized against the petitioner and he was found to have encroached upon the Gaon Sabha land for public utility, namely, Gata No.3065 min. ad-measuring 0.073 hectare situated in Village Kotia Tehsil Milkipur, District Ayodhya and has been asked to deposit Rs.6,20,50,000/- for unauthorized occupation and utilization of Gaon Sabha public utility land and also to pay Rs.5,000/-as execution expenses.

3. It is the case of the petitioner that the petitioner had bought adjoining land of Gata No.3068 ad-measuring 0.0126 hectare situated in the same village from its recorded tenure holder through a sale deed in 2007 and constructed Sri Ramnidhi Smriti Shiksha Niketan Madhyamik Vidyalaya over it. On the other side of the road between Gata No.3068 and Gata No.3065, is banjar land recorded in the name of Gaon Sabha. The allegation is that the petitioner has encroached upon 0.073 hectares.

4. It is the case of the petitioner that no survey of the area concerned was done

by the Lekhpal and a false notice was issued to him under Section 67(1) of the U.P. Revenue Code, 2006 (hereinafter referred to as "the Code of 2006"), to which the petitioner submitted his objections. Because of his enmity with the Village Pradhan, however his objections were not considered even though he produced two witnesses in his favour and the Tehsildar Milkipur passed the order dated 26.08.2020 arbitrarily. The petitioner preferred an Appeal which Appeal has also been rejected by the District Collector on 08.12.2020.

5. It is the case of the petitioner that Gata No.3065 banjar land recorded in the name of Gaon Sabha is a huge Gata wherein patta has been given to several persons, and some of them have constructed their houses and others are doing farming over the said land. The petitioner alone has been singled out for taking action against on the alleged encroachment of such land.

6. It is also the case of the petitioner that the Village Pradhan was instrumental in getting the recognition of his institution cancelled for the Academic Session 2020 on the grounds of such encroachment on village land and the petitioner filed a Writ Petition No.32111 (M/S) of 2019, wherein this Court by way of an order dated 22.11.2019 has finally disposed of with a direction that till proceedings under Section 67 in Case No.201904230401652: Gram Sabha Vs. Ram Nidhi Vidyalaya, are concluded, the cancellation orders of the petitioner's recognition shall remain in abeyance.

7. Learned counsel for the petitioner has argued that in pursuance of the order passed by the Tehsildar Milkipur, an execution notice has also been issued to him on 05.09.2020. It has also been argued by learned counsel for the petitioner that the petitioner is imparting education to the children of local area and he is performing a public duty giving public utility services, and if the school building is demolished, great loss will occur to the petitioner as also to the public services for which he is serving.

8. Learned counsel for the petitioner has placed reliance upon an order passed in Writ Petition No.25735 (M/S) of 2020:Committee of Management S.N. Public School through its Manager Smt. Sumitra Vs. State of U.P. and others, wherein this Court disposed of the petition on 04.01.2021 by observing that the petitioner's application for exchange under Section 101 of the Code having been rejected on 15.01.2020, the petitioner's Revision was pending before the Additional Commissioner, Ayodhya, and during the pendency of the said Revision, the proceedings under Section 67 of the Code were finalized leading to proceedings for his eviction from the land in question being undertaken. The Court observed that since the petitioner's application for exchange of land under Section 101 of the Code can be considered to be still pending during the pendency of the Revision, no action be taken in the matter. The orders passed by the Tehsildar Milkipur and the District Collector Ayodhya were kept in abeyance till the disposal of the Revision said to be pending before the Additional Commissioner Ayodhya.

9. The order of the Co-ordinate Bench on which reliance has been placed by learned counsel for the petitioner is clearly inapplicable in the case of the petitioner as there are no pleadings on record in the

entire petition that the petitioner has made any application for exchange under Section 101 on which prior proceedings are underway.

10. Learned counsel for the petitioner has argued that Hon'ble Supreme Court in the case of Jagpal Singh and others Vs. State of Punjab and others; **2011 (11) SCC 396**, has permitted exchange of land and regularization of unauthorized occupation of public utility land. The petitioner has placed reliance upon paragraphs 14 and 22 of the said judgment.

11. This Court has carefully perused the entire judgment which refers to several earlier binding precedents of Hon'ble Supreme Court clearly prohibiting all encroachment on public utility land, changing of its nature, exchange of said land and creating of bhumidhari rights thereon. It has referred to the judgment rendered in M.I. Builders (P) Ltd. Vs. Radhey Shyam Sahu; **1999 (6) SCC 464**, and also the judgement rendered in Hinch Lal Tiwari Vs. Kamala Devi, **AIR 2001 SC 3215**, that public utility land must not be allotted to anybody for construction of houses or for any allied purpose. The Hon'ble Supreme Court has further observed in paragraph-23 as follows:-

"23. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorised occupants of the Gram Sabha/Gram Panchayat/poramboke/shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show-cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularising the illegal possession. Regularisation should only be permitted in exceptional cases e.g. where lease has been granted under some government notification to landless labourers or members of the Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land."

12. It has also been submitted by learned counsel for the petitioner that this Court has in a similar case set aside the huge cost/ damages imposed for encroachment upon public utility land/ Gaon Sabha land. He has referred to the judgment of Co-ordinate Bench in Writ Petition No.826 (Consolidation) of 2005; decided on 23.05.2017.

13. This Court has carefully perused the judgment of Co-ordinate Bench which arises out of the orders passed by the Deputy Director of Consolidation under Section 48(3) of the U.P. Consolidation of Holdings Act, whereby the name of the writ petitioner Abdul Aziz was directed to be struck off in revenue record in respect of a plot of land ad-measuring two bigha situated in Village Kushmana, Pargana Haveli Avadh, Tehsil Sadar, District Faizabad and the name of Gaon Sabha was directed to be recorded in such land.

14. It is apparent from a perusal of the order passed by the Co-ordinate Bench that

the Deputy Director of Consolidation under Section 48(3) of the Consolidation of Holdings Act had initially found that the name of the petitioner over the land in question had been recorded as Asami by playing fraud and forgery in the khatauni of 1376-1378 fasli. The said order was challenged by the writ petitioner in Writ Petition No.689 (Consolidation) of 1999, which was allowed on 23.12.1999 by the Court and the matter was remitted to the Deputy Director of Consolidation for fresh consideration.

15. The Deputy Director of Consolidation in his order dated 05.03.2001 maintained his earlier order and directed the land to be recorded as Banjar land in the name of the Gaon Sabha. The writ petitioner challenged the order dated 05.03.2001 in Writ Petition No.610 (Consolidation) of 2001, which was allowed by this Court on 26.04.2005 directing the Deputy Director of Consolidation to decide the matter afresh. In pursuance of such order passed by this Court, the impugned order in the writ petition was passed. The Court after considering the entire facts of the case came to the conclusion that lease had been granted to the petitioner under Section 133 of the U.P. Z.A. & L.R. Act but under Section 132 of the U.P. Z.A. & L.R. Act, no bhimdhari rights could have been created over such land reserved for public utility. The Court observed that there was no law, including provisions contained in U.P.Z.A. & L.R. Act, which conferred any bhumidhar rights to the lease holder who had been granted Asami lease over land mentioned in Section 132. The Court also observed that even if the case of the writ petitioner therein that he was Sirdar under Section 134 whose rights have matured was taken into account, the fact remained that the writ petitioner could not produce any admissible evidence to show that he was ever permitted to pay twenty times of the land revenue and his possession as Sirdar regularised. He continued to remain a Sirdar if the lease, if any, that was granted to him in 1966 was taken into account.

The Court also observed that the Deputy Director of Consolidation under Section 48 could certainly pass the order impugned in the petition in view of the mandate of Section 11 (C) of the Act. However, the Court observed that even though the petitioner would be treated as illegal trespasser, proceedings under Section 122 (B) of the U.P. Z.A. & L.R. Act and Section 67 of the U.P. Revenue Code could be initiated against him, and therefore, just by striking off the name of the petitioner from the revenue records under Section 48(3), huge costs could not be imposed upon him by the Deputy Director of Consolidation as damages for being in possession of the land of the Gaon Sabha since 1966.

16. It is evident from the observations made hereinabove with regard to the judgment and order dated 23.05.2017 that the case of the petitioner cannot in any way be said to be similar to that of the writ petitioner Abdul Aziz of the aforecited judgment.

17. Learned counsel for the petitioner has placed reliance upon the Government Order No.745/ Ek- 1- 2016 -20 (5)/2016 issued by the Principal Secretary Revenue, with regard to changing of nature of land reserved in Gram Sabha and in local authorities for "public purpose".

18. From a perusal of the said Government Order, it is apparent that

"public purpose" has been defined to have the same meaning as given in the Land Acquisition Act and it gave power to the State Government to change the nature of land reserved for public utility, for any other "public purpose" on specific recommendation being made in this regard by the District Magistrate and in unavoidable circumstances and in exceptional cases. The conditions for change in nature of land of public utility have been mentioned in paragraph-4 of the said Government Order. In so far as the change in the nature of public utility land for the private purpose is concerned, the proceedings under Section 101 for exchange of land could also be considered by the State Government, if specific proposal in this regard is sent with detailed reasons by the District Magistrate with 25% of the Circle Rate having been deposited by the applicant for consideration of the application for change in user.

19. Learned counsel for the petitioner has placed reliance upon a Government Order No.11/2020/689/Ek-1-2020-20(5)/2016 dated 06.07.2020, wherein the Government Order dated 03.06.2016 has been amended to the extent that the power of permitting of exchange under Section 101 can now be exercised by the Collector in certain cases where the cost of the land did not exceed Rs.40 lakhs and in all other cases has been given to the Additional Commissioner of the Division.

20. The petitioner has not filed any application in pursuance of the Government Order dated 03.06.2016 or 06.07.2020.

21. This Court has gone through the orders impugned in the petition. It finds therein that the Tehsildar/ Assistant Collector, Milkipur, Ayodhya, by means of a detailed order has referred to the encroachment carried out by the petitioner on Gaon Sabha land. On survey, it was found that the petitioner has encroached a part of Gata No.3065 ad-measuring 0.073 hectare enclosing it within his boundary wall and put up a gate and constructed toilets therein. The petitioner had been issued notice under Section 67(1) of the Code to which the petitioner had sought time to submit the reply in his letter dated 10.05.2019 and actually submitted reply on 14.08.2020.

In the said reply the petitioner said that he has not encroached upon pashuchar land and the Area Lekhpal had given a false report. The Gaon Sabha through its counsel had argued that the petitioner had encroached upon pashuchar land. The Lekhpal in his evidence had also supported the case of the Gaon Sabha. The petitioner had disputed the value of the land that was calculated in the notice sent to him and also the proposed damages of Rs.6,20,00,000/- and odd. The petitioner had also disputed the evidence of the Lekhpal saying that he did not belong to the area in question and referred to certain orders passed by this Court, namely, Satendra Vs. Sub Divisional Magistrate/ Assistant Collector, Gautam Buddh Nagar, and Jagpati Vs. Chief Revenue Officer Allahabad and others, to substantiate his claim.

22. The Tehsildar Milkipur considered each and every objection made by the petitioner including the objection that four-five other persons had also constructed their houses over plot no.3065 on the basis of patta granted to them by the Gaon Sabha. After referring to C.H. Form 45 wherein Khata No.1260, land of Gata No.3065 ad-measuring 13-15-16 was recorded as pashuchar bhumi, the

respondent no.4 passed the order impugned, after referring also to the revenue and consolidation officials joint report dated 11.01.2019, that the petitioner was found to have encroached upon 0.073 hectare of the said land reserved as pashuchar bhumi.

23. The Appellate Court i.e. the court of the Collector Ayodhya also considered the petitioner's Appeal wherein the petitioner had stated that no survey of the land had been carried out and no opportunity was given to the petitioner at the time of joint inspection. It was found from the record that the petitioner had indeed encroached 0.073 hectare of land of Gata No.3065 reserved as pashuchar bhumi and this fact came to the notice of the authorities on survey being carried out.

24. This Court finds no factual or legal infirmity in the orders impugned. The observations made in the case of Jagpal Singh (supra) for regularization of unauthorized encroachments are only applicable in exceptional cases. The petitioner has not shown his case to be exceptional.

25. For the judgments relied upon by the learned counsel for the petitioner and the Government Orders, it would suffice to observe that it is evident from the observations made hereinabove that the same are inapplicable in the case of the petitioner.

26. The petitioner's grievance is also that several other persons have encroached upon the Gaon Sabha land and they have not been proceeded against. It is settled law that Article 14 is not a negative concept and there can be no parity claimed in illegality.

27. The writ petition stands **dismissed**.

(2021)01ILR A1091
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.01.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SAURABH LAVANIA, J.

Misc. Bench No. 810 of 2021

Indian National Trade Union Congress ...Petitioner

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Dipak Seth, Harshita Mohan, Ratnesh Chandra

Counsel for the Respondents:
C.S.C.

Civil Law-Petitioner allotted an accommodation in 1996- In 2016 allotment cancelled-asked to vacate and pay the arrears of rent-Trade Union registered under Act, 1926-not eligible for allotment unless it satisfies conditions of section 2 (1), 4 Of Act,2016 r/w Rule 5 (viii) of Rules, 2016.

W.P. dismissed. (E-7)

List of Cases cited: -

1. Lok Prahari Vs. St. of U.P. & ors.; Writ Petition No. 657 of 2004 dated 01.08.2016

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Saurabh Lavania, J.)

1. Shri Ratnesh Chandra, learned counsel for petitioner and learned Additional Chief Standing Counsel for State.

2. This is a writ petition under Article 226 of the Constitution of India filed by the Indian National Trade Union Congress which is a Trade Union registered under the Trade Unions Act, 1926.

3. The petitioner claims that in 1996 an accommodation was allotted to it but subsequently that was changed to House No. 155 Vidhayak Niwas- 2, New Darul Safa, District- Lucknow, in 2014.

4. On being asked as to under which provision of law the said allotment was made we could not be informed of any provision of law under which such allotment had been made. Even the writ petition does not disclose as to under which provision of law such allotment was made.

5. In fact on 19.08.2016 itself petitioner was informed about cancellation of its allotment in view of pronouncement of Hon'ble Supreme Court in the case of Lok Prahari Vs. State of U.P. and Ors.; Writ Petition No. 657 of 2004 dated 01.08.2016 and was asked not only to vacate the premises but pay arrears of rent also. This order was not put to challenge, instead, as informed by learned counsel for petitioner, as the allotment was to be renewed every year/ or re-allotment was to be made, therefore, under Section 6(2) of the Allotment of Houses under Control of the Estate Department Act, 2016 (hereinafter referred to as 'Act, 2016') the petitioner applied for renewal vide application dated 09.12.2016, though, the application at page 55 does not refer to this provision. It is this application which was rejected on 01.11.2017. The said order was never put to challenge prior to filing of this writ petition. In fact, on 13.11.2020 when the petitioner was asked to vacate the premises, it is only then, that it has approached this Court not only challenging the order dated 13.11.2020 but also the order dated 01.11.2017, albeit, belatedly. No reason has been given much less a plausible one for the delay in approaching the Court challenging the order dated 01.11.2017.

6. By the recent order dated 13.11.2020, referring to earlier orders dated 19.08.2016, 05.12.2016 and 01.11.2017, the petitioner has been asked to deposit arrears of rent and vacate the premises. By the order dated 01.11.2017 petitioner's application for renewal of allotment/re-allotment had been rejected on the ground it is not a society registered under the Societies Registration Act, 1860. Much emphasis was laid by learned counsel for petitioner that this reasoning was not tenable in the facts of the case.

7. Learned counsel for petitioner laid great emphasis on an order dated 31.01.2020 which is nothing but an internal correspondence with the Principal Secretary, Labour Department that the term 'Employees Association' is used in Section 2-L of the Act, 2016 refers to such Employees Association which had been recognized by the State Government and whose head quarters are at Lucknow. The said correspondence further goes on to say that it is being examined as to whether Indian National Trade Union Congress as an employees association, is recognized by the State Government or not. We categorically asked the learned counsel for petitioner as to whether petitioner is an employees association and also as to whether it is recognized by the State Government, as, only such associations are covered for allotment of premises under the Act, 2016, learned counsel responded by contending that the petitioner is a Trade

Union under the Trade Unions Act, but could not show any recognition by the State Government, though, he claimed benefit of Section 2(l) of the Act, 2016 on the ground that it was an 'employees association'.

8. In the writ petition also it has been asserted that it is an employees association recognized by the State Government but without any proof being annexed with it.

9. We further asked him as to whether this union comprises of employees of the State Government or public undertakings controlled by it, he stated that it comprised of workmen. On the other question regarding its recognition, as already stated, he could not place before the Court any document to show that petitioner was recognized by the State Government.

10. We pointed out to learned counsel for petitioner Rules known as Uttar Pradesh (Recognition of Service Associations) Rules, 1979 (hereinafter referred to as 'the Rules, 1979') which have been made by the State Government for recognition of employees associations. These Rules are of 1979 and are still in force. Government Servant is defined in Rule 2-(b) of Rules, 1979 to mean- any person appointed by the Government to any civil service or post in connection with the affairs of the State and to whom all or any of the provisions of the Uttar Pradesh Government Servants Conduct Rules, 1956 apply. Rule 5 of the said Rules mentions the conditions for recognition of associations under the said Rules. As per Clause-(c) of Rule 5- membership of an Association is required to be restricted to a district category of serving Government Employees (excluding retired) and it is required to represent more than 50% of the total strength of that particular category. Clause-(e) of Rule 5 further goes on to say that it is necessary that no person, who is not serving Government servant is connected with the affairs of the Association in order to be eligible for recognition under the said Rules. Similarly, Rule 6 speaks of conditions for recognition of a Federation and Clause-(c) thereof also requires the Federation to be comprised of recognized associations of the same category of Government employees and it should not be multi-functional or multi-professional. Rule 7 deals with condition of recognition of Confederation. Clause-(b) thereof also mentions that the Confederation should be formed primarily with the object of promoting harmonious relations amongst the wider group of Government employees and promoting their common service and interest.

11. On a perusal of aforesaid Rules it is evident that the association which is to be recognized thereunder has to be of serving Government employees. The aforesaid Rules 5, 6 and 7 have to be read in consonance with Rule 2(b) of Rules, 1979 and not otherwise.

12. Now, when we come back to Act, 2016 under which renewal was sought by petitioner i.e. under Section 6(2) thereof, firstly, we find that the said Act was enacted by the State Legislature to regulate the allotment of houses under the Control of Estate Department of Government to the employees and Officers of the State Government, **employees associations**, political parties etc. Section 2(a) defines 'Allotment' to mean to authorise a person to occupy a house under the provisions of this Act. Section 2 (h) defines "Trust", which the petitioner is not. Section 2(i) defines "Society", which the petitioner is not. A Trust which is registered under the Trust

Act. The petitioner is also not a political party, nor a journalist.

13. The question is, is it an 'employees association' as defined in Section 2(l) of the Act, 2016 which means an Employees Association which is recognized by the State Government and the head quarter of which is at Lucknow. Now, Shri Ratnesh Chandra, learned counsel for petitioner contends that the employees association does not necessarily have to be an association of employees of the State Government. The point is, if the employees association referred in Section 2(l), which is to be recognized by the State Government, is not one comprising of employees of State Government then why recognition by the State Government is required. We may in this regard refer to Rule 3 of the Allotment of Houses under Control of the Estate Department Rules, 2016 (hereinafter referred to 'the Rules, 2016') made under the Act, 2016 which says that a person eligible for allotment under Section 4 of the Act, 2016 shall make an application to the Estate Officer. Further, as per Rule 5(viii) of the Rules, 2016 employees associations which are recognized by the State Government with its headquarters at Lucknow, and are working for the welfare of Uttar Pradesh employees may be allotted a house for a period of two years. This Rule is not under challenge. Moreover, we have already referred to Rules, 1979 under which the State Government does recognize the employees associations of serving government employees. The property in question, allotment or re-allotment of which is sought, is that of the Estate Department of the Government. A Trade Union is registered under a Central enactment i.e. the Act, 1926 by the Registrar of Trade Union who is a central government employee.

14. Irrespective of this, there is nothing on record to show that petitioner is recognized by the State Government as an employee association so as to be covered under Section 2(l) read with Section 4 and 6(2) of the Act, 2016.

15. Now, it is said that the application for allotment was made under Section 6(2) which applies to applicants other than the applicants mentioned in Sub-Section 1 of Section 6 of the Act, 2016. Herein also petitioner does not fall in any category. Type- 1 houses are reserved for Group- 'D' employees working under the State Government. Type- 2 is reserved for Group- 'C' non gazetted employees working under the State Government. Type- 3 is reserved for Group -'C' gazetted employees working under the State Government. The petitioner does not fall in these categories. Type- 4 is reserved for Group- 'B' officers working under the State Government/ Officers of judicial serves, journalist, society, recognized association. Now, Shri Ratnesh Chandra, learned counsel for petitioner says that petitioner is a recognized association, however, he is not able to show any order of the State Government by which it may have been recognized nor that it falls within the definition of Section 2(l). Type- 5, 6 and 7 houses referred in the Act, 2016 are reserved for other categories mentioned in Section 4 and it is not the case of petitioner that it falls in any of the categories mentioned therein.

16. Now, one can understand if the petitioner has a grievance as to why, if a Trust, Society and a Journalist can be brought within the ambit of the Act, 2016, the petitioner, which is a Trade Union, should not be so brought under the purview of the Act but this would require a challenge either to the vires of the Act, 2016 or seeking of such other appropriate relief as may be permissible in law, but no renewal or allotment could have been

sought by petitioner under the Act, 2016 in the first place, therefore, even if the reason given in the impugned order dated 01.11.2017, challenge to which is in any case highly belated, is that the petitioner is not a society, that itself does not persuade this Court to interfere in the matter by quashing the said order unless the petitioner was able to satisfy the Court that it was covered by the Act, 2016, about which we are not satisfied at all.

17. As regards contention of learned counsel for petitioner that the State Government is still seized with the matter as to whether petitioner qualifies as an employees association recognized by the State Government or not in view of a letter dated 31.01.2020, firstly, it is an internal correspondence. Secondly, the order dated 13.11.2020 has been passed 10 months thereafter, therefore, obviously the matter is no longer under consideration by the State Government. Thirdly, whether the petitioner is covered by the Act, 2016 or not, is a legal issue to be decided and the Courts are best suited to decide the said issue with the assistance of the counsel, which has been ably provided by Shri Ratnesh Chandra, yet, inspite of it we have not been persuaded to come to the conclusion that petitioner is covered by the Act, 2016 for the reasons already mentioned hereinabove.

18. The contention of Shri Chandra that neither the Act nor the Rules made thereunder contain modalities for recognition, therefore, this can not be a ground for ousting the petitioner from its purview is also not acceptable in view of Rules 1979 referred above as also Rule 5(viii) of the Rules, 2016 made under the Act, 2016 and Section 2(l) of the Act, 2016. Even if this argument is accepted for the sake of discussion, it does not help the petitioner, as he claims to fall in the category of employees association which has to be recognized by the State Government under Section 2(l) and does not claim to fall in any other category to which the Act 2016 applies. No recognition of the petitioner by the State Government has been produced by it before us.

19. A Trade Union registered under the Act, 1926 is not eligible for allotment under the Act, 2016 unless it satisfies the conditions of Section 2(l), Section 4 of the Act, 2016 read with Rule 5(viii) of the Rules, 2016. As already stated petitioner could have a grievance of discrimination if otherwise tenable in law but it is not possible to come to the conclusion that it has a right of allotment, re-allotment or renewal of allotment under the Act, 2016 as it stands without a challenge to its vires.

20. We appreciate the efforts made by Shri Ratnesh Chandra but in view of the admitted factual position before us and the express provision of law we find ourselves unable to accede his arguments nor accept the same. We do not find any reason to interfere with the impugned orders.

21. We accordingly **dismiss** the writ petition.

(2021)01ILR A1095
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Special Appeal No. 861 of 2019

Naunihal Haidar ...Appellant
Versus
Asst. Settlement of Consolidation Badaun & Ors. ...Respondents

Counsel for the Appellant:
Sri Hari Bhawan Pandey, Sri Hari Shankar Chaurasia

Counsel for the Respondents:
C.S.C.

Civil Law- Petitioner appointed as lekhpal on temporary basis-regularized on 20.03.1000 in persuance to and order of Hon'ble High Court-said W.P. dismissed for want of prosecution-Petitioner got dismissed-Petitioner filed recall order-rejected-Recall application treated as Review Application by single judge.

Special Appeal allowed. (E-7)

List of Cases cited:-

1. Asit Kumar Kar Vs St. of W.B. & ors.: (2009) 2 SCC 703

2.Vishnu Agarwal Vs St. of U.P. & anr.: (2011) 14 SCC 813

(Delivered by Hon'ble Samit Gopal, J.)

1. The present Special Appeal has been filed against the judgment and order dated 15.04.2019 passed in Writ A No. 16860 of 1991 (Naunihal Haider Vs. Assistant Settlement Officer, Consolidation, Badaun and others) whereby a learned Single Judge has rejected an application for recall of order dated 26.10.2017.

2. Heard Sri Hari Shankar Chaurasia, Advocate holding brief of Sri Hari Bhawan Pandey, learned counsel for the petitioner-appellant and Sri A.K. Goel, learned Additional Chief Standing Counsel and have perused the record.

3. The present case has a long and old background. The petitioner-appellant was initially appointed on the post of Lekhpal on temporary basis in the year 1987. His engagement was extended from time to time and ultimately the services of the petitioner-appellant were dispensed with in the year 1991.

4. Aggrieved by the order dated 01.03.1991 by which the services of the petitioner-appellant were dispensed with, he preferred a Writ A No. 16860 of 1991 before this Court with the following prayers:

"It is therefore most respectfully prayed that this Hon'ble Court may be pleased to issue

A. A writ of Certiorari quashing the impugned order dated 1.05.1991 (Annexure 4) passed by opposite party no.1.

B. a writ of Mandamus commanding the opposite parties not to give effect to and not to implement the impugned order and not to interfere in petitioner's functioning as Lekhpal, village Deptori, Tehsil Bisauli, District Budaun.

C. Any other suitable writ, direction or order which this Hon'ble Court may deem fit and proper be issued in favour of the petitioner.

D. Costs of the writ petition be awarded to the petitioner."

5. In the said writ petition an interim order was passed in favour of the petitioner-appellant on 03.06.1991. The services of the petitioner-appellant were regularized on 20.03.1999 with a condition that the same shall be subject to the final order passed in the said writ petition. The said writ petition was dismissed for non prosecution on 14.11.2008. Subsequent to the dismissal of the writ petition, the services of the petitioner were terminated on 15.01.2014. A Civil Misc. Restoration Application No. 652 of 2014 along with the

Delay Condonation Application No. 651 of 2014 was filed by the petitioner-appellant for the restoration of the writ petition which was allowed vide order dated 08.12.2016 passed by a learned Single Judge. Even, the delay condonation application was allowed. The writ petition was directed to be restored to its original number and was directed to be listed before the appropriate Court after two weeks.

6. The writ petition then remained pending for quite sometime and then was listed on 26.10.2017 wherein on the statement of learned counsel appearing for the petitioner-appellant that the same has rendered infructuous by efflux of time, and subsequent developments, the same was dismissed accordingly. The order dated 26.10.2017 is quoted herein-below:

"1. Sri R.P.S. Chauhan, learned counsel for petitioner, at the outset stated that by efflux of time and in view of the subsequent events, this matter has rendered infructuous.

2. Dismissed accordingly.

3. Interim order, if any, stands vacated. "

7. In the meantime, since the services of the petitioner-appellant were terminated on 15.01.2014 he preferred another writ petition before this Court numbered as Writ A No. 8181 of 2018 (Naunihal Haider Vs. State of Uttar Pradesh and 5 others) which was dismissed with an observation by a learned Single Judge that the remedy to the petitioner-appellant lay in moving appropriate application in his earlier petition and to seek appropriate protection therein. The order dated 29.03.2018 is quoted herein below:

"Petitioner was initially appointed on the post of Lekhpal on temporary basis in 1987. Such engagement was extended from time to time, and ultimately the services of petitioner were dispensed with in 1991. Petitioner aggrieved by such order approached this Court by filing Writ Petition No.16860 of 1991, in which an interim order came to be passed in favour of the petitioner on 3rd June, 1991. Petitioner continued to work and his services were also regularized on 20th March, 1999. The regularization order, however, clearly provided that petitioner's regularization would be subjected to the order to be passed in Writ Petition No.16860 of 1991. This petition was dismissed in default on 14.11.2008. Consequently, the services of petitioner were terminated on 15.1.2014. It is this order of 15.1.2014, which is under challenge in the present writ petition.

Contention is that after the petitioner came to know of dismissal of the writ petition in default, he moved an application for restoration, which was allowed on 8th December, 2016. The writ petition, thereafter, was dismissed on 26.10.2017, upon the statement of the counsel for the petitioner that by efflux of time the writ petition has been rendered infructuous. The order dated 26.10.2017 passed in Writ Petition No.16860 of 1991 reads as under:-

"1. Sri R.P.S. Chauhan, learned counsel for petitioner, at the outset stated that by efflux of time and in view of the subsequent events, this matter has rendered infructuous.

2. Dismissed accordingly.

3. Interim order, if any, stands vacated."

Petitioner thereafter has made certain representations for his reinstatement in service, and as no orders have been passed, he has approached this Court. Learned counsel for the petitioner submits that once petitioner's services have been regularized

and he was about to retire, the respondents would not be justified in terminating his services, in the manner stated. It is also stated that petitioner is entitled to retiral benefits, and in respect of such grievance a fresh cause has arisen.

Petition is opposed by the learned Standing Counsel.

Admittedly petitioner was engaged on temporary basis and his services were terminated in 1991. Petitioner's continuation thereafter was under an interim order. The order of regularization passed in favour of the petitioner also made it clear that the same shall be subject to the final outcome of the writ petition. Admittedly petition of 1991 was initially dismissed in default, and thereafter has been dismissed on 26.10.2017. Once that be so, the petitioner can have no grievance against the order of the respondents, inasmuch as his continuance was under the interim order, and there was no independent right created in favour of the petitioner to continue. The order of regularization is also specific in that regard. The writ petition apparently was dismissed on the statement of the counsel that petition had been rendered infructuous due to efflux of time and on account of subsequent events. No direction, therefore, can be issued to the respondents to reinstate the petitioner in service. Remedy of the petitioner lay in moving appropriate application in his earlier petition and to seek appropriate protection therein.

Subject to the observations made above, this writ petition is dismissed "

8. Consequent to the dismissal of the writ petition on 29.03.2018, the petitioner-appellant filed recall/restoration application which was numbered as Civil Misc. Recall/Restoration Application No. 5 of 2018 along with a Civil Misc. Delay condonation Application No. 4 of 2018. The prayer in the said recall/restoration application is quoted herein-below:

"It is therefore most respectfully prayed that this Hon'ble Court may be pleased to recall the order dated 26.10.2017 passed by this Hon'ble Court in the instant writ petition and to restore the same to its original number after hearing the case on merit so justice be done to the applicant."

9. The said recall/restoration application has been decided by the learned Single Judge vide order dated 15.04.2019 which is impugned herein by which the said application has been rejected.

10. The learned Single Judge has in the impugned judgment and order in para 3 stated that the petitioner-appellant has filed a recall/restoration application and has stated as follows:

"3. The reason given for filing of this recall/restoration application is that subsequently, petitioner filed another Writ Petition No. 8181 of 2018 which was dismissed on 29.03.2018."

11. Subsequently, in paragraph 5 of the impugned judgment and order, the learned Single Judge has stated that the review application has been filed by another counsel. Para 5 of the same is quoted herein-below:

"5. In the present writ petition, Review Application has been filed by another counsel without giving any cogent reason as to why review petitioner was not filed by same counsel."

12. The learned Single Judge then takes up two issues in the impugned

judgment and order, the first being that the review petition ought to have been filed by the same counsel and not by a new counsel and the second aspect of the matter that the grounds taken in the review petition amounts to almost rehearing of the matter and states that some of the arguments advanced are such as were not raised earlier. Paragraphs 6 and 7 of the impugned judgment and order referring to the first objection and the second aspect of the matter are quoted herein-below:

"6. First objection before review-applicants is that review petition ought to have been filed by same counsel and not by a new counsel. In T.N. Electricity Board Vs. N. Raju Reddiar AIR 1997 SC 1005, Apex Court has deprecated the practice of arguing matter by one counsel and review by another counsel and has observed that review application ought to have been filed by same counsel who has argued matter.

7. Now the second aspect is that the grounds taken in review petition amounts to almost rehearing of matter and some of arguments advanced are such as were not raised earlier. A review petition cannot be made as an opportunity to re-argue the matter."

13. The learned Single Judge has proceeded to give the reasoning why the review application is not maintainable. Certain case laws have been quoted which refer to the issue of review. In para 13, the learned Single Judge has stated that review is not an appeal in disguise. He proceeds to rely upon another judgment of the Apex Court as to when can power of review be exercised. Para 13 of the impugned judgment and order is quoted herein-below;

"13. Thus, Review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In Lily Thomas Vs. Union of India AIR 2000 SC 1650, the Court said that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in Inderchand Jain Vs. Motilal (2009) 4 SCC 665."

14. Then, lastly the said impugned judgment and order concludes in para 15 which is quoted herein-below:

"15. In view thereof, review application is rejected."

15. Learned counsel for the petitioner-appellant argued that the applicant for recall/restoration was filed giving adequate reasons which was treated as an application for review and the learned Single Judge rejected it. It is further argued that the learned Single Judge misread an application for recall/restoration and proceeded to decide it as review application. It is argued that the judgment and order is totally based on non-existent fact and deserves to be set aside.

16. Sri A.K. Goel, learned Additional Chief Standing Counsel though opposed the present special appeal but could not dispute the fact that the application as filed was an application for recall of the order dated 26.10.2017 and not a review application.

17. There is a marked difference between "recall" and "review." As is apparent from the application titled as Civil Misc. recall/restoration application the

same had been filed with a prayer to recall the order dated 26.10.2017 and to restore the writ petition to its original number. There is no prayer in the said application to review the order passed in the writ petition. Even the writ petition was dismissed on the ground that it has become infructuous by efflux of time and subsequent events but not on merits.

18. The Apex Court in the case **of Asit Kumar Kar Vs. State of West Bengal and others : (2009) 2 SCC 703** has held that there is a difference between recall and review and has held as under:

"6. There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party."

19. The said judgment of Asit Kumar Kar (supra) has been followed in the judgment of **Vishnu Agarwal Vs. State of Uttar Pradesh and another : (2011) 14 SCC 813**.

20. The learned Single Judge completely fell in error while deciding the application for recall/restoration application by treating it as an application for review. Prayer made in the said recall/restoration application is as has been quoted above just plain and simple for recalling of the order by which the petition was dismissed as infructuous and further the prayer that the writ petition be restored to its original number. There is no prayer whatsoever in the said application that the order be reviewed. Even further, the order sought to be recalled is not a judgment as the merits of the matter have not been touched at all. The petition was dismissed without going into the merits of the matter and without deciding the issues as raised therein. The application for recall and restoration is of an order which did not decide any issue raised between the parties in the writ petition.

21. If a party whose counsel under some misconception made a prayer for dismissing the writ petition as infructuous by efflux of time and by some subsequent events does not mean that the petition has been decided on merits. As a matter of fact, a rectification of the said order was prayed by means of the application for recall/restoration. Rectification of an order stems from the fundamental principle that justice is above all. The writ petition of the petitioner continued to be pending before this Court from the year 1991 to 26.10.2017 for a good period of 26 years with an order in favour of the petitioner on the strength of which he continued to remain in service till 15.01.2014 on which date his services were terminated as the said writ petition was dismissed for non prosecution on 14.11.2008. Even thereafter, the recall application filed by the petitioner-appellant along with the delay condonation application were allowed vide order dated 08.12.2016 and the writ petition was directed to be restored to its original number.

22. Thus, looking to the facts and circumstances of the matter, the learned Single Judge totally fell in error in treating the application for recall/restoration as an application for review and thereby dismissing the same as such.

23. The present special appeal is thus **allowed**.

24. The impugned judgment and order dated 15.04.2019 is set aside. The review/recall Application No. 5 of 2018 dated 14.07.2018 along with the Delay Condonation Application No. 4 of 2018 are allowed. The writ petition is restored to its original number.

25. The office shall forthwith list the **Writ A No. 16860 of 1991 (Naunihal Hairder Vs. Assistant Settlement Officer, Consolidation, Budaun and others**) before the appropriate Bench for its hearing and disposal which is expected to be done as expeditiously as possible.

26. No order as to cost.

(2021)01ILR A1101
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 1106 of 2021

Shriprakash Upadhya ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
B.R. Singh

Counsel for the Respondents:
C.S.C., Shubhra Kumar

Civil Law-Prior to retirement-charesheet was been served-till retirement enquiry could not be concluded-recovery order passed after 9 months of retirement-no specific provision -recovery order illegal.

W.P. allowed. (E-7)

List of Cases cited: -

1. Bhagirathi Jena Vs Board of Directors, O.S.F.C. & ors., (1999) 3 SCC 666

2.Chandra Prakash Verma Vs Chairman, U.P. Govt. Employees Welfare Corpn. & anr., [2018 (36) LCD 82],

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri B.R. Singh, learned counsel for the petitioner. Notice for opposite party no.1 has been accepted by the office of learned CSC.

2. Sri Anurag Vikram has filed Vakalatnama on behalf of opposite party no.2, the same is taken on record.

3. By means of this petition, the petitioner has assailed the punishment order dated 11.9.2020 (Annexure No.1), orders dated 13.10.2020 and 23.12.2020 (Annexures No.2 & 3). By means of order dated 23.12.2020, recovery to the tune of Rs.50,12,631.59 has been directed. The petitioner has also assailed the order dated 8.7.2020 whereby opposite party no.2 has denied payment of due salary of the petitioner from January, 2014 to December, 2019.

4. The precise submission of learned counsel for the petitioner is that the petitioner retired from service on 31.12.2019 after attaining the age of superannuation. Prior to his retirement, charge sheet dated 26.10.2019 has been served upon the petitioner. Till retirement of the petitioner, enquiry could not be concluded. However, after nine months from the retirement, the impugned order dated 11.9.2020 has been issued whereby

recovery for an amount of Rs.36,31,735.25 has been directed by opposite party no.2 from the retiral dues of the petitioner. Subsequent impugned orders dated 13.10.2020 and 23.12.2020 have been issued for making recovery to the tune of Rs.50,12,631.59.

5. Learned counsel for the petitioner has drawn attention of this Court towards the decision of the Hon'ble Apex Court in re; **Bhagirathi Jena v. Board of Directors, O.S.F.C. and others, (1999) 3 SCC 666**, referring paras 6 & 7, which are as under:-

"6. It will be noticed from the abovesaid regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of the departmental enquiry after superannuation.

7. In view of the absence of such provision in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

6. The Hon'ble Apex Court has held that if there are no provision, rules or regulation authorizing the competent authority to make deduction of any amount or to punish employee after retirement on any of the misconduct, no such order can be passed after the retirement of the employee. Sri B.R. Singh has submitted that in the present case, admittedly, the impugned orders have been issued after retirement of the petitioner as the petitioner retired from service on 31.12.2019 whereas the punishment orders/ recovery orders have been passed on 11.9.2020, 13.10.2020 and 23.12.2020. Therefore, in view of the dictum of the Hon'ble Apex Court in re; **Bhagirathi Jena** (supra), those impugned orders are not sustainable in the eyes of law.

7. He has also drawn attention of this Court towards the decision of this Court in re; **Chandra Prakash Verma Vs. Chairman, U.P. Govt. Employees Welfare Corpn. and another, [2018 (36) LCD 82]**, whereby the Division Bench, while dealing the identical issue, has referred the dictum of Hon'ble Apex Court in re; **Bhagirathi Jena** (supra) and allowed the writ petition after quashing the charge sheet.

8. Therefore, Sri B.R. Singh has submitted that he is raising the legal ground at the admission stage by submitting that when there are no rules with the opposite parties to punish the employee after his/ her retirement, the impugned orders passed against the petitioner after his retirement are illegal and non-est in the eyes of law, therefore, the writ petition may be decided at the admission stage.

9. Learned counsel for opposite party no.2 has, however, submitted that serious anomalies have been noticed by the opposite party against the petitioner,

therefore, charge sheet has been issued prior to two months from the retirement of the petitioner but such enquiry could not be concluded till retirement of the petitioner. He has further submitted that so far as the relevant rules/ regulation authorizing the opposite party to continue the departmental enquiry after retirement of the petitioner, he has fairly submitted that by now, there are no such provision.

10. Considering the aforesaid submission of learned counsel for the respective parties, I am also of the considered opinion that if there is no specific provision for passing the impugned orders after retirement of an employee and no rules or regulation have yet been adopted by the Corporation for passing orders against its employee after his retirement, the impugned orders dated 11.9.2020, 13.10.2020, 23.12.2020 & 8.7.2020 (Annexures No.1, 2, 3 & 4) are nullity in the eyes of law as the same have been issued without jurisdiction. The law is trite that unless and until the authority concerned has got any colour of authority to pass any punitive order/ punishment order, no order can be passed and if such order is passed, the same shall not sustain in the eyes of law. Therefore, the present case is not being tested on further merits but on the aforesaid legal point, the present writ petition is liable to be allowed.

11. Accordingly, the impugned orders dated 11.9.2020, 13.10.2020, 23.12.2020 and 8.7.2020 (Annexure No.1 to 4) are hereby quashed being illegal, arbitrary and without jurisdiction. A writ in the nature of mandamus is issued commanding the opposite parties to make payment of all admissible retiral dues of the petitioner including arrears of salary.

12. Since learned counsel for opposite party no.2 has informed the Court that opposite party no.2 is in serious financial crunch, therefore, it may be directed that the aforesaid dues be paid in six equal quarterly installments.

13. Therefore, bonafide submission of learned counsel for opposite party no.2 is worth considerable. Therefore, the opposite parties are directed to make payment of aforesaid dues to the petitioner in six equal quarterly installments. Payment of first installment shall be given to the petitioner within a month.

14. The writ petition is accordingly **allowed**.

(2021)01ILR A1103
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 1213 of 2021

Nandan Singh Rawat ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Satendra Nath Rai

Counsel for the Respondents:
C.S.C., Shubhra Kumar

Civil Law-Till retirement no departmental enquiry initiated-after 11 months of retirement-recovery order issued-no specific provision for passing recovery notice after retirement-impugned recovery order illegal.

W.P. allowed. (E-7)

List of Cases cited: -

1. Bhagirathi Jena Vs Board of Directors, O.S.F.C. & ors., (1999) 3 SCC 666

2.Chandra Prakash Verma Vs Chairman, U.P. Govt. Employees Welfare Corpn. & anr., [2018 (36) LCD 82

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Satendra Nath Rai, learned counsel for the petitioner. Notice for opposite party no.1 has been accepted by the office of learned CSC. Sri Anurag Vikram has put in appearance for opposite party no.2, 3 & 4.

2. By means of this petition, the petitioner has assailed the impugned order/ recovery notice dated 8.10.2020 (Annexure No.1), impugned order/ recovery notice/ office letter dated 8.12.2020 (Annexure No.4) and notice dated 21.12.2020 (Annexure No.5). The petitioner has also prayed that the opposite parties may be directed to release his post retiral dues and to make payment of arrears of salary for 16 months i.e. March, 2018 and July to December, 2018 as well as January, 2019 to September, 2019.

3. The precise submission of learned counsel for the petitioner is that the petitioner retired from service on 30.11.2019 after attaining the age of superannuation. Till retirement of the petitioner, no departmental enquiry was initiated. However, after eleven months from the retirement of the petitioner, recovery order dated 8.10.2020 has been issued by opposite party no.4. Subsequent impugned orders dated 8.12.2020 and notice dated 21.12.2020 have been issued for making recovery of Rs.83,12,398.49.

4. Learned counsel for the petitioner has drawn attention of this Court towards the decision of the Hon'ble Apex Court in re; **Bhagirathi Jena v. Board of Directors, O.S.F.C. and others, (1999) 3 SCC 666**, referring paras 6 & 7, which are as under:-

"6. It will be noticed from the abovesaid regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of the departmental enquiry after superannuation.

7. In view of the absence of such provision in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

5. The Hon'ble Apex Court has held that if there are no provision, rules or regulation authorizing the competent authority to make deduction of any amount or to punish employee after retirement on any of the misconduct, no such order can be passed after the retirement of the employee. Sri Satendra Nath Rai has submitted that in the present case, admittedly, the impugned orders have been issued after retirement of the petitioner as the petitioner retired from service on 30.11.2019 whereas the impugned orders/ recovery notices have been issued on

8.10.2020, 8.12.2020 and 21.12.2020. Therefore, in view of the dictum of the Hon'ble Apex Court in re; Bhagirathi Jena (supra), those impugned orders are not sustainable in the eyes of law.

6. He has also drawn attention of this Court towards the decision of this Court in re; **Chandra Prakash Verma Vs. Chairman, U.P. Govt. Employees Welfare Corpn. and another, [2018 (36) LCD 82],** whereby the Division Bench, while dealing the identical issue, has referred the dictum of Hon'ble Apex Court in re; Bhagirathi Jena (supra) and allowed the writ petition after quashing the charge sheet.

7. Therefore, Sri Satendra Nath Rai has submitted that he is raising the legal ground at the admission stage by submitting that when there are no rules with the opposite parties to punish the employee after his/ her retirement, the impugned orders passed against the petitioner after his retirement are illegal and non-est in the eyes of law, therefore, the writ petition may be decided at the admission stage.

8. Learned counsel for opposite parties no.2 to 4 has, however, submitted that serious anomalies have been noticed by the opposite parties against the petitioner. So far as the relevant rules/ regulation authorizing the opposite parties to continue the departmental enquiry after retirement of the petitioner is concerned, learned counsel has fairly submitted that by now, there are no such provision.

9. Considering the aforesaid submission of learned counsel for the respective parties, I am also of the considered opinion that if there is no specific provision for passing the impugned orders/ recovery notices after retirement of an employee and no rules or regulation have yet been adopted by the Corporation for passing orders against its employee after his retirement, the impugned orders/ recovery notices dated 8.10.2020, 8.12.2020 and 21.12.2020 are nullity in the eyes of law as the same have been issued without jurisdiction. The law is trite that unless and until the authority concerned has got any colour of authority to pass any punitive order/ punishment order, no order can be passed and if such order is passed, the same shall not sustain in the eyes of law. Therefore, the present case is not being tested on further merits but on the aforesaid legal point, the present writ petition is liable to be allowed.

10. Accordingly, the impugned orders/ recovery notices dated 8.10.2020, 8.12.2020 and 21.12.2020 (Annexures No.1, 4 & 5) are hereby quashed being illegal, arbitrary and without jurisdiction. A writ in the nature of mandamus is issued commanding the opposite parties to make payment of all admissible retiral dues of the petitioner including arrears of salary.

11. Since learned counsel for opposite parties no.2 to 4 has informed the Court that the Corporation is in serious financial crunch, therefore, it may be directed that the aforesaid dues be paid in six equal quarterly installments.

12. Bonafide submission of learned counsel for opposite parties no.2 to 4 is worth considerable, therefore, the opposite parties are directed to make payment of aforesaid dues to the petitioner in six equal quarterly installments. Payment of first installment shall be given to the petitioner within a month.

13. The writ petition is accordingly **allowed.**

(2021)01ILR A1106
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2020

BEFORE

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

Writ-A No. 10928 of 2020

Smt. Manjul Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ghan Shyam Maurya

Counsel for the Respondents:
C.S.C., Sri Arun Kumar

Civil Law-Compassionate Appointment-Claim for appointment rejected on ground that married daughter not included in family u/s 2 (c) (iii) of The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974-definition of daughter to be read unqualified by the marital status of the daughter-impugned order is illegal.

W.P. allowed. (E-7)

List of Cases cited: -

1. Smt. Vimla Srivastava Vs St. of U.P. & anr., 2016 (1) ADJ 21

2.Smt. Neha Srivastava Vs St. of U.P. & anr., Spl. Appl. (Defective) No. 863 of 2015, decided on 23.12.2015

3. Saghir Ahmad Vs St. of U.P. & ors., AIR 1954 SC 728

4. Deep Chand & ors. Vs St. of U.P. & ors., AIR 1959 SC 648

5. Mahendra Lal Jaini Vs St. of U.P. & ors., AIR 1963 SC 1019

6. The St. of Guj. & anr. Vs Shri Ambica Mills Ltd., Ahmedabad & anr., (1974) 4 SCC 656

7. Sh. P.L. Mehra Vs Sh. D.R. Khanna, AIR 1970 Del 1

8. A.K. Gopalan Vs St. of Mad., AIR 1950 SC 27

9. D.S. Nakara & ors. Vs U.O.I., AIR 1983 SC 130

10. State of Bombay & anr. Vs F.N. Balsara, AIR 1951 SC 318

11.Minerva Mills Ltd. & ors. Vs U.O.I.& ors., (1980) 3 SCC 625

12. Kihoto Hollohan Vs Zachillhu & ors., (1992) Supp (2) SCC 651

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

1. The petitioner, Manjul Srivastava has impugned an order of June the 25th, 2020, passed by the District Basic Education Officer, Prayagraj, rejecting her claim for compassionate appointment under The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (for short, "the Rules).

2. A counter affidavit has been filed on behalf of respondent nos. 2 and 3, which is taken on record.

3. Mr. Sharad Chandra Upadhyay, learned State Law Officer, was granted time to file a short counter affidavit. He has not come up with any return.

4. Admit.

5. Heard forthwith.

6. Heard Mr. Ghan Shyam Maurya, learned Counsel for the petitioner, Mr. Arun Kumar, learned Counsel appearing on behalf of respondent nos.2 and 3 and Mr. Sharad Chandra Upadhyay, learned State Law Officer appearing on behalf of respondent no.1.

7. The question, that arises for consideration here, is: "*Whether the judgment of this Court in* ***Smt. Vimla Srivastava vs. State of U.P. and another1****, striking down the word "unmarried' in Rule 2(c) (iii) of the Rules, entitles a married daughter to a consideration of her claim for compassionate appointment without an amendment to the Rules made by the State Government, expressly including "married daughter' in the expression "family', defined under Rule 2(c)?*

8. The petitioner's mother, the late Pushpa Srivastava was inducted as an Assistant Teacher in the services of the Basic Education Board and appointed at the Primary School, Chaka, District Prayagraj. She was serving as the Headmistress of the School, last mentioned, when she passed away on 09.11.2016. She was a permanent employee and the sole bread winner of the family, comprising her husband, Vijay Kumar Srivastava, aged about 63 years and three married daughters: Parul Srivastava, Manjul Srivastava and Manshi Srivastava, aged about 32 years, 30 years and 28 years, in that order. The petitioner's mother died in harness, it is claimed on account of a heart attack.

9. It is the petitioner's case that their family have become financially crippled. They were totally dependent on the deceased teacher because the petitioner's father and the deceased's husband is an unemployed man. In consequence, the family have plunged into a sudden economic crisis. The petitioner is also unemployed. She, therefore, applied for compassionate appointment on the post of an Assistant Teacher in the Primary School, where her mother served. The petitioner asserts that she holds the necessary educational and other qualifications to be appointed as an Assistant Teacher. The petitioner holds degrees of Bachelor of Arts and Bachelor of Education. She has also passed the Uttar Pradesh Teacher Eligibility Test, 2018 for the Primary Level. The petitioner has placed on record photostat copies of her certificates and degrees, which the Court has perused.

10. It is the petitioner's further case that she submitted an application for consideration of her candidature under the Rules on 17.07.2019 in the office of the District Basic Education Officer, Prayagraj. The application is accompanied by all requisite documents. It is duly certified by the Headmistress, Primary School, Chaka, Prayagraj. The petitioner's claim for compassionate appointment has come to be rejected by an order dated 25.06.2020 passed by the District Basic Education Officer, Prayagraj on the sole ground that a married daughter of a deceased Government servant is not included in the definition of the family of the deceased under the Rules, as amended by the 9th Amendment Rules, 2011, carried in the Government Order no.6/12/73/ कार्मिक-2/ 2011-TC, Lucknow, dated 22.12.2011, issued by the Government of U.P. in the Department of Personnel, Anubhag-2.

11. Aggrieved, this writ petition has been instituted.

12. Mr. Ghan Shyam Maurya, learned Counsel for the petitioner submits that the

impugned order passed by the District Basic Education Officer is manifestly illegal as it denies the petitioner's claim in violation of this Court's judgment in **Smt. Vimla Srivastava (supra)**. He has drawn the attention of this Court to the holding and the declaration in **Smt. Vimla Srivastava** by a Division Bench of this Court, where it was held that exclusion of married daughters from the definition of "family' carried in Rule 2(c) of the Rules was unconstitutional and violative of Articles 14 and 15 of the Constitution. By the judgment in **Smt. Vimla Srivastava**, the word "unmarried' occurring in Rule 2(c) (iii) of the Rules, was struck down by this Court. Mr. Maurya, learned Counsel says that once the word "unmarried' occurring in Rule 2(c) (iii) of the Rules has been struck down as unconstitutional, it no longer survives on the Statute Book. According to him, the Rules, as they stand, do not require any further amendment to consider a married daughter's right to compassionate appointment. He urges, therefore, that the impugned order founded on the definition of family, occurring in Rule 2(c) (iii) of the Rules, ignoring the judgment of this Court in **Smt. Vimla Srivastava**, which has struck down the word "unmarried' qualifying the word "daughter' is illegal, inasmuch as a provision of a statute, statutory rule or even a Government Order, that is struck down, cannot be treated as a subsisting provision to decide rights of citizens or parties by Authorities of the State.

13. Mr. Sharad Chandra Upadhyay, learned State Law Officer, on the other hand, has taken a stand, in which he is wholeheartedly joined by Mr. Arun Kumar, learned Counsel appearing for the Secretary, Basic Education Board, U.P., Prayagraj and the District Basic Education Officer, Prayagraj, that the impugned order proceeds on valid ground and ought not to be disturbed. Mr. Upadhyay and Mr. Arun Kumar submit that notwithstanding the declaration made by this Court that Section 2(c) (iii) is unconstitutional and void to the extent that it carries the word "unmarried', qualifying the word "daughter', an unmarried daughter cannot be considered for compassionate appointment, unless the State appropriately amends the provisions of Rule 2(c) in accordance with the judgment of this Court.

14. What in substance Mr. Upadhyay and Mr. Arun Kumar submit is that a decision of this Court, striking down a particular provision as unconstitutional, would not ipso facto operate unless suitably given effect to by amending the relevant statutory provision. They do not dispute the fact that the State is under an obligation to amend the Rules to bring it in accord with this Court's judgment in **Smt. Vimla Srivastava (supra),** but say that so long as an appropriate amendment is not made, no rights can be founded by the petitioner on the Rules, as if the Rules stand amended by this Court's judgment.

15. This Court has keenly considered the matter. The decision of their Lordships of the Division Bench in **Smt. Vimla Srivastava (supra)** held the provisions of Rule 2(c) (iii) of the Rules to be unconstitutional and struck it down in the following terms:

"In conclusion, we hold that the exclusion of married daughters from the ambit of the expression "family" in Rule 2

(c) of the Dyingin-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution.

We, accordingly, strike down the word 'unmarried' in Rule 2 (c) (iii) of the Dying-in-Harness Rules."

16. The order in that decision, that was made inter partes reads thus:

"In consequence, we direct that the claim of the petitioners for compassionate appointment shall be reconsidered. We clarify that the competent authority would be at liberty to consider the claim for compassionate appointment on the basis of all the relevant facts and circumstances and the petitioners shall not be excluded from consideration only on the ground of their marital status."

17. The decision of the Division Bench in **Smt. Vimla Srivastava** was followed by another Division Bench of this Court in **Smt. Neha Srivastava v. State of U.P. & Another**2.

18. The Rules are framed under the proviso to Article 309 of the Constitution and confer on the family members of a Government servant, who has died in harness, a right to be considered for compassionate appointment. There is no cavil about the issue that the Rules, including Rule 2(c) (iii) is law within the meaning of Article 13(2) of the Constitution. The judgment of this Court in **Smt. Vimla Srivastava (supra),** makes an unqualified declaration "that the 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" to borrow the words of their Lordships of the Division Bench. This declaration has not been disturbed by the Supreme Court in Petition(s) for Special Leave to Appeal (C) No(s). 22646/2016 (carried from the decision in **Smt. Neha Srivastava (supra)**), where Leave to Appeal has been denied vide order dated 23.07.2019. The declaration is wholesome and unqualified, followed by a formal order striking down the word "unmarried' occurring in Rule 2(c) (iii) of the Rules. The principle is well settled that once a statute, particularly, a post Constitution Statute, governed by Clause (2) of Article 13, is declared unconstitutional for the violation of a fundamental right, it is rendered void. It is for all purposes rendered completely ineffectual, even if it lingers on, on the Statute Book as a dead letter. This issue has been the subject matter of pronouncement by high authority in the Constitution Bench decisions of the Supreme Court in **Saghir Ahmad v. State of U.P. & Others3, Deep Chand & Others v. State of U.P. & Others4, Mahendra Lal Jaini v. State of U.P. & Others5 and The State of Gujarat & Another v. Shri Ambica Mills Ltd., Ahmedabad & Another**6. It has also engaged attention of the Full Bench of Delhi High Court in **Sh. P.L. Mehra v. Sh. D.R. Khanna**7. The broad principle deducible is that a post Constitution statute declared void for contravening a Part III right is rendered completely unenforceable. These subtle aspects, if any, about the difference in the statute (a post Constitution law) being declared void on account of violation of a fundamental right on one hand and legislative competence on the other, need not trouble this Court, for they do not arise on the facts here.

19. If Mr. Upadhyay's submissions were to be regarded as one's advanced to bring home the distinction between the

effect of a statute declared void for the violation of a fundamental right on one hand and legislative competence on the other, this Court has found it not to arise on facts because the petitioner here is also a citizen of India, whose fundamental right against discrimination on the ground of sex alone is equally infringed as that of the petitioners in **Smt. Vimla Srivastava and Neha Srivastava**. To all intents and purposes, Rule 2(c) (iii) of the Rules has been declared void in Smt. Vimla Srivastava and followed in **Neha Srivastava**. That declaration operates in rem. Thus, in the definition of "family' occurring under Section 2(c) (iii), the word "daughter' is to be read without the pre-fixed qualification "unmarried'. The effect of the declaration, therefore, is that the Rule is to be read as one including "daughter' in Rule 2(c) (iii), whether married or unmarried.

20. The submission of Mr. Upadhyay, if it were to deserve any serious consideration, would amount to accepting an almost insurmountable inhibition on the jurisdiction of this Court to declare an unconstitutional statute or statutory provision void for contravening a Part III right. A judgment of the Court declaring a statute void for the contravention of a fundamental right works to grant a declaration proprio vigore, rendering the provision invalidated; effaced for all intents and purposes. It does not certainly require a legislative compliance to give it effect. There could be some sense to that submission if after ignoring the word "unmarried' occurring in Rule 2 (c) (iii) of the Rules, the provision had become workable. But, that it has not become. The word "unmarried' has been struck down, applying the reputed doctrine of severability, that has always had approval of their Lordships of the Supreme Court. That doctrine has been accepted in **A.K. Gopalan vs. State of Madras8, D.S. Nakara and others vs. Union of India9, State of Bombay and another vs. F.N. Balsara10, and, in later years, in Minerva Mills Ltd. and others vs. Union of India and others11 and Kihoto Hollohan vs. Zachillhu and others12.**

21. The severance of the offending part has made the remainder of Section 2(c) (iii) intra vires, purging it of the vice of discrimination on the ground of sex alone. What has remained back is a workable provision and is to be understood in the manner that a daughter, irrespective of her marital status, is to be regarded as a member of the deceased government servant's family, in the same manner as a son, whether married or unmarried. This Court, therefore, holds that in the definition of the deceased's family, the word "daughter' has to be read unqualified by the marital status of the daughter and it requires no further amendment to the Rules by the Government to make the right of a daughter of the deceased government servant effective under the Rules. The impugned order, therefore, passed on the basis of a reading of Rule 2(c) (iii) of the Rules with the word "daughter' qualified by the word "unmarried' since struck down by this Court in **Smt. Vimla Srivastava (and followed in Neha Srivastava),** is manifestly illegal. It is so as it proceeds on the basis of a statutory provision, that has been declared unconstitutional and void by this Court.

22. In the result, the writ petition succeeds and is **allowed.**

23. The impugned order dated 25.06.2020 passed by the District Basic

Education Officer, Prayagraj, rejecting the petitioner's claim for compassionate appointment, is hereby **quashed**. A mandamus is issued to the District Basic Education Officer, Prayagraj 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 **two months** from the date of communication of a copy of this order.

24. There shall, however, be no order as to costs.

25. Let this order be communicated to the District Basic Education Officer, Prayagraj by the Joint Registrar (Compliance).

(2021)01ILR A1111
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2020

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Writ-A No. 13368 of 2009

Kashi Prasad Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kr. Srivastava, Sri Shiv Kumar Pal, Sri Sushil Kumar Pal

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

Civil Law-Petitioner retired-Only 90 % gratuity/GPF paid and 10 % to be paid after final settlement -after 5 years the impugned recovery order passed-after retirement Respondent cannot proeed for recovery.

W.P. allowed. (E-7)

List of Cases cited: -

1. St. of Pun. & ors. Vs Rafiq Masih (White Washer) (2015) 4 SCC 334

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. By means of this writ petition, the petitioner has, inter-alia, prayed for following reliefs:

"(i) issue a writ order or direction in the nature of certiorari quashing the recovery notice dated 26.8.2004 and 11.2.2009 (contained as Annexure Nos.1 and 3 to the writ petition) asking the petitioner to pay Rs.2,13,838/- as an excess payment of GPF to the petitioner;

(ii) issue a writ order or direction in the nature of mandamus commanding the respondents to not to initiate any coercive measure against the petitioner till the representation dated 11.09.2004 is decided and considered by speaking and reasoned order passed by the respondent no.4;

(iii) issue a writ order or direction in the nature of mandamus directing the respondent no.4 to release the 10% balance amount of GPF to the petitioner forthwith."

2. The brief facts of the case are that petitioner is a retired employee of the respondents and he retired on 30.04.2004 on the post of Sub-Inspector of Motor Transport while he was working under the control of Superintendent of Police, Fatehpur. Petitioner was provided GPF Account No.PU 72897. The GPF contribution of the petitioner has regularly been deducted by the respondents since 1964. After his retirement, the petitioner has been paid GPF amount to the tune of Rs.4,00,000/-. The said payment was made only up to 90% gratuity/GPF and 10% was to be paid after final settlement. Since the petitioner retired on 30.04.2004, and as

such, the petitioner has moved a representation on 03.07.2004 to the respondent authorities to release his 10% of balance GPF amount. In pursuance of the said representation, the respondents vide order dated 26.08.2004 informed the petitioner that he has been paid excess amount of GPF to the tune of Rs.2,13,838/-. In pursuance of the said order dated 26.08.2004, the petitioner has submitted a detailed reply dated 11.09.2004 by registered post as well as by hand before the respondent no.4 requesting therein to calculate the GPF amount as per details mentioned in the said representation. The said representation has not been decided by the respondent no.4 and the same is still pending consideration. On 04.10.2004, the respondents have informed the petitioner that Rs.3606/- has been paid to him by Superintendent of Police, Pratapgarh. In reply to the said notice dated 04.10.2004, the petitioner has submitted a reply dated 03.11.2004 mentioning all the facts. After sleeping over the matte for almost 5 years, the respondent no.4 has illegally issued the impugned demand notice dated 11.02.2009 asking the petitioner to deposit Rs.2,13,838/- in pursuance of the order dated 26.08.2004, hence, this writ petition.

3. Learned counsel for the petitioner has submitted that petitioner has superannuated on 30.04.2004 on the post of Sub Inspector. After his retirement, firstly a demand notice dated 26.08.2004 has been issued and, thereafter, the impugned notice dated 11.02.2009 has been issued to the petitioner informing him to deposit Rs.2,13,838/- as excess amount. Grievance of the petitioner is that without considering petitioner's reply, an order has been passed directing recovery to be made from the petitioner. Learned counsel for the petitioner has further submitted that there is no allegation of misrepresentation or fraud practiced by the petitioner in the matter. For the excess payment on the default of the department, the same cannot be recovered from the petitioner, hence, the impugned demand notice is illegal, arbitrary, malafide and unreasonable on the part of the respondents and, therefore, the same is liable to be quashed. Submission is that after petitioner superannuated, no recovery could have been effected in view of the law laid down by Hon'ble Supreme Court in ***State of Punjab and others vs. Rafiq Masih (White Washer) 2015 4 SCC 334.***

4. Learned Standing Counsel tried to support the impugned order by drawing attention to various Government orders, however could not dispute the current legal position as laid down by Hon'ble Apex Court in the case ***Rafiq Masih (supra).*** He could not point out that there was any misrepresentation or fraud on the part of the petitioner.

5. Heard learned counsel for the petitioner, learned Standing Counsel for the State and perused the material available on record.

6. In any event, the law is well settled by the latest judgment of the Apex Court in ***State of Punjab and others vs. Rafiq Masih (White Washer) 2015 4 SCC 334***, making it clear that recovery from the retired employees or the employee who are due to retire within one year of the order of recovery, would be impermissible in law. In this context, it is relevant to extract paragraph 18 of the said judgment, which is given as under:-

"18. It is not possible to postulate all situations of hardship which would govern

employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference summarize the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

7. The Hon'ble Supreme Court of India had consistently taken a view that in respect of the retired employees as well as Group-3 and 4 employees, excess payment already paid cannot be recovered considering the financial constraint of these employees as well as the retired employees.

8. Admittedly, there does not appear to be any case of misrepresentation or fraud on part of the petitioner in the matter. This is an also admitted fact that the petitioner was allotted GPF Account No.PU 72897 and the GPF contribution of the petitioner has regularly been deducted by the respondents since 1964. After his retirement, the petitioner has been paid GPF amount to the tune of Rs.4,00,000/-. The said payment was made only up to 90% gratuity/GPF and 10% was to be paid after final settlement.

9. In paragraph 5 of the counter affidavit filed on behalf of respondent no.3, it is stated that petitioner's GPF account number is PU 72879 but in the district Fatehpur, there is no record available showing the GPF contribution from 1964 to 1978-79. It is further mentioned that from 1978-79, the entry with regard to GPF contribution has been made in GPF passbook of the petitioner.

10. It is categorically observed by the Hon'ble Apex Court in the judgment that recovery from the retired employees is impermissible. As such in the present case in hand where the petitioner is a retired employee of respondents, recovery of the amount so sought by the respondent cannot be allowed.

11. Under these circumstances, this Court is of the considered opinion that any order, affecting the service rights or conditions of an employee, cannot be issued without providing an opportunity to the employee concerned. This apart, the petitioner is a pensioner and retired from service on 30.04.2004. The petitioner is now aged about 76 years. Under these circumstances, any further recovery from the pension of the petitioner would affect his normal livelihood.

12. In the light of judgment of Hon'ble Apex Court in the case of ***Rafiq***

Masih (supra), if the case of the petitioner is considered, as mentioned above, since he retired from service, the respondents cannot proceed against the petitioner with the impugned order of recovery, therefore, the impugned recovery notice dated 26.08.2004 and 11.02.2009 (Annexure Nos.1 and 3 to the writ petition) issued by Officer of Accountant General Mahalekhakar (Lekha Evam Hakdari,) 1st U.P., Allahabad through Senior Accountant Nidhi-14, is not sustainable in the eye of law and the same is hereby quashed and remaining 10% balance amount of GPF be paid to the petitioner within a period of two months.

13. In view of vivid observations, this petition stands allowed.

14. However, on the facts and in the circumstances of the case, there will be no order as to costs.

(2021)01ILR A1114
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Writ-A No. 19141 of 2019
Connected with Writ-A Nos. 21089 of 2019, 21101 of 2019, 19140 of 2019, 19150 of 2019 and 145 of 2020

Home Guard Resident No. 6901020120 Hriday Narayan Yadav ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shailesh Verma

Counsel for the Respondents:
C.S.C.

Civil Law-Service of Petitioner dispensed on account of pendency of the criminal case against him-verification of antecedents is to find out whether he is suitable for the post of a Home Guard-pendency of criminal case-not suitable for appointment of post of Home Gurad.

List of Cases cited: -

1. Arun Kumar Shukla Vs St. of UP & ors., 2018 2 ADJ 353

2.Riyasat Ali Vs St. of U.P. & ors. reported in 2003(4) AWC Page 3046

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Since in all these writ petitions, similar reliefs have been prayed, hence they are being decided by a common order.

2. The facts of WRIT - A No. - 19141 of 2019 (Hriday Narayan Yadav Vs. State Of U.P. And 02 Others) is taken as leading case to decide the controversy.

3. The petitioner has instituted this writ petition for issuance of writ of certiorari for quashing the order dated 18.11.2019, whereby his engagement has been dispensed with by respondent no. 3, District Commandant of Home Guards, Sonebhadra as well as the Government Order dated 21.08.2012 passed by respondent no. 2.

4. The brief facts of the case are that petitioner is alleged to be appointed as Home Guard under the provisions of UP Home Guards Act, 1963. He was served a show cause notice regarding his involvement in criminal case, wherein after investigation the Investigating Officer has submitted charge sheet. The petitioner was called upon to submit his reply within 15 days. The petitioner has submitted his reply

wherein he has not denied the pendency of any criminal case against him and has stated that he has been falsely implicated. After considering the reply submitted by the petitioner, the impugned order has been passed dispensing the services of the petitioner on the ground of the pendency of the criminal case against him.

5. It is contended by learned counsel for the petitioners that service of the petitioner could not be terminated due to mere filing of a charge sheet as that by itself is not enough to remove or disengage an employee unless the underlying conduct that has led to registration of a criminal case is considered. It is also contended that the services of petitioner could not have been dispensed with by the impugned order in the manner it has been done without holding any enquiry into the allegations against him. It is further submitted that private dispute giving rise to criminal case cannot be made subject matter of departmental proceedings as it would not amount to misconduct. He contends that a full fledged enquiry was required in the matter.

6. He has placed reliance on the case of **Arun Kumar Shukla Vs State of UP and others, 2018 2 ADJ 353**, to contend that a Government employee cannot be dismissed, removed or reduced in rank merely on the ground that he has been convicted by a court of law.

7. A counter affidavit has been filed on behalf of the respondents. It is stated therein that under the Circular issued by the respondent no. 2 i.e. Headquarters of Home Guards, Uttar Pradesh, Lucknow dated 02.09.2013, which is Annexure No. 4 to the counter affidavit, in which conditions have been mentioned as to on which grounds the action can be taken against the conduct of the Home Guards. One of the grounds mentioned for dispensing the services is the pendency of the criminal case, wherein the involvement of the petitioner is prima-facie clear. It has further been stated that as criminal case is pending against the petitioner, the impugned order of termination has been passed under the provisions of Section 12(1) of the Home Guards Act, 1963.

8. Learned Standing Counsel for the State submits that in view of the circular letters dated 21.08.2012, 2.9.2013 and 30.102.2019, the termination of the petitioner is justified. It is further submitted that the services of the petitioner was purely on temporary basis, which came to be terminated on the ground of unsuitability and the same being the discharge simplicitor and certainly not by way of penalty, it was not necessary to afford any opportunity to the petitioner before passing any order of termination against him. He also contends that there is no statutory Rules regarding the holding of an enquiry into allegations levelled against the petitioner, before dispensing with his service. He also contends that Home Guards are volunteers and do not hold any civil post under the State. It is further submitted that since the petitioner is not a regular government employee, therefore, the judgement **[Arun Kumar Shukla(supra)]** relied upon by the petitioner is of no application in the case of the petitioner.

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

10. Admittedly, criminal case is pending against the petitioner and this fact has not been denied by the petitioner. Thus,

there is no dispute regarding the pendency of the criminal case.

11. Perusal of circular dated 2.9.2013 issued by the Headquarters of Home Guards, Uttar Pradesh for taking disciplinary action against the Home Guards, referring the earlier circular dated 02.11.2007, whereby some amendments have been made, clearly mentions the following grounds on which the action against the Home Guards can be taken. The circular is as under:-

"होमगार्ड्स मुख्यालय के परिपत्र संख्या : 3890/स्था0/एक–796/ 2006, दिनांक 02.11.2007 में दिये गये निर्देशों में आंशिक संशोधन करते हुए निम्नलिखित आदेश पारित किये जाते हैं –

1– निष्कासन की कार्यवाही निम्नलिखित परिस्थितियों में ही की जायेगी :–

(क) अनुशासनहीनता।

(ख) गैर मान्यताप्राप्त एसोसिएशन की गतिविधियों यथा–धराना–प्रदर्शन इत्यादि में संलिप्तता।

(ग) अवॉछनीय गतिविधियां।

(घ) शारीरिक अक्षमता/अपंगता (मेडिकल प्रमाण पत्र के आधार पर)

(ङ) नैतिक अधमता।

(च) ड्यूटी पर मद्यपान सेवन।

(छ) आपराधिक मामलों में संलिप्तता (आपराधिक मामलों में अभियोग पंजीकृत होने पर प्रथमदृष्टया संलिप्तता पाये जाने पर)

(ज) स्थानी नौकरियों में समायोजित होने पर।"

12. Moreover, there is another circular dated 21.08.2012 issued by the Headquarters of Home Guards, Uttar Pradesh for taking disciplinary action against the Home Guards, who are involved in criminal offences.

13. A perusal of the said circulars clearly indicates that the impugned order has been passed in compliance of the said circulars and show cause notice has also been given to the petitioner and in its reply, the petitioner has also admitted the pendency of the criminal case.

14. So far as the contention that full fledged enquiry was required to be conducted, there is no such provision under the Act 1963. The petitioner, as per the explanation to Section 10 of the Act, 1963, does not hold a civil post as has also been held by a Division Bench of this Court in the case of **Riyasat Ali Vs. State of U.P. & others reported in 2003(4) AWC Page 3046,** which is still good law, therefore, the protection under Article 311 of the Constitution is also not attracted to the case at hand. Consequently the judgement [**Arun Kumar Shukla(supra)]** relied upon by the petitioner is also not applicable to the facts and circumstances of the present case. Moreover, record reveals that show cause notice was duly issued to the petitioner, seeking his reply in respect of the involvement in criminal case, therefore, passing of the impugned order in terms of Section 12 (1) of the Act 1963 sufficiently satisfies the requirement of principles of natural justice.

15. Petitioner, a Home Guards, who was assigned the duty to act in aid to the police and to maintain public order, is always expected to be of clean antecedents. It is settled that a person who violates the law cannot be permitted to urge that his offence cannot be subjected to inquiry, trial or investigation. Hence the decision of the respondents holding that the petitioner is not suitable, is just, fair and reasonable keeping in view the nature of the post and the duties to be discharged. The Apex Court in unambiguous terms has categorically held in catena of decisions that the employer would be well within his rights to

consider the antecedents and the suitability of its employee.

16. Moreover, perusal of all the connected writ petitions indicates that in the criminal cases shown to have been pending against the petitioners, they are facing trial. The petitioner cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services. The standard expected of a person intended to serve in uniformed service is quite distinct from other services. The authorities entrusted with the responsibility of appointing Home Guard, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a Home Guard and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of Home Guard.

17. In view of the above, I am of the opinion that no interference is called for in the matter.

18. The writ petition lacks merit and is accordingly **dismissed.**

(2021)01ILR A1117
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2021

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Writ-A No. 28281 of 1997

Chandra Shekhar Singh Yadav & Anr.
...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri K.K. Mishra, Sri Siddharth Khare

Counsel for the Respondents:
S.C.

Civil Law-Petitioners given temporary appointment on post of Survey Lekhpal-appointment cancelled-so that retrenched employees of Kaimoor Survey Agency could be absorbed-All retrenched employees had already been absorbed prior to passing of the impugned order-the basis of cancellation of appointment is non-existent.

W.P. allowed. (E-7)

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. To assail correctness of the order dated 06.11.1996 passed by respondent no.3-Assistant Record Officer Obra, District Sonebhadra and circular letter dated 17.09.1996 issued by respondent no.1-Secretary & Commissioner Board of Revenue, U.P. Lucknow (Annexure Nos.5 and 6 respectively), this writ petition under Article 226 of the Constitution of India, has been preferred by the petitioners.

2. In a nut-sell, the case of the petitioners are that the appointment of the petitioners were made on 11.07.1996 on temporary basis and petitioners have reported their duties on 12th July, 1996 (copy whereof is annexed as Annexure No.3 to the writ petition), which is evident from the report of Assistant Record Officer Obra. Thereafter, the petitioners were started their functioning on the basis of their appointment letter dated 11.07.1996 on the post of Survey Lekhpal. It is mentioned in the appointment letter that the appointment of the petitioners were made purely on temporary basis and their services can be terminated at any time by given one month prior notice. It appears

that, thereafter, the respondent no.1 has issued an order on 17.09.1996 by imposing ban on the appointments and has also directed to the concerned authority that if any appointments/ promotions have been made, the same be cancelled with immediate effect on the ground that certain persons of dissolved Kaimoor Survey Agencies or declared surplus. On 16.10.1995, the Commissioner Varanasi Division has issued a direction to the District Magistrate Varanasi and Mirzapur to give employment of remaining 36 persons belonging to the Kaimoor Survey Agency. All the persons, who were remained, have been absorbed and now not a single employee of Kaimoor Survey Agency is waiting for appointment. It is further alleged that on the basis of order dated 17.09.1996, the Assistant Record Officer-respondent no.3 terminated the services of the petitioners by order dated 06.10.1996 on the basis of absorption/re-engagement of the employee of the dissolved Kaimoor Survey Agency, who have already been engaged and none is remain for giving employment. It appears that Kaimoor Survey Agency was operating in the Division of Varansi for the purpose of survey but Kaimoor Survey Agency has been dissolved and its employees declared surplus. The termination order dated 06.11.1996 refers to a circular letter issued by Commissioner and Secretary dated 17.09.1996 as also a consequential order passed by the Record Officer dated 06.11.1996. Feeling aggrieved, the petitioner have preferred this writ petition before this Court.

3. Learned counsel for the petitioners has submitted that the termination order based on the letter dated 17.09.1996 issued by respondent no.1-Secretary and Commissioner Board of Revenue U.P., Lucknow does not exist when the order of termination was passed. The impugned termination order has been passed in violation of principle of natural justice and without affording any opportunity of hearing to the petitioners, therefore, the impugned order has been passed in an arbitrary, discriminatory exercise of powers violating of Article 14 of the Constitution. It is specifically stated that order dated 06.11.1996 passed by Assistant Record Officer have not proceeded by any notice to show cause to the petitioners, which is against the U.P. Temporary Government Servants Rules, 1975.

4. Learned counsel for the petitioners has further submitted that before passing the said termination order dated 06.11.1996 as well as circular letter dated 17.09.1996, neither any notice or information nor any opportunity of hearing have been given to the petitioners, thus, the termination order is illegal and based on no reason. The impugned order has been passed in an arbitrary, discriminatory exercise of powers violating of Article 14 of the Constitution of India, hence, the same is liable to be set aside. Learned counsel for the petitioner has relied upon the judgment dated 22.04.1998 in Writ Petition No.37136 of 1996, wherein the Court quashed the G.O. dated 06.11.1998.

5. Per contra, learned Standing Counsel vehemently opposed the writ petition by submitting that as per the appointment of the petitioners, it has been clearly mentioned that at any time the services of the petitioners could be terminated without giving prior notice. He has further submitted that however there was no need of giving any notice to the petitioners, hence, after considering the legal aspects, the termination orders have been passed by the Board of Revenue.

6. I have heard Siddharth Khare, learned counsel for the petitioner, learned

Standing Counsel for the State and perused the material available on record.

7. Admittedly, the petitioners were given temporary appointment on the post of Survey Lekhpal vide appointment letter dated 11.07.1996 and by the impugned termination order dated 06.11.1996 the said appointment/promotion has been cancelled on the basis of circular dated 17.09.1996 issued by the Board of Revenue directing the concerned authorities to cancel all appointments/promotions so that retrenched employees of Kaimoor Survey Agency could be absorbed. It has been revered that all retrenched employees of Kaimoor Survey Agency had already been absorbed.

8. It appears that all the retrenched employees of Kaimoor Survey Agency had already been absorbed prior to passing of the impugned order. In the circumstances of the case, therefore, the basis on which the appointment/promotion of the petitioners have been cancelled is not non-existent.

9. Subject to the above observations, the writ petition succeeds and the same is hereby allowed. The impugned termination order dated 06.11.1996 (Annexure No.5 to the writ petition) is hereby quashed. The petitioners are held entitled to consequential benefits.

10. However, on the facts and in the circumstances of the case, there will be no order as to costs.

(2021)01ILR A1119
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.11.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Appl. u/s 482 No. 34490 of 2015

Smt. Ummeda Fatima ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Petitioner:
Sri Nazrul Islam Jafri, Sri S.A. Ansari, Sri S.I. Jafri

Counsel for the Respondents:
A.G.A., Sri Azim Ahmad Kazmi, Sri Khurshed Alam

A. Criminal Law – Application u/s 482 – Exercise of inherent jurisdiction - U.P. Revenue Code: Section 114(c); Land Revenue Act: Section 34; Criminal Law Amendment Act: Section 7 - This court in exercise of its inherent jurisdiction u/s. 482 Cr.P.C. is not expected to meticulously analyse the facts and evidence as it is matter of trial to be seen during trial. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits. High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. (Para 14, 17)

Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice. Inherent jurisdiction u/s 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. (Para 15)

B. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters - High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent

jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings.

C. U/s 482, proceedings can be quashed but there should be justification for inference - To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive. (Para 16)

Application dismissed. (E-3)

Precedent followed:

1. St. of An. Pr. Vs Gaurishetty Mahesh, JT 2010 (6) SC 588; (2010) 6 SCALE 767; 2010 Cr.LJ 3844 (Para 15)

2. Hamida Vs Rashid, (2008) 1 SCC 474 (Para 15)

3. Monica Kumar Vs St. of U.P., (2008) 8 SCC 781 (Para 15)

4. Dhanlakshmi Vs R. Prasana Kumar, (1990) Cr.LJ 320 (DB); AIR 1990 SC 494 (Para 16)

5. St. of Bih. Vs Murad Ali Khan, 1989 Cr LJ 1005; AIR 1989 SC 1 (Para 16)

Present application is for quashing the charge-sheet as well as entire proceeding of Criminal Case No. 603 of 2015, arising out of Case Crime No. 945 of 2014, under Sections 420, 467 and 468 of the Indian Penal Code, relating to Police Station-Dibai, District-Buland Shahar.

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 Cr.P.C. has been filed, by Smt. Ummeda Fatima, against the State of U.P. and Smt. Wasima Begum, with the prayer for quashing the charge-sheet as well as entire proceeding of Criminal Case No. 603 of 2015, arising out of Case Crime No. 945 of 2014, under Sections 420, 467 and 468 of the Indian Penal Code, relating to Police Station-Dibai, District-Buland Shahar.

2. Learned counsel for the applicant, mentioned that allegations made against the applicant, at the best, makes out a case of civil liability as the applicant is alleged to have get her name mutated after the death of her husband, under Section 34 of the Land Revenue Act, which become a bone of contention between the applicant and opposite party no. 2, who claims to be second wife of the deceased. The applicant was married with Sagar Ali, R/o Kesar Kalan of Police Station-Dibai, District-Buland Shahar, under Muslim rites and customs on 28.10.2007. She was blessed by one female child namely Zoya, aged about 5 years, from their wedlock. She along with her daughter and husband was living in her matrimonial obligation happily but, was subjected to cruelty with regard to dowry, hence, a criminal case was -2- filed by her, against her husband and in-laws. Unfortunately, Sagar Ali, husband of the applicant, and his mother Smt. Ikhlasi Begum were murdered by unknown assailants on 22.06.2014 at Kesar Kalan, District-Buland Shahar. But, because of enmity and litigation, one Parvej @ Koki got lodged criminal case against the applicant and her family members on the basis of frivolous allegations, on 22.06.2014 at 2.45 p.m., as Case Crime Number 299 of 2014, under Sections-147, 148, 149, 302, 307, 115, and 120-B, I.P.C. read with Section 7 of the Criminal Law Amendment Act, at Police Station-Dibai, District-Buland Shahar.

3. After the death of Sagar Ali, the applicant filed an application, in the Court of Nayab Tehsildar- Dibai, District-Buland

Shahar, under Section 34 of the Land Revenue Act, for getting her and her daughter's name mutated at the place of Sagar Ali, over his entire agricultural property. This application was allowed vide order dated 30.09.2014 and thereby, the name of the applicant and her daughter was got mutated in the revenue records.

4. The opposite party no. 2 Smt. Wasima Begum, claiming to be second wife of Sagar Ali, moved an application, before the Court of Nayab Tehsildar, Dibai, District-Buland Shahar, on 07.10.2014, challenging the above mutation order dated 30.09.2014, on the ground, that she is legally wedded wife of Sagar Ali, wherein, it was submitted that Shahana Begum had also filed an original Suit No. 810 of 2014 against Sagar Ali, in the Court of Tehsildar-Dibai, District- Buland Shahar, wherein, Smt. Ummeda Begum-the applicant, had also filed her objection, hence, the present applicant was fully aware of those facts even then, she got mutated her name with wrong contention.

5. The Court heard both sides and vide order dated 07.10.2014 the mutation order dated 30.09.2014 was set aside by the Tehsildar-Dibai. -3-

6. The applicant had also filed a Suit No. 554 of 2014, against Smt. Shahana wife of Shri Azmat Ali and Smt. Rehena wife of Shri Khaliq Ahmad, in the Court of Civil Judge, Senior Division, Buland Shahar for declaring the will dated 12.03.2010, being said to be executed by Sagar Ali in favour of Smt. Shahana and Rehana as null and void. The same is still pending. But, knowing all these facts, the opposite party no. 2 got lodged First Information Report on 30.07.2015, on frivolous grounds.

7. The applicant preferred a Criminal Misc. Writ Petition No. 10874 of 2015, Smt. Ummeda Fatima vs. State of U.P. and 2 others, before this Hon'ble Court, for quashing the impugned First Information Report as well as stay of her arrest.

8. This Hon'ble Court, vide order dated 05.05.2015, disposed of the above Criminal Writ Petition finally, with a direction for not arresting the petitioner in pursuant of First Information Report dated 07.11.2014, till credible evidence is there or till the submission of police report under Section 173 (2) Cr.P.C. The investigating officer, without making any fair investigation, but recording statements of Smt. Wasima Begum, Parvej @ Koki and Ashfaq, under Section 161 Cr.P.C., submitted a charge-sheet against the applicant in the Court of Additional Chief Judicial Magistrate, Buland Shahar, for offenses punishable under Sections 420, 467 and 468 of Indian Penal Code, whereupon, cognizance was taken vide order dated 11.09.2015, following issuance of summon against the applicant, in above criminal case. This was under abuse of process of law. The applicant, being wife of Sagar Ali, and Zoya Fatima, being daughter of Sagar Ali, were entitled to inherit the property of Sagar Ali after death of Sagar Ali and mere filing an application, in the Court of Tehsildar, Dibai, under Section 34 of the Land Revenue Act, will not amount to an offence of cheating or forgery. More so, matter is still subjudice before the Court of Tehsildar Dibai, -4- Buland Shahar, and final order is yet to be passed by the Tehsildar. Hence, this registration of case crime number was nothing but, a malafide action. Hence, this application, with above prayer.

9. Learned A.G.A. argued that the First Information Report of Case Crime Number 495 of 2014, under Sections-420, 467 and 468 I.P.C. was presented by the opposite party no. 2 at Police Station-Dibai, District-Buland Shahar, with the allegation of playing fraud to usurp the entire property

of Sagar Ali, husband of the informant. Matter was under investigation, when a proceeding under Section 482 Cr.P.C. was filed for quashing the said First Information Report, but, a Division Bench of this Hon'ble Court, in above proceedings under Section 482 Cr.P.C., did not grant relief, prayed for, rather, held that prima-facie case has been made out for registration of case crime number. Statements of witnesses were got written under Section 161 Cr.P.C.; documentary evidence were also taken and investigation resulted in logical conclusion for filing of police report under Section 173 (2) Cr.P.C. as charge-sheet number 126 of 2015 dated 25.05.2015, for the offences punishable, as above. Judicial Magistrate, took cognizance over it on 11.09.2015. Nothing under misuse of process of law is there.

10. Learned counsel for the informant vehemently argued that Smt. Ummeda Fatima was first wife of Sagar Ali. But, she tortured Sagar Ali, with intention to grab his entire property. She and her family members pressurized Sagar Ali to part with his agricultural land. False and frivolous cases were filed by them, against Sagar Ali and his mother Ikhlasi Begum. Sagar Ali did not concede their illegal demand, rather, he made several complaints against Smt. Ummeda Begum, before the concerned police station and administrative authorities. Ultimately, Smt. Ummeda Begum left matrimonial house of Sagar Ali. Police and administrative authorities did not act upon the complaint made by Sagar Ali, resulting murder of Sagar Ali and his mother Smt. Ikhlasi Begum, by Smt. Ummeda Begum and her parents. It was a gruesome -5- murder, in broad day light, on 22.06.2014 in full public view. This offence of murder was witnessed by Parvej @ Koki S/o Ashfaq and many other persons, present on the spot. First Information Report of Case Crime Number 299 of 2014 under Sections-147, 148, 149, 307, 302, 115, 120-B I.P.C. read with Section 7 of the Criminal Law Amendment Act, was got registered at Police Station-Dibai, upon the report of Parvej @ Koki against Smt. Ummeda Fatima and others.

11. In the statement recorded under Section 161 Cr.P.C. Smt. Ummeda Fatima has admitted that since Sagar Ali had contracted second marriage, therefore, this murder was to happen and for this, she felt no remorse over his murder. Smt. Ummeda Fatima, remained in prison till her release on bail in Criminal Misc. Bail Application No. 30364 of 2014, Smt. Ummeeda Begum @ Ummeeda Fatima Vs. State Of U.P., vide order dated 16.09.2014 by this Hon'ble Court. But, during this confinement an application dated 14.08.2014 was moved by Smt. Ummeda Fatima, through his counsel in the Court of Nayab Tehsildar, Dibai, District-Buland Shahar for getting her name mutated over the agricultural land of Sagar Ali and his mother Smt. Ikhlasi Begum. Which was registered as Mutation Case No. 663 of 2014 Smt. Ummeda Fatima vs. Ikhlasi Begum, mutation case No. 664 of 2014 Smt. Ummeda vs. Sagar Ali, under Section 34 of the Land Revenue Act. Smt. Ummeda Fatima claimed herself and her daughter to be only survivor and successor of deceased Sagar Ali and his mother Ikhlasi Begum. Whereas, she was fully aware that being murderer of her husband and mother-in-law, she was debarred from being their successor. She deliberately and knowingly made false averment on oath, before the above Revenue Court, on 29.09.2014, in above mutation proceedings, that she, along with her daughter Zoya, are only legal heirs of Sagar Ali and his mother Ikhlasi Begum,

and thereby, she got prepared the application and documents under fraud and by this fraud, she got mutated her and her daughter's name against the properties of deceased Sagar ali and his mother Ikhlasi -6- Begum.

12. Smt. Wasima Begam, being legally wedded wife of Sagar Ali, along with her daughter Sumera, borned on 01.9.2013 from wedlock of deceased Sagar Ali, were entitled to succeed the estate of her deceased husband Sagar Ali and her mother Ikhlasi Begum. She moved, an application, for cancellation of mutation order dated 30.09.2014, before the Revenue Court of Tehsildar-Dibai and thereupon, the mutation order was got cancelled and for this fraud, present Case Crime number was got registered; charge-sheet has been filed and this was on the basis of evidence collected during investigation and as such there is no abuse of process of law, hence this application be dismissed.

13. Admitted fact is that Smt. Ummeda Fatima was legally wedded wife of Sagar Ali. She was blessed with a daughter Zoya. There was matrimonial discard between Ummeda Fatima and Sagar Ali, for which, criminal cases were pending. Sagar Ali, was got married with Smt. Waseema Begum who was blessed with a daughter from their wedlock. Civil Suits regarding agricultural land of Sagar Ali and his mother Smt. Ikhlasi Begum, with regard to disputed "will", said to be executed by Sagar Ali, is pending before the competent Civil Court of Buland Shahar. Sagar Ali and his mother Smt. Ikhlasi Begum were murdered on 22.06.2014, for which Case Crime Number 299 of 2014 under Sections-147, 148, 149, 307, 302, 115, 120-B, I.P.C. read with section 7 of Criminal Law Amendment Act, was got registered at Police Station-Dibai, District-Buland Shahar by Parvej@ Koki, wherein, Smt. Ummeda Fatima, her father, her brother and one relative Shahnaz S/o Aabad were accused. This case crime number caused arrest of Smt. Ummeda Fatima, who was enlarged on bail in Criminal Misc. Bail Application No. 30364 of 2014, vide order dated 16.09.2014. A Mutation application, under Section 34 of the Land Revenue Act, for mutation at the name of Sagar Ali as mutation case no. 663 of 2014 -7- and at the name of Smt. Ikhlasi Begum, in Mutation Case No. 664 of 2014 was filed by Smt. Ummeda Fatima as Ummeda Fatima vs. Ikhlasi Begum and Ummeda Fatima vs. Sagar Ali. In both of these cases Smt. Ummeda Begum claimed herself to be successor along with her daughter Zoya for the property of late Sagar Ali and late Smt. Ikhlasi Begum. She has claimed herself and her daughter to be only survivor and successor with no other inheritor. Whereas, in many other previous litigations it was fully in the knowledge of Smt. Ummeda Fatima that Sagar Ali was married with Wasima Begum, who was blessed with one female child. Even knowing this fact mutation application was moved with incorrect affidavit and incorrect application of documents. In oral statements too, the same contention was made and on the basis of these forged and fabricated evidence, the impugned order of mutation was passed which was challenged by Smt. Wasima Begum and ultimately, mutation order was cancelled. Thereafter, mutation was entered, by adding name of Wasima Begum and her daughter too. Though, there is legal bar under the Land Revenue Act, subsequently, in U.P. Revenue Code Section 114 (c) provides that " ***A person who commits murder of a [Bhumidhar, asami or government lessee], or abates the commission of such murder,***

shall be disqualified from inheriting the interest of the deceased in any holding". But, it is a question to be seen by the competent Revenue Authority. Hence, this First Information Report was challenged before this Court and a request was made for quashing the First Information Report dated 07.11.2014 registered as Case Crime Number 495 of 2014, under Sections-420, 467, 468 I.P.C., Police Station-Dibai, District-Buland Shahar, and it was argued before this Court that question in the matter appeared to be a reference of property in question that had been left over by Sagar Ali and his mother Smt. Ikhlasi Begum, but, the Division Bench of this Court in Criminal Misc. Writ Petition No. 10874 of 2015 Smt. Ummeda Fatima vs. State of U.P. and 2 other had held that ;

".....We have the occasion to persue the arguments that has been so -8- advanced o behalf of the parties before us and FIR, prima facie discloses cognizable offence, as such request for quashing of the FIR is turned down".....

Meaning thereby, prima facie case was disclosed for cognizable offence and it was not a ground for quashing of the First Information Report. Investigation has resulted submission of charge-sheet over which cognizance has been taken. Offence of moving application, with false and fictitious contention, claiming herself to be sole survivor along with her minor daughter over the property of late Sagar Ali and his mother Smt. Ikhlasi Begum, and thereafter, fabricating oral and documentary evidence for it and getting name mutated, knowing the legal situation of debar of inheritance and conviction in that criminal case of murder, prima facie, makes out offences for which chargesheet has been filed.

14. This court in exercise of its inherent jurisdiction u/s 482 Cr.P.C. is not expected to meticulously analyses the facts and evidence as it is matter of trial to be seen during trial.

15. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844*** has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of -9- it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent ***Hamida v. Rashid, (2008) 1 SCC 474***, Hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC***

781, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296 has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

16. Regarding prevention of abuse of process of Court, Apex Court in ***Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494*** has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in ***State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1***, Apex Court propounded "In exercising jurisdiction under Section 482 High Court -10- would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

17. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above. This court is not to make any comment on factual matrix because the same remains within the domain of trial court.

18. Accordingly, there remains nothing for any indulgence in this proceeding. The prayer for quashing the impugned order as well as proceeding of the aforesaid complaint case is refused and the application u/s 482 Cr.P.C. is hereby dismissed.

(2021)01ILR A1125
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2021

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Arbitration & Concilla. Appl. U/S 11(4) No. 5 of 2019

Siemens Ltd. ...Applicant
Versus
Madhyanchal Vidyut Vitran Nigam Ltd. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Ronak Chaturvedi, Sri Anurag Khanna, Sri Shivank Diddi

Counsel for the Opp. Parties:
Sri Kapil Dev Singh Rathore, Sri Girish Chand Sinha, Sri Mukesh Kumar Singh, Sri Mayank Sinha, Sri Mayank Singh, Sri Abhishek Srivastava

Civil Law-Application filed seeking appointment of an independent arbitrator -a written agreement exist containing an arbitration clause-consent recorded in the order of which review filed- Respondent did not give up its preliminary objection-consent recorded is not true reflection of record of proceeding that existed before the court- mistake crept in while passing the impugned order owing to three other

similar application-since consent do not exist.

Review Application maintainable. (E-7)

List of Cases cited: -

1. Pushpalata Jain Vs M/s. Raj Enterprises; AIR Online 2020 MP 551

2. Municipal Corporation of Greater Mumbai Vs Pratibha Industries Ltd.; AIR Online 2018 SC 891

3. State Road Transport Corp. & anr. Vs Indra Raj Verma & anr.; AIR 2018 All 6

4. Grindlays Bank Ltd. Vs The Central Government Industrial Tribunal & ors.; (1980) Supp 1 SCC 420

5. Smt. Chandra Dickshit Vs Smart Builders; (2008) SCC Online All 85

6. M/s. Shiv Hare Builders through Proprietor, Agra Vs Executive Engineer, Provincial Division, Public Works Department; (2010) SCC Online All 2309

7. Antikeros Shipping Corporation Vs Adani Enterprises Limited; 2020 (3) MhLJ 855

8. State of Maharashtra Vs Ramdas Shrinivas Nayak & Anr.; (1982) 2 SCC 463

9. State of West Bengal Vs Associated Contractors; (2015) 1 SCC 32

10.Ador Samiya (P) Ltd. Vs Peekay Holdings Ltd.; (1999) 8 SCC 572

11.Konkan Railway Corp. Vs Mehul Construction Co. Ltd.; (2000) 7 SCC 201

12. Konkan Railway Corp. Vs Rani Construction (P) Ltd.; (2002) 2 SCC 388,

13.SBP & Co. Vs Patel Engineering Ltd.; (2005) 8 SCC 618

14.Jain Studios Ltd., Through its President Vs Shin Satellite Public Co. Ltd.; (2006) 5 SCC 501

15. Municipal Corporation of Greater Mumbai & anr. Vs Pratibha Industries Limited & ors.; (2019) 3 SCC 203

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

Re: Civil Misc. Delay Condonation Application No. 1 of 2019 & Re: Civil Misc. Review Application No. 2 of 2019.

1. Heard Sri Girish Chand Sinha and Sri Mukesh Kumar Singh, learned counsel for the applicant in review application and Sri Anurag Khanna, learned Senior Advocate assisted by Sri Ronak Chaturvedi, learned counsel for the respondent-claimant.

2. The present review application has been filed by the Madhyanchal Vidyut Vitran Nigam Ltd. (herein referred to as the 'opposite party') being opposite party no.1 in Arbitration and Conciliation Application U/S 11(4) No. 5 of 2019. For ready reference, the relevant part of the order dated 08.05.2019, is quoted herein:

"Heard Sri Anurag Khanna, learned Senior Counsel assisted by Sri Ronak Chaturvedi and Sri Shivank Diddi, counsel for the applicant and Sri Abhishek Srivastava, learned Chief Standing Counsel/Special Counsel and Sri Mayank Singh, learned counsel for the respondents.

This application is field under Section 11(4) of the Arbitration and Conciliation Act, 1996 by which the applicant has prayed for appointment of sole Arbitrator to resolve the dispute.

The applicant is a company, indulged in manufacturing rendering services in the sector of electricity related to component, supply and distribution.

The applicant company has entered into an agreement with the respondents

Madhyanchal Vidyut Vitran Nigam Limited for supply of certain goods and related services viz. Implementation.

The said agreement executed in between the applicant and respondent no.1 on 25th day of August, 2014.

The said agreement dated 25th August, 2014 provides the special conditions of contract as well as general conditions of contract. The said agreement further provides as follows:-

"IN WITNESS whereof the parties hereto have caused this Agreement to be executed in accordance with the laws applicable in exclusive jurisdiction of the High Court Of Judicature in the state of Uttar Pradesh, India and all courts subordinate to its exclusive Jurisdiction on the 25th August 2014 indicated above."

Clause GCC 7.2 of the said agreement provides as follows:-

"The formal mechanism for the resolution of disputes shall be:

If the parties fail to resolve such a dispute or difference by mutual consultation within twenty-eight (28) days form the commencement of such dispute and difference, either party may require that the dispute be referred for resolution to the formal mechanisms, described below (The date of commencement of the dispute shall be taken from the date when this clause reference is quoted by either party in a formal communication clearly mentioning existence of dispute or as mutually agreed):

a. The mechanism for resolution of disputes for bidders shall be in accordance with the Indian Arbitration and Conciliation Act of 1996. The Arbitral Tribunal shall consist of 3 (three) Arbitrators. Each Party shall agree and nominate a third Presiding Arbitrator.

b. The Arbitrators shall necessarily be retired High Court Judges and the umpire shall be a retired Chief Justice.

c. The place for arbitration shall be State of Uttar Pradesh."

Learned counsel for the respondent-Nigam has raised the preliminary objection about the maintainability of the instant application.

Learned counsel for the respondents has submitted that the conditions so as stipulated in Clause GCC 7.2 provides to resolve the dispute or the difference by mutual consultation within 28 days from the commencement of such dispute and difference.

Learned counsel for the respondent therefore submits that the applicant has not approached the Nigam as such has approached the U.P. Power Corporation Ltd. Lucknow who has nothing to do with the dispute or difference arose between the parties.

Per contra, learned counsel for the applicant has placed reliance on a document/letter dated 23rd August, 2018 by which the applicant has addressed the Executive Engineer, Madhayanchal Vidyut Vitran Nigam Limited, office of the Managing Director, 4A, Gokhale Marg, Lucknow. 'Subject' so as mentioned in the said letter clearly indicates that the letter has been issued by the applicant for settlement of claims.

Admittedly the instant application has been filed by the applicant after expiry of the period so as indicated (28 days) in January, 2019.

Having heard the learned counsel for the parties, though no observation is required to be made on the merits of the issue, it cannot be disputed, at present, there exists a dispute between the parties, and that such dispute arises under the written agreement entered into between

them, and also there exists an arbitration clause for resolution of such dispute. Further, the parties have not been able to appoint an arbitrator, of their own.

In view of above and as agreed in between the counsels representing the respective parties, this Court has no option but to appoint .....

List on 30th May, 2019."

3. At the outset, Sri Khanna, learned Senior Advocate appearing for M/s Siemens Limited (herein referred to as the 'claimant'), has raised a preliminary objection as to the maintainability of the review application. It is his submission that the application is not maintainable in law. The Arbitration Act being a complete code, there is no inherent or other power of review. No such application may be entertained in absence of a specific provision. Second, it has been submitted that in any case, the order dated 08.05.2019 being a consented order, no application for review would lie against the same. Third, he has also objected to the delay in filing the present review application. In view of the preliminary objections raised, it is considered desirable that the same may be first dealt with before proceeding to hear the substantive grounds of review.

4. On the other hand, according to Sri Sinha, learned counsel appearing for the opposite party, this Court being a Court of record has ample power to review its orders, to correct its record. Inasmuch as the opposite party had never given his consent and the order dated 08.05.2019 came to be passed by the Court, overlooking the preliminary objection, which fact was first recorded in that order, this Court is obliged to correct its record and entertain the review application. In that regard, reliance has been placed by Sri Sinha on a recent decision of the Madhya Pradesh High Court in **Pushpalata Jain Vs. M/s. Raj Enterprises; AIR Online 2020 MP 551**. He has also relied on a decision of the Supreme Court in **Municipal Corporation of Greater Mumbai Vs. Pratibha Industries Ltd.; AIROnline 2018 SC 891** and on a decision of this Court in **U.P. State Road Transport Corp. & Anr. Vs. Indra Raj Verma & Anr.; AIR 2018 All 6.** As a second limb of his submission, Sri Sinha would further submit that the review being sought is a procedural review and therefore, relying on a decision of the Supreme Court in **Grindlays Bank Ltd. Vs. The Central Government Industrial Tribunal & Ors.; 1980 Supp 1 SCC 420**, the review application is asserted to be wholly maintainable. Third, he has supported his submission on the strength of the provisions of the Commercial Courts Act, 2015, to submit that by virtue of Section 16 of that Act, the provisions of Code of Civil Procedure, 1908, are applicable to the present proceedings as well and, therefore, the present review application would lie.

5. As to consent, it has been submitted by Sri Sinha that at no point of time any consent had been given by the opposite party to the appointment of an independent arbitrator. Referring to his objections filed to the Arbitration and Conciliation Application U/S 11(4) No. 5 of 2019 and the contents of paragraph no.2 thereof, he submits that the opposite party had first taken objection to the appointment of an independent Arbitrator by the Court both on account of lack of territorial jurisdiction (at Allahabad), as also on account that application being pre-mature as no effort had been made by the applicant in terms of Clause GCC 7.2 which mandatorily required the parties to first

resolve their dispute/s by mutual consent. Not only that objection had been specifically raised in the written objection, but it had also been raised at the time of hearing as is recorded in the order dated 08.05.2019 in paragraph no.8 thereof. Thereafter, without referring to that preliminary objection raised by the opposite party and without recording the submissions advanced by the opposite party, a simple observation has been made "in view of above and as agreed in between the counsels representing the respective parties, this Court has no option but to appoint .....". The said observation is stated to have been made under a mistake arising from the fact that Arbitration and Conciliation Application U/S 11(4) No. 5 of 2019 came to be heard along with Arbitration and Conciliation Applications U/S 11(4) Nos. 6 of 2019, 7 of 2019 and 8 of 2019. In those cases, an objection as had been raised by the present opposite party, may not have been raised and pressed. In those circumstances, there was consent between those parties for appointment of an independent arbitrator. Owing to that fact, a patent mistake or error has crept in the order of this Court dated 08.05.2019 which may be rectified. Last, it has been submitted, there is no delay in filing the review application.

6. The above submissions have been vehemently opposed by Sri Khanna. In support of his preliminary objection, Sri Khanna had first relied on two earlier decisions of this Court in **Smt. Chandra Dickshit Vs. Smart Builders; 2008 SCC Online All 85** and **M/s. Shiv Hare Builders through Proprietor, Agra Vs. Executive Engineer, Provincial Division, Public Works Department; 2010 SCC Online All 2309**, to submit that the issue is no longer res integra inasmuch as in both those decisions it has been clearly opined that the order passed appointing an Arbitrator is not amenable to review. In that regard, he has also relied on a recent Division Bench decision of the Bombay High Court in **Antikeros Shipping Corporation Vs. Adani Enterprises Limited; 2020 (3) MhLJ 855**, wherein the Division Bench of the Bombay High Court distinguished the decision of the Supreme Court in Pratibha Industries (supra) relied upon by the learned counsel for the opposite party and opined that an appointment made under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') is not amenable to review jurisdiction.

7. On the issue of procedural review, it has been submitted by Sri Khanna, though remedy of procedural review may remain to be exercised in an appropriate case, however, the opposite party has failed to establish any ground of procedural review in the admitted facts of the present case. Not only the opposite party was served notice in ARCO No. 5 of 2019 but it had filed its objections and was duly represented at the time of the order dated 08.05.2019 being passed. Thus, no ground of procedural review arises as the principles of natural justice and other rules of procedure were duly complied.

8. Second, relying on the decision of the Supreme Court in **State of Maharashtra Vs. Ramdas Shrinivas Nayak & Anr.; (1982) 2 SCC 463**, it has been submitted that the consent as recorded in the order dated 08.05.2019 is final and binding. The opposite party not only gave its consent through counsel as was then recorded in the order, but no objection was raised on the next date when the order of appointment of the Arbitrator was

confirmed. No ground was taken, to that effect in the Special Appeal filed by the respondent. He has also referred to the grounds of appeal (as annexed to his counter affidavit). Then, even in the SLP filed by the respondent, no ground of challenge was raised to assert the lack of consent. Also, that leave to appeal was confined to challenge the order dated 23.8.2019 passed by the Division Bench. No challenge was raised to the order dated 8.5.2019. Thus, according to Sri Khanna, the issue of consent was dead. It was never raised, except in the present review application filed with a long delay for which there is no explanation.

9. Having heard learned counsel for the parties and having perused the record, the admitted facts of the case are that the Arbitration and Conciliation Application under section 11(4) No. 5 of 2019 was filed by the claimant in January 2019, seeking appointment of an independent arbitrator for resolution of its disputes with Madhyanchal Vidyut Vitran Nigam Ltd. and U.P. Power Corporation Limited. Admittedly, there exists a written agreement between the parties containing an arbitration clause. Upon notice, the Madhyanchal Vidyut Vitran Nigam Ltd. put in appearance and filed its objections to the aforesaid application. Paragraph no.2 of the said objection reads as under:

"II. The respondent no.2 was nowhere party to the agreement and, therefore, he should not be arrayed as party to the petition. As such, once again, the petition filed by the petitioner deserves to be dismissed for mis-joinder of parties.

III. The agreement, between the parties, was executed at Lucknow and as such, work and duty in this reference to the agreement was to be done in Lucknow, therefore, the petitioner has wrongly filed the petition at Allahabad, knowing very well this fact that the Bench of this Hon'ble Court at Lucknow has exclusive jurisdiction into the matter. As such, the petition filed by the petitioner deserves to be dismissed for want of appropriate jurisdiction.

IV. The petition, filed by the petitioner for appointment of Arbitrator, is pre-mature as per Clause-GCC 7.2, which is referred in the petition itself, says that any request for arbitration could only be entertained only after the parties fail to resolve such disputes or differences by mutual consultation within 28 days from the commencement of such disputes and differences.

V. The GCC also provies that in case of arbitration, the Arbitral Tribunal shall consist of 3 Arbitrators and each party shall nominate one Arbitrator and these two nominated Arbitrators shall mutually agree and nominate a third Presiding Arbitrator. However, the petitioner himself has violated the terms of the contract and insisted for sole arbitrator. Therefore, directly approaching this Hon'ble Court for appointment of Arbitrator is wrong and illegal."

10. Around the same time, other applications came to be filed by the claimant with respect to similar disputes with other distribution companies namely - Dakshinanchal Vidyut Vitran Nigam Limited, Pachimanchal Vidyut Vitran Nigam Limited and Purvanchal Vidyut Vitran Nigam Limited. Upon exchange of pleadings, all four applications being ARCO Nos. 5 of 2019, 6 of 2019, 7 of 2019 and 8 of 2019 came to be listed and heard together. The same independent arbitrator was proposed on all applications, by four separate orders, all dated

08.05.2019. Thereafter, for consent of the proposed Arbitrator, the matters were again listed on 30.05.2019 whereupon the Court allowed all the applications. At this stage, against the aforesaid order, the opposite party alone filed Special Appeal No. 696 of 2019. A copy of that has been annexed by the claimant - to its counter affidavit to the review application. That appeal was dismissed by order dated 01.07.2019, as not maintainable. Against that order, the opposite party preferred Special Leave Petition before the Supreme Court being No. 17628 of 2019, which came to be dismissed, vide order dated 23.08.2019 on following terms:

"We find no ground to interfere with the impugned order passed by the High Court in view of the consent recorded. At this state, the learned counsel has prayed for withdrawal of the petition with liberty to approach the concerned court. Liberty is granted.

However, liberty is not granted to assail the impugned order afresh in this Court.

The Special Leave Petition, is accordingly, dismissed as withdrawn."

11. Thereafter, the present review application came to be filed on 01.10.2019 on which affidavits have been exchanged and the matter has thus ripened for hearing.

12. Having heard learned counsel for the parties and having perused the record, in the first place, it may be seen, at the time of the Special Leave Petition (filed by the respondent), being dismissed on 23.08.2019, the Supreme Court had granted liberty to the respondent to approach this Court. Though that observation may not give rise to maintainability of the review application if it is found otherwise not maintainable, at the same time, in the context of the explanation of the delay, it may be recorded that there were no other proceedings pending or permissible on that date. The review application was filed on 1.10.2019 i.e., within 40 days of the dismissal of the SLP by the Supreme Court wherein leave to approach this Court had been granted.

13. First, it is observed, the review application was filed within reasonable time after the dismissal of the SLP by the Supreme Court. Second, it may not be forgotten liberty had been granted to the respondent, by one Constitutional Court to approach another. In view that fact alone, the litigant who has approached the other Constitutional Court with that certified liberty, may not be left bemused and aggrieved, at the refusal or reluctance offered by the other Constitutional Court to allow him audience, on account of a small delay, if any. Cause shown is sufficient. Delay condoned. Accordingly, the delay condonation application is **allowed.**

14. Insofar as reliance has been placed by Sri Khanna on the orders in the cases of **Smt. Chandra Dickshit Vs. Smart Builders (supra) and M/s. Shiv Hare Builders (supra)**, it may be noted, both orders had been passed by the then Chief Justice(s) of this Court, on 25.1.2008 and 26.11.2010, on applications filed seeking review of earlier orders passed under Section 11(6) of the Act, as it stood then. Undisputedly, at that time, the provisions of the Section 11(6) of the Act were materially different from those that existed when order dated 8.5.2019 came to be passed. Prior to the amendment made vide Act no. 3 of 2016 (with retrospective effect from 23.10.2015), Section 11(6) of the Act read as below:

"(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, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment".

15. The amended section 11(6)(c) of the Act reads:

"(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

16. A three-judge bench of the Supreme Court in **State of West Bengal Vs Associated Contractors; (2015) 1 SCC 32** has clearly opined (in the context of the unamended section 11(6) of the Act) that an application filed before a Chief Justice (either of a High Court or the Supreme Court) or his designate, was not an application filed before the Court of which that judge may be the Chief Justice or his designate. It was observed:

"17. .....It is obvious that Section 11(12)(b) was necessitated in order that it be clear that the Chief Justice of "the High Court" will only be such Chief Justice within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate and the Chief Justice of that High Court which is referred to in the inclusive part of the definition contained in Section 2(1)(e). This sub-section also does not in any manner make the Chief Justice or his designate "court" for the purpose of Section 42. ***Again, the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value being a decision of a judicial authority which is not a Court of Record."*** (emphasis supplied)

17. On the other hand, under the amended law, with which alone we are concerned, the power to appoint an arbitrator came to be vested in the High Court - as a Court, in place of its Chief Justice. Therefore, the order dated 08.05.2019 is indisputably an order passed by the High Court. Accordingly, the ratio, if any, involved in the two (single judge) decisions of this Court relied upon by Sri Khanna would stand distinguished, upon change of law. Similarly, in **Antikeros Shipping Corporation (supra),** the order of appointment of an independent arbitrator had been made on 21.04.2011 i.e., prior to 23.10.2015 - the date of enforcement of the amendment to section 11(6)(c) of the Act. Therefore, it was also an order passed by the person or institution designated by the Chief Justice of that Court and not by the Bombay High Court, itself.

18. In the present case, the order appointing an independent arbitrator had been passed post amendment, on 08.05.2019. Clearly, it is an order passed by the High Court, in exercise of the power vested on it under section 11(6)(c) of the

Act. Therefore, the reasoning being attempted by Shri Khanna, is not applicable to the facts of the present case. That line of reasoning would remain applicable to cases falling under the unamended law only.

19. As to the nature of power, whether judicial or administrative, in the context of the unamended section 11(6)(c) it was held to be an administrative power, **Ador Samiya (P) Ltd. Vs Peekay Holdings Ltd.; (1999) 8 SCC 572** as affirmed by a three-judge bench decision in **Konkan Railway Corp. Vs Mehul Construction Co. Ltd.; (2000) 7 SCC 201**. Later, upon another reference, in **Konkan Railway Corp. Vs. Rani Construction (P) Ltd.; (2002) 2 SCC 388**, a five-judge Constitution bench of the Supreme Court confirmed the view expressed by the three-judge bench in **Mehul Construction case. Finally, in SBP & Co. Vs Patel Engineering Ltd.; (2005) 8 SCC 618**, a seven-judge Constitution bench held the power under section 11(6)(c) of the Act to be a judicial power, to be exercised either by the Chief Justice of a High Court or a designated Judge of that Court. Such judicial order was held appealable under Article 136 of the Constitution of India. That being the nature of that power, upon the 2016 amendment, a judicial power now vests in this Court, in place of its earlier vesting in the Chief Justice of this Court or in his designate.

20. In **Jain Studios Ltd., Through its President Vs. Shin Satellite Public Co. Ltd.; (2006) 5 SCC 501** (a rare order of a Single Judge of the Supreme Court), it was reasoned, since the order appointing an arbitrator (under unamended Section 11(6) of the Act), passed by the Chief Justice of India or his nominee is an order within the meaning of Article 137 of the Constitution of India, that order would remain amenable to review power of that Court. However, the distinction between the "Supreme Court" and its "Chief Justice" and the consequential effect on the power of review remained to be noticed. Thus, it was a judgement pronounced upon an admission between the parties. It must therefore remain confined to the facts of that case. Even otherwise, for obvious reason of Article 137 being applicable to the Supreme Court alone, the ratio of that decision cannot be applied to proceedings before this Court.

21. In **Municipal Corporation of Greater Mumbai & Anr. Vs. Pratibha Industries Limited & Ors.; (2019) 3 SCC 203**, the High Court came to appoint a neutral arbitrator on 27.06.2017 (i.e., under the amended Act). It appears, that order was later recalled. However, upon an intra-Court appeal, the order of recall was itself set-aside by a division bench of that Court. Thus, the matter reached the Supreme Court. It was held,

*"**10**. Insofar as the High Courts' jurisdiction to recall its own order is concerned, the High Courts are courts of record, set up under Article 215 of the Constitution of India. Article 215 of the Constitution of India reads as under:*

*"**215. High Courts to be courts of record**.--Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."*

It is clear that these constitutional courts, being courts of record, the jurisdiction to recall their own orders is inherent by virtue of the fact that they are superior courts of record. This has been recognised in several of our judgments."

22. That being clear as daylight, the further submission of Sri Khanna that the ratio of that case is distinguishable on facts,

is plainly unacceptable. Though it is true that in that case, there was no arbitration clause, and the arbitrator came to be appointed by the Bombay High Court on a mere statement made by an officer of the Municipal Corporation of Greater Mumbai, which statement was later clarified to be without authority yet, that fact distinction is wholly irrelevant to the question of existence of the inherent power of review, vested in the Court, by virtue of Article 215 of the Constitution of India. Existence of a power and the ground for exercise of that power would ever remain two different issues. While no reason to exercise a power may arise in absence of the power itself, it cannot be true, vice versa. Existence of power is a pure question of law, traceable to the statutory provision, in this case Article 215 of the Constitution of India. Whether, it would be exercised, may be examined while wielding that power. However, if there was no power of review, in existence, the occasion to exercise it would never arise.

23. In view of the categorical pronouncement of the Supreme Court in **Municipal Corporation of Greater Mumbai & Anr. Vs. Pratibha Industries Limited & Ors. (supra)** and the admitted fact that the order dated 8.5.2019 was passed by the High Court and not its Chief Justice of this Court or its designate (as distinct from the Court itself), the review application is found to be wholly maintainable.

24. As to the consent, it is seen, not only the respondent had raised a preliminary objection by means of the counter affidavit to arbitration application no. 5 of 2019 but that it had also raised preliminary objections at the stage of oral hearing. It is clearly recorded in the order dated 8.5.2019. Though, the later part of that order does record that the parties agreed for appointment of the sole arbitrator, however, that order nowhere records, at any place, that the respondent gave up its preliminary objections. It is also difficult to accept that such preliminary objection once raised, would have been given up because the order also does not record, either the exact nature of the preliminary objections raised or any consideration thereof. Then, it cannot be lost sight that the said order came to be passed along with three other orders passed on similar applications filed by the applicant, that were also decided on the same date.

25. It thus appears that an error has crept in, while passing the order dated 8.5.2019. Thereby consent of parties came to be recorded. In view of the facts noted above, I am prima facie satisfied that the respondent did not give up its preliminary objection and therefore, the consent recorded, is not a true reflection of the record of proceedings that existed before the Court. Without a doubt a mistake has thus crept in the order dated 8.5.2019, probably, as suggested by Sri Girish Chand Sinha, owing to the three other similar applications having been dealt with on the same day wherein, upon consent, a sole arbitrator was appointed, in similar circumstances. Since, the consent did not exist, a review application would be maintainable.

26. That being the nature of mistake, it is also not truly relevant that initially the respondent did not raise the ground of lack of consent. Once it appears to the Court that such consent was not existing, the Court owes a duty to itself, to keep its record straight. To deprive a litigant of

rectification of a mistake in the Court's record, when that mistake otherwise appears to exist, solely because the litigant did not come to it in the first instance, may never be relevant for this Court considering the obligation cast on it under Article 215 of the Constitution of India. The Court is not a party to the dispute. On the other hand, a litigant has complained that its record is incorrect. Thereafter, it is necessary for the Court, as a non-partisan and independent adjudicator to correct its record especially, since the litigant is not shown to have accepted as correct the order dated 08.05.2019.

27. Accordingly, the review application is found to be wholly maintainable in law, by virtue of Article 215 of the Constitution of India and since no consent existed (of the respondent), to appoint the sole arbitrator. The observation made in the order dated 08.05.2019, to that effect, is erroneous.

28. In so far as, it has been urged that the Court has a power of procedural review, again, there can be no dispute to that. However, no ground of procedural review has been made out in the facts of the present case. As to the third line of reasoning adopted by Sri Girish Chand Sinha relying on the provisions of the Commercial Courts Act, the same is left undetermined as this Court clearly has the power to review and correct it's record by virtue of Article 215 of the Constitution of India.

29. Put up the review application for consideration on 01.02.2021.

(2021)01ILR A1135
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2021

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Appeal U/s 37 of Arbitration & Conciliation Act 1996 No. 36 of 2020

Bhartiya Rashtriya Rajmarg Pradhikaran ...Appellant

Versus

Rajesh Kaushik & Ors. ...Opp. Parties

Counsel for the Appellant:
Sri Pranjal Mehrotra, Sri Gaurav Pundir

Counsel for the Respondents:
Sri Shesh Kumar Srivastava, Sri Gaurav Pundir

Civil Law-Award passed for re determining amount of compensation-Objection filed against the award-held not maintainable-in no event the arbitrator can remit the matter to competent authority -it's a power of Court or Tribunal in Appeal or Revision specifically granted by a statute-Award being passed beyond the scope of reference-award was open to challenge in terms of section 34(2) (a) (iv).

Appeal disposed. (E-7)

List of Cases cited: -

1. Writ C No.8347 of 2018 (Rajiv Memorial Academy Welfare Society Vs. U.O.I. & ors.

2. Ashok Leland Ltd. Vs St.of T.N.& anr., (2004) 3 SCC 1 i

3. S. P. Manohar Reddy & Bros. Vs Maharashtra Krishna Valley Development Corpn., (2009) 2 SCC 494

4. Indian Oil Corp. Ltd. & ors. Vs M/S Raja Transport (P) Ltd., (2009) 8 SCC 520

5. Writ C No. 8347 of 2018 (Rajiv Memorial Academy Welfare Society Vs. U.O.I. & ors.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Sri Pranjal Mehrotra, learned counsel for the appellant through video

conferencing and Sri Shesh Kumar Srivastava, learned counsel for the respondent-claimant who is present in Court. Sri Gaurav Pundir, learned counsel is also present through video conference on behalf of a brother of respondent no.1. His impleadment application stands rejected by order dated 25.11.2020. Hence, he was not heard.

2. The present appeal is directed against the order dated 07.03.2020 passed by the District Judge, Mathura in Miscellaneous Arbitration Case No.35 of 2017, Bhartiya Rashtriya Rajmarg Pradhikaran Vs. Rajesh Kaushik & Others. By that order, the learned District Judge, Mathura has rejected the objection filed by the appellant under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act'), as not maintainable. That objection had been filed against the award of the arbitrator dated 25.10.2016, referable to Section 3-G (5) of The National Highways Act, 1956 (hereinafter referred to as the 'Highways Act') - arising from the order dated 31.01.2013 passed by the 'competent authority'. Perusal of that order reveals, amongst others, compensation for the 3600 sq. mtrs land, plot no.332/1M belonging to the respondent had been determined. Being aggrieved, the respondents had invoked arbitration under Section 3-G (5) of the Highways Act. By that award, the learned arbitrator, directed the 'competent authority' under the 'Highways Act' to redetermine the amount of compensation under Section 3-G (1) of the Highways Act.

3. Sole submission advanced by learned counsel for the appellant is, though there was no defect in the arbitration proceedings thus instituted, however, the learned arbitrator has acted without jurisdiction in remitting the matter to the competent authority to redetermine the amount of compensation. Referring to Section 3-G (7) of the Highways Act and a Division Bench decision of this Court in **Writ C No.8347 of 2018 (Rajiv Memorial Academy Welfare Society Vs. Union of India & 4 Others**, it has been submitted that the only power vested with the arbitrator was to determine the amount of fair compensation. While doing so, the learned arbitrator had no power vested in him, either under the Highways Act or the Act - to act as an appeal court or to even otherwise pass an order to set aside the order of the competent authority and to remit the matter back for redetermination.

4. Then, referring to Section-34(2)(a)(iv) read with Section-34(2)(b)(ii) of the Act, it has been submitted that the award of the learned arbitrator to the extent, he has remitted the matter back for redetermination, is both outside the scope of implied reference and against the public policy of India.

5. On the contrary, learned counsel for the respondent-claimant submits, the competent authority had by order dated 31.01.2013 correctly valued 1200 sq. mtrs. out of the total area 3600 sq. mtrs, as non-agricultural land. The balance area 2400 sq. mtrs was undervalued as agricultural land. Hence arbitration had been sought. By his award dated 25.10.2016, the learned arbitrator has valued the 2400 sq. mtrs. land also as non-agricultural land with commercial potential. The rate of non-agricultural land being specified in the order dated 31.01.2013 passed by the competent authority, the total compensation amount may be paid out to the claimant, accordingly. It is his submission that nothing remains to be done by the

competent authority and the respondent-claimant has already become entitled to payment at the enhanced rate. Accordingly, the learned District Judge has rightly rejected the objections filed against the award dated 25.10.2016.

6. Having heard learned counsel for the parties and having perused the record, there can be no two opinions about the scope of the proceedings before the arbitrator. Such proceedings arose purely in terms of the provision of Section 3-G (5) of the Highways Act. For ready reference, the said provision reads as below:

"(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government."

7. Thus, such arbitration may arise only at the instance of a party to whom the amount determined by the competent authority may not be acceptable. That party may apply for determination of the amount by the arbitrator and for no other purpose. The scope or terms of reference have been chosen or determined or limited by the legislature to determination of the amount payable to the claimant. In **Ashok Leland Ltd. v. State of Tamil Nadu & Another, (2004) 3 SCC 1** it has been observed:

"94.The word "determination" must also be given its full effect, which presupposes application of mind and expression of the conclusion. It connotes the official determination and not a mere opinion of (sicor) finding".

8. Then the law recognises arbitration as a private dispute resolution mechanism agreed upon by the parties, **P. Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corpn., (2009) 2 SCC 494**. It is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties, **Indian Oil Corp. Ltd. & Others v. M/S Raja Transport (P) Ltd., (2009) 8 SCC 520**. Therein a final determination of a matter in dispute is made by the judgement of one, two or more persons, called the arbitrators/Arbitral Tribunal. The concept of any further or other proceeding to resolve the dispute that may be made a subject matter of reference to an arbitral tribunal, is an absolute anathema to the founding principle of arbitration. It is for that reason, that a limited scope of challenge exists against any award of arbitrator/s, under section 34 of the Act.

9. There is no provision or general principle in law, that may allow an arbitrator to act outside the scope or terms of his reference. An arbitrator to a dispute comes into existence upon an agreement between the parties to the dispute and his jurisdiction is confined to adjudicate the dispute brought by them. Arbitration under section 3-G (5) of the Highways Act is a proceeding to resolve the dispute between the parties to determine the fair amount of compensation, by the arbitrator. It is not a proceeding to judge the correctness of the order already passed by the competent authority.

10. While it may be true that in the conduct of such an arbitration proceeding, the order passed by the competent authority may come to be read in evidence, however, the subject matter of the arbitral proceedings under section 3-G (5) of the Highways Act would never be to uphold or to set-aside the existing order passed by the

competent authority but to independently determine the amount of compensation payable to the claimant. It is possible that no enhancement may arise upon arbitration however, it would not, and it cannot amount to upholding the order of the competent authority.

11. Irrespective of the fate of the arbitration proceedings, the order of the competent authority would not merge in the award rather it would continue to exist, though its enforceability (as to quantum of compensation payable), may, in given facts be eclipsed by the arbitral award. It is so because, the terms of reference arise from the plain language of section 3-G (5) of the Highways Act. That provision of law would ever limit the scope of arbitration proceedings and command the arbitrator to himself determine the just amount of compensation.

12. Thus, in no event, the arbitrator may set aside the order passed by the competent authority and he may never remit the matter to the original/competent authority to pass a fresh order. Typically, that power is a power of a Court or Tribunal sitting in appeal or revision that too, if specifically granted by statute, and not implied. In absence of any such power given to the arbitrator either under the Highways Act or the Act, the direction issued by the arbitrator is a nullity in law.

13. Perusal of the order passed by the arbitrator again does not leave any manner of doubt that he has not determined the amount of compensation to be paid, since, he has neither mentioned the rate at which compensation may be awarded for 2400 sq. mtrs of land nor he has quantified the total compensation amount. In fact, he has specifically remitted the matter to the competent authority for that purpose. That direction clearly falls foul with Section 3-G (5) of the Highways Act.

14. Hence the award was open to challenge in terms of Section 34(2)(a)(iv) of the Act being beyond the scope of reference to arbitration and also under Section 34(2)(b)(ii) of the Act, being contrary to be public policy of India.

15. Therefore, the learned District Judge has erred in rejecting the objections raised by the appellant as not maintainable. The above conclusion is also fortified by the view taken by the Division Bench of this Court in ***Writ C No.8347 of 2018 (Rajiv Memorial Academy Welfare Society Vs. Union of India & 4 Others***. Accordingly, the order dated 07.03.2020 cannot be sustained and it is set aside.

16. In absence of any other challenge raised in this appeal and in view of the language of the proviso to Section-34(2)(iv) of the Act, the newly appointed arbitrator may determine the compensation for the land in question on the same parameters as approved in the award dated 25.10.2016. For purpose of clarity, it is provided, it is only the direction of remand that is erroneous, however, the entire award has been set aside on account of peculiar limitation of the law.

17. The award of the arbitrator dated 31.01.2013 is also set aside with leave to the claimant-respondent to seek a fresh arbitration. That arbitration may be held between the appellant and the claimant respondent only. Such exercise may be completed, as expeditiously as possible, preferably within a period of three months from today. The amount that has been paid to the respondent-claimant pursuant to the

earlier order passed in the present appeal may remain in deposit with him. It shall abide by the final computation made by the arbitrator, pursuant to this order.

18. With the above observations, the appeal is **disposed of**. No order as to costs.

(2021)01ILR A1139
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.04.2020

BEFORE

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

Writ B-No. 3934 of 1985

Smt. Ram Dei & Ors. ...Petitioners
Versus
Joint Director of Consolidation, Ghazipur & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vishnu Singh, Sri A.K. Rai, Sri V.K. Rai, Sri V.K. Singh

Counsel for the Respondents:
S.C., Sri A.R. Dubey, Sri L.P. Singh, Sri S. Rai, Sri Bhola Nath Yadav, Sri Ganesh Pandey, Sri R.N. Singh, Sri Ram Niwas Singh, Sri V.K. Chandel, Sri V.K.S. Chandel

A. Civil Law – Non-concurrent determination of objections - Transfer of Property Act: Section 6(a), 43; Uttar Pradesh Consolidation of Holdings Act, 1953: Section 9-A(2); U.P.Z.A. & L.R. Act: Section 174, 229-B.

Transfer of Property Act: Section 43 – *Feeding the estoppel* - a right based on the principle of feeding the estoppel is available, so long as the transferee does not know for a fact that the transferor who represents title in himself, does not hold it. In a case where the transferee knows for a fact that the transferor does not hold title that he transfers by his deed, a subsequent acquisition of that title by the transferor, would not serve to feed the estoppel. (Para 27)

Evidently, during proceedings before the Deputy Director of Consolidation, the petitioner had ample opportunity to take a plea based on Section 43 of the Transfer of Property Act, which she never did. The Revisional Authority's judgment is testimony to the fact that no such plea was taken before the said Authority by the petitioner. (Para 33)

A plea based on Section 43 of the Transfer of Property Act would always give rise to a mixed question of fact and law. It is not a plea giving rise to one of those pure questions of law that may be determined, abstracted from facts by this Court, at a stage as late as address of arguments with no foundation laid for it. A plea of that kind that may be urged, bereft of any foundation is classically associated with a case about total lack of jurisdiction in the Court, relating to the subject matter. A plea and a question of that kind is invariably based on facts, of which the Court must take judicial notice. The present plea based on Section 43 of the Transfer of Property Act is far from it.

In the considered opinion of the Court, it cannot be examined on the existing state of the parties' pleadings here, and before the Revisional Authority. (Para 34)

B. The opinion of the Authority of first instance, on an issue that primarily rests on evaluation of oral evidence, ought not to have been disturbed by the Appellate and the Revisional Authorities, who did not see the witnesses. Wherever an issue arises that is primarily to be decided on the basis of oral evidence, the Appellate Court should invariably accept the Trial Court's evaluation, unless the conclusions drawn or the reasoning adopted is patently flawed. (Para 37)

When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the

trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. When there is a direct conflict between the oral evidence of the parties, and there is no documentary evidence that clearly affirms one view or contradicts the other, and there is no sufficient balance of improbability to displace the trial court's findings as to the truth of the oral evidence, the appellate court can interfere only on very clear proof of mistake by the trial court. (Para 38)

This principle about pre-eminence accorded to the Trial Court, in the matter of appreciation of oral evidence, is based on the reasoning that the Trial Court had advantage of watching the witnesses' demeanour, which the Appellate Court or still higher fora did not. In judging the truth of a statement in the testimony, **it is of prime importance that not only what the witness says be considered, but also how he says it. The demeanour reveals the unspoken truth, or the truth or falsehood of spoken words.** (Para 40)

The principle that primacy be accorded to the evaluation of purely oral evidence by the Trial Judge/Court/Authority of first instance, must show for a fact that the incumbent Judge or Presiding Officer, who wrote judgment for the Trial Court/Authority of first instance, was the same Presiding Officer who had heard and recorded evidence in the matter. This would then be the modification which the long standing principle must suffer in the changed times. (Para 40)

In the present case, there is nothing on record to suggest that the Presiding Officer in this case, Sri. C.P.N. Singh, the then Consolidation Officer-II, Jamania, District Ghazipur, was the incumbent Presiding Officer, before whom the witnesses testified. This is not asserted for a fact in the writ petition, though a ground based on the principle has been taken. This Court, therefore, is not minded to accept the contention of the learned Counsel for the petitioner that urges a blanket application of the classical principle. This Court, may, however, hasten to add that the principle would still apply in all cases where a party urges a case on its basis and shows that the Judge who heard evidence was the same Judge/Presiding Officer, who delivered judgment. (Para 41)

C. Mutation proceedings are summary proceedings to identify the person to be recorded, primarily for fiscal purposes. There is absolutely no justification for the Authorities below to have considered the findings of the Mutation Authorities as relevant evidence in title proceedings. The proceedings in hand arise out of objections u/s 9-A(2) of the Uttar Pradesh Consolidation of Holdings Act, 1953, which to all intents and purposes, are title proceedings. (Para 50)

A perusal of findings by the Appellate and the Revisional Authorities show that these Authorities have considered for relevant evidence, the decision of the Mutation Authorities inter partes as also the judgments in the declaratory suit. The proceedings of the suit never reached terminus ad quem. So far as the decisions of the Mutation Authorities are concerned, it is settled beyond cavil that those findings are in no way relevant in title proceedings. (Para 50)

D. Determination of identity through finger print/thumb impression - The law does not prohibit a Court at all from undertaking a comparison of the disputed and the admitted finger prints, but finger print identification being a perfect and highly evolved science by now, it is perilous to undertake an unassisted enterprise of this kind for any Court. A perusal of findings reveal that the Settlement Officer of Consolidation has ventured to compare the disputed and the admitted finger prints. He has clearly done so without the assistance of an expert. A simple magnifying glass is all that has been called in aid. (Para 52)

The Indian Evidence Act, 1872: Section 73 and 45 are the statutory provisions that govern and regulate the jurisdiction and powers of the Court, to undertake a comparison of the disputed and the admitted finger print specimens. In the case of an Authority invested with judicial functions, like the Consolidation Authorities to whom the last mentioned provisions of the Evidence Act may not apply

proprio vigore, the same would apply on principle. (Para 55)

If a Court is constrained to opine without the assistance of one or more experts, about the genuineness of a finger print/thumb impression, its reasons must be expressed in terms understood and known to the science of finger print identification. For the purpose, the Court must look into an authoritative text book on the subject and seek assistance of Counsel, before recording findings based on reputed and recognized parameters. (Para 58)

In the present case, the opinion expressed by the Settlement Officer of Consolidation, appears to be utterly uninformed and based on no more than what is popularly called, "common sense". This kind of a reasoning bereft of reference to the cardinal principles, evolved by the science of finger print identification, cannot be accepted to be any reason at all. The findings of the Settlement Officer of Consolidation on this count must be held to be bereft of reason. It would, therefore, vitiate the conclusion. (Para 65)

Writ Petition allowed. (E-3)

Precedent followed:

1. Hardev Singh Vs Gurmail Singh (dead) By LRs, (2007) 2 SCC 404 (Para 25)

2. Biswanath Sahu & ors. Vs Mrs. Tribeni Mohan (dead) by L.R.s & ors., AIR 2003 Ori 189 (Para 26)

3. Jumma Masjid, Mercara Vs Kodimaniandra Deviah & ors., AIR 1962 SC 847 (Para 28)

4. Jharu Ram Roy Vs Kamjit Roy & ors., (2009) 4 SCC 60 (Para 29)

5. Mahipat Missir & ors. Vs Ganpat Sah & ors., AIR 1963 Pat 277 (Par 30)

6. Ram Sarup Gupta Vs Bishnu Narain Inter College, (1987) 2 SCC 555 (Para 31)

7. Madhusudan Das Vs Narayanibai (Deceased) by LRs & ors., (1983) 1 SCC 35 (Para 38)

8. Thiruvengadam Pillai Vs Navaneethammal & anr., (2008) 4 SCC 530 (Para 56)

Present petition assails impugned orders dated 26.02.1985 and 04.12.1972 passed by the Deputy Director of Consolidation, Ghazipur and the Settlement Officer of Consolidation, Ghazipur.

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

1. This writ petition questions a non-concurrent determination of objections under Section 9-A(2) of the Uttar Pradesh Consolidation of Holdings Act, 1953 (for short, the Act) by the Consolidation Authorities.

2. The objections were brought by the petitioner, Ram Dei, since deceased and represented by her LRs, against one Smt. Sona Kunwar, represented before this Court by Ramji Tiwari, since deceased. Ramji Tiwari, original respondent no. 3 to this writ petition, is now represented by his heirs and legal representatives, substituted *pendente lite*. The objections also sought relief against respondent nos.4 and 5, that is to say, Jagardev Tiwari and Mukhdev Tiwari. Both these respondents have died pending this petition and are represented by their heirs and legal representatives. Before this Court, the claim of the petitioner is confined to the interest of Ramji Tiwari in terms morefully set out hereinafter. So far as respondent nos.4 and 5 are concerned, it appears that parties have buried the hatchet and are at peace with the way the event has gone before the Authorities below. Thus, there appears to be no conflict or *lis inter se* the petitioner on one hand and respondent nos.4 and 5 on the other, before this Court. So far as respondent no.6 is concerned, the said respondent asserts herself to be Sona Kunwar, mother of the third respondent and

wife of one Sarju Tiwari. This Sona Kunwar has been called an impostor by another woman, who contested these proceedings and claimed to be the real Sona Kunwar. Sona Kunwar's interest is represented by respondent no.3, now before this Court through his legal representatives.

3. The dispute in this petition relates to agricultural land located in two different villages of District Ghazipur. One of these is *Khata* no.52, admeasuring 2 *bigha* 2 *biswa* 5 *dhoor*, situate at Village Sindura, Pargana Jamania, District Ghazipur. In the basic year, this *Khata* was recorded in the name of Ram Naresh Tiwari son of Devi Tiwari, Smt. Ram Dei Kunwar wife of Basdev Tiwari and Smt. Sona Kunwar daughter of Ram Swarup Tiwari and wife of Sarju Tiwari. The other part of land, subject matter of dispute between parties is located at Village Kusi, Pargana Jamania, District Ghazipur. It comprises *Khata* nos.245 and 542, admeasuring a total of 7 *bighas* 17 *biswas* 2 *dhoors*. In the basis year, it is recorded in the name of Jagardev Tiwari and Mukhdev Tiwari, both sons of the late Ram Naresh Tiwari, Smt. Ram Dei Kunwar wife of Basdev Tiwari and Smt. Sona Kunwar daughter of Ram Swarup Tiwari, wife of Sarju Tiwari.

4. The land above described above, shall hereinafter be called as "the *Khata* in question'.

5. It would be apposite to indicate the relationship between parties traceable to their ancestors before setting out the origin and course of proceedings, that have led to this petition. Ram Swarup Tiwari, Mathura Tiwari and Ram Naresh Tiwari were brothers. The *Khata* in question is part of an ancestral holding of these brothers, the fuller detail of which may not be very relevant. Sona Kunwar is the daughter of Ram Swarup Tiwari. Her mother is Smt. Phula Kunwar, wife of Ram Swarup Tiwari. Smt. Ram Dei Kunwar (the petitioner) is wife of Basdev Tiwari son of Mathura Tiwari. Jagardev Tiwari and Mukhdev Tiwari are sons of the late Ram Naresh Tiwari. It appears that Ram Swraup Tiwari died sometime before the year 1938, and Smt. Phula Kunwar inherited his rights in the then larger joint *khata* of the family, comprising his brothers and co-laterals. It is common ground between parties that Phula Kunwar sued for partition, that led to a partition decree dated 31.03.1938. This decree brought Smt. Phula Kunwar a share of 1/6th in the joint *khata* of her husband's two brothers and co-laterals. The aforesaid 1/6th share in the erstwhile joint *khata*, that came to be partitioned and fell to the share of Smt. Phula Kunwar vide decree dated 31.03.1983, makes for the land in dispute.

6. It appears from some stray remark in the judgment of the Consolidation Authorities that during the lifetime of Smt. Phula Kunwar, her rights to the land in dispute were questioned, despite the partition decree. This was done by some members of the family, like one Basgit and some others, but that is of no consequence. The land in dispute came to be recorded in the name of Smt. Phula Kunwar during her lifetime and her right to it is not in question. Phula Kunwar had a lone child, a daughter Smt. Sona Kunwar. Smt. Sona Kunwar was married to Sarju Tiwari. Smt. Sona Kunwar had a son, Ramji Tiwari and a daughter, Shiv Kumari. Ramji Tiwari son of Sarju Tiwari and Smt. Sona Kunwar is the third respondent here. There is no claim or issue about the land in dispute on behalf of Shiv Kumari. Smt. Phula Kunwar admitted Ramji Tiwari, her daughter's son as a co-tenant along with herself, in the

land in dispute. This was done with the permission of the then *Zamindar*. In consequence, the name of Ramji Tiwari came to be recorded as a co-tenant along with Smt. Phula Kunwar. Smt. Phula Kunwar passed away on 25.11.1958 intestate. Immediately before Phula Kunwar's death, the land in dispute was jointly held by Ramji and Smt. Phula Kunwar, with each co-sharer holding a half share. Upon Smt. Phula Kunwar's death, her share was inherited by her daughter, Smt. Sona Kunwar, Ramji's mother.

7. It appears that there was some resistance to Smt. Sona Kunwar's right to inherit Smt. Phula Kunwar, her deceased mother. This resistance was put up by co-laterals of Phula Kunwar's father. It did not take the form of an outright suiting of rights in an action for title. Rather, it came about in the form of a mutation application made on behalf of Kapil Dev, Basgit and Ambika on 16.12.1958, asking to be mutated in place of the late Phula Kunwar. In those proceedings, Sona Kunwar was ordered to be mutated in place of Smt. Phula Kunwar. It is recorded for a fact in the Consolidation Officer's order that Smt. Sona Kunwar did not apply for mutation in her favour. However, mutation in her favour was made on 30.09.1959. It does not appear that co-laterals of Sona Kunwar's mother's father, who initially applied for mutation upon Phula Kunwar's death, pursued the matter any further. However, before mutation in favour of Smt. Sona Kunwar regarding her half share in the land in dispute, inherited from her mother could be carried out, Ramji executed a registered sale deed on 14.09.1959, relating to the land in dispute (the entire land that was the joint holding of himself and his maternal grandmother, Smt. Phula Kunwar) in favour of Smt. Ram Dei Kunwar and Ram Naresh. Smt. Ram Dei Kunwar, the petitioner here, made an application for mutation on the basis of the last mentioned sale deed. The application was objected to by Smt. Sona Kunwar. The Sub-Divisional Officer passed an order granting mutation in favour of Smt. Ram Dei to the extent of Ramji's share, that is to say, half share in the land in dispute, whereas the other half was allowed to stay back with Smt. Sona Kunwar on the basis of succession. This order was passed by the Sub-Divisional Officer in mutation proceedings on 16.12.1960. The last mentioned order was appealed by Smt. Ram Dei to the Commissioner of the Division. The appeal was dismissed and the mutation order was affirmed by the Commissioner vide his order of February the 22nd, 1961. Just a few days before the Commissioner decided the mutation appeal, the petitioner claimed that a registered sale deed dated 15.02.1960 was executed in her favour by Smt. Sona Kunwar, relating to that half share of the land in dispute, without which the Mutation Authority of first instance had determined that it would go by succession to Smt. Sona Kunwar.

8. It must be remarked here that the petitioner's stand about this sale deed is that it was secured from Smt. Sona Kunwar *ex abundanti cautela*. This stand is founded on the reasoning that Ramji, in fact, held title to the land in dispute in its entirety and nothing went to Smt. Sona Kunwar, but to avoid uncertainties of litigation, the petitioner took the half share from Smt. Sona Kunwar through the registered sale deed dated 15.02.1960. It must also be remarked here that the contrary stand of Smt. Sona Kunwar, now represented by respondent no.3 through his legal representatives, is that the sale deed dated 15.02.1960 was never executed by Smt.

Sona Kunwar. Rather, the said sale deed is a bogus document, secured by setting up an impostor in place of Smt. Sona Kunwar. This is a matter about which the parties are much at issue, and details about it would figure a little later in this judgment.

9. After dismissal of the appeal by the Commissioner from the Sub-Divisional Officer's order regarding mutation vide order dated 22.02.1961, the petitioner, Smt. Ram Dei applied for mutation afresh on 31.04.1961. This claim was apparently founded on the sale deed dated 15.02.1960, purportedly executed by Smt. Sona Kunwar for her half share. This mutation application was brought arraying Smt. Sona Kunwar as the opposite party, properly so called. The application was rejected by the Sub-Divisional Officer by an order dated 18th January, 1963.

10. Smt. Ram Dei, failing in her endeavour to secure mutation over the entire land in dispute, that is to say, one that included the share inherited by Smt. Sona Kunwar, filed a declaratory suit under Section 229-B of the U.P. Z.A. & L.R. Act. By her suit aforesaid, Smt. Ram Dei claimed declaration of title to the land in dispute on the basis of registered sale deed dated 14.09.1959 from Ramji and the sale deed dated 15.02.1960, claimed to have been executed in her favour by Smt. Sona Kunwar. The suit aforesaid was tried and dismissed by the Sub-Divisional Officer vide his judgment and decree of October, the 29th 1965. The said decree was appealed to the Commissioner by Smt. Ram Dei. The appeal was dismissed by the Additional Commissioner, Varanasi Division, Varanasi vide judgment and decree dated 30.12.1966. The Appellate Court held Smt. Sona Kunwar entitled to a half share in the land in dispute, whereas the other half was held in favour of Smt. Ram Dei and Ram Naresh, the assignees from Ramji. A further appeal was carried to the Board of Revenue from the appellate decree by Smt. Ram Dei, the petitioner. Pending the aforesaid second appeal before the Board of Revenue, consolidation proceedings were notified, under Section 4(2) of the Act, leading to abatement of the appeal.

11. Post abatement of her second appeal, the petitioner brought these objections under Section 9-A(2) of the Act on 21.09.1970. The case of the petitioner in her objections as briefly extracted in the order of the Consolidation Officer, is this: Ramji was admitted as a co-tenant by Smt. Phula Kunwar in the land in dispute with the permission of the *Zamindar*. A *Praman Patra* was issued in favour of Ramji, that shows him to be a co-tenant along with his maternal grandmother, Smt. Phula Kunwar. Smt. Phula Kunwar died on 25.11.1958. In consequence of her death, the land in dispute, that is to say, the entire *khata* devolved upon Ramji, whereof he became the sole *bhumidhar*, under Section 174 of the U.P. Z.A. & L.R. Act. Ram Dei purchased the land in dispute from Ramji on 14.09.1959 through a registered sale deed. The petitioner has acquired *bhumidhari* rights relating to the land in dispute through the aforesaid conveyance. The further case appears to be that the petitioner entered possession of the land in dispute to the extent of the whole of it on the basis of the sale deed dated 14.09.1959, executed by Ramji. However, a subsequent sale deed dated 15.02.1960 was got executed by Smt. Sona Kunwar, in order to avoid litigation.

12. Some amendment to the objections was sought which does not

appear to say anything to add to the case. It was nevertheless allowed by the Consolidation Officer. However, in consequence of the amendment, Ramji was made a party to the objections. It is recorded by the Consolidation Officer that Ramji, respondent no.3, now represented by his LRs, did not appear or file a written statement. The case is recorded to have proceeded *ex parte* against Ramji before the Consolidation Officer. It was ordered to so proceed vide order dated 11.01.1970.

13. Smt. Sona Kunwar - one of the two Sona Kunwars - contested the objections with the case that she has succeeded to a half share in the land in dispute, that is to say, the share of her mother, Smt. Phula Kunwar; the remaining half share being held by her (Sona Kunwar's) son, Ramji. It appears to have been pleaded by Smt. Sona Kunwar before the Consolidation Officer that the petitioner's suit under Section 229-B, based on the same cause of action, was tried and dismissed. Her appeal from the Court of first instance failed before the Additional Commissioner. It is also her further case that no appeal from the appellate decree was preferred by the petitioner, resulting in the petitioner's claim being barred by *res judicata*. This Sona Kunwar urged that the petitioner's objections be rejected.

14. Before the Consolidation Officer on 17.10.1970, another woman claiming herself to be Sona Kunwar, appeared in Court and sought impleadment. She admitted the execution of the sale deed dated 15.02.1960 by her and urged that she is the real Sona Kunwar, wife of Sarju Tiwari and Ramji's mother.

15. On the pleadings of parties, the Consolidation Officer framed the following issues:

"(1) Whether Smt. Ramdeo Kunwar (sic Ram Dei) took sale deed from Smt. Sona Kunwar and she is in possession?

(2) Whether the name of Smt. Sona Kunwar is fictitiously recorded?

(3) What is the share of the parties?

(4) What is the share of the parties?

(5) Whether Smt. Sona Kunwar or Ramji had right to executed (sic execute) the sale deed?

(6) Which of the two Sona Kunwar is genuine Sona Kunwar and its effect?"

16. The petitioner, Ram Dei examined four witnesses in support of her case, which does not include herself. She filed eight documents on 06.08.1971. Smt. Sona Kunwar, who supported execution of the sale deed dated 15.02.1960 in favour of the petitioner, examined two witnesses in support of her case, including herself. She filed eight papers on 06.08.1971, that constitute her documentary evidence. She was represented before the Consolidation Officer by Sri Bachchu Singh, Advocate. She is described by the Consolidation Officer and by the other Consolidation Authorities in the judgments impugned in a rather long-winded description, that says "Sona Kunwar represented by Sri Bachchu Singh, Advocate". This Sona Kunwar is impleaded as respondent no.6 to this petition. For ease of reference, the Sona Kunwar, last mentioned, who supports the petitioner's case, shall hereinafter be called, "Sona Kunwar-I'. The other Sona Kunwar, who contested the objections, examined herself in the witness-box, besides five other witnesses. This Sona Kunwar filed some 101 papers by way of documentary evidence. She was represented before the

Consolidation Officer by Sri Mohd. Taufiq Khan, Advocate. Again, she is identified in the judgment of the Consolidation Officer and the Superior Consolidation Authorities by reference to her learned Counsel's identity. In this judgment, Sona Kunwar, who contested the petitioner's claim, shall be called, "Sona Kunwar-II'. These references to Sona Kunwar as "I" or "II", shall figure hereinafter where the issue related to her identity is considered; elsewhere she would be referred to as "Sona Kunwar'.

17. The Consolidation Officer tried the objections and allowed the petitioner's claim by his judgment and order dated 04.06.1972. He ordered the name of Smt. Sona Kunwar to be expunged from the land in dispute, and a fortiori from the *khata* in question. It was furthered ordered that in the *khata* in question, the name of Ram Dei, the petitioner be recorded to the extent of a 4/5th share in both villages, whereas a 1/5th share be recorded in the name of Jagardev and Mukhdev, sons of Ram Naresh. Noting the fact that the name of Ram Naresh, since deceased, continued to be recorded in the *khata* relating to Village Sindura, it was ordered to be expunged and the names of Jagardev and Mukhdev, sons of Ram Naresh, entered.

18. From the aforesaid judgment of the Consolidation Officer, five appeals were carried to the Settlement Officer of Consolidation; two by Smt. Sona Kunwar and three by the petitioner, Ram Dei. Smt. Sona Kunwar's Appeals were numbered as 1862 and 1863 whereas those by the petitioner, Ram Dei, were numbered as Appeals nos.1895, 1896 and 1897. Smt. Sona Kunwar by her two appeals sought reversal of the judgment of the Consolidation Officer to the extent her name was ordered to be expunged for her half share in the land in dispute. The appeals were two in number, inasmuch as the land in dispute was located in two different villages. The petitioner's appeals sought exclusion of the names of Jagardev and Mukhdev, sons of Ram Naresh, on ground that the petitioner was entitled to the entire land comprising the *khata* in question that she had purchased from Ramji, who had title to the whole of it.

19. The Settlement Officer of Consolidation heard and determined the five appeals vide judgment and order dated 04.12.1972, in the manner that Smt. Sona Kunwar's appeals were allowed and the petitioner's appeals, numbering three, were dismissed. The Settlement Officer of Consolidation declared a share for the parties in the manner that the petitioner, Ram Dei was held entitled to a 2/5th share in the *khata* in question, whereas Jagardev and Mukhdev were found to have a 1/10th share. Smt. Sona Kunwar was entitled to a half share in the said *khata*. This determination of shares in the *Khata* in question was made on the basis that Smt. Sona Kunwar was entitled to a half share in the land in dispute. It must be remarked here that it is not clear how a half share in the land in dispute led the Settlement Officer to determine a half share for Smt. Sona Kunwar in the *Khata* in question. This Court says so as the case of the parties is about a dispute whether Smt. Sona Kunwar holds a half share in the land in dispute or none at all. Even if, Sona Kunwar is held to have a half share in the land in dispute, it is not indicated in the order of the Settlement Officer how that half share would extend to the *Khata* in question that is much larger than the land in dispute.

20. The petitioner, Ram Dei assailed the judgment and order of the Settlement

Officer of Consolidation through five revisions, under Section 48 of the Act, that she preferred to the Deputy Director of Consolidation, Ghazipur. These revisions were numbered as Revisions nos.465, 581, 464, 463 and 366. Of these five revisions, two revisions were referable to the appellate judgment rendered in the appeal preferred by Smt. Sona Kunwar, by which the Consolidation Officer's order directing her name to be expunged from the land in dispute was set aside, granting Sona Kunwar a half share. The other three revisions were directed against that part of the appellate judgment by which the petitioner's claim to exclude Jagardev and Mukhdev was rejected by the Settlement Officer of Consolidation. All the revisions were heard together by the Deputy Director of Consolidation with Revision no.581 being treated as the leading case. The Deputy Director of Consolidation by his judgment and order dated 26.02.1985 dismissed all the revisions and affirmed the Settlement Officer of Consolidation.

21. Disillusioned by the Revisional and the Appellate orders, the petitioner has instituted this writ petition.

22. Heard Sri Vishnu Singh, learned Counsel appearing on behalf of the petitioners and Sri Bhola Nath Yadav, learned Counsel appearing on behalf of respondent nos. 3/1, 3/2 and 3/3. No one has appeared at the hearing on behalf of the heirs and legal representatives of respondent nos. 4, 5, as also respondent no.6.

23. The Court has perused the writ petition, the two counter affidavits filed on behalf of respondent nos. 3/1 to 3/3 and the relative rejoinder affidavits.

24. Sri Vishnu Singh, learned Counsel for the petitioners has assailed the judgments of the Revisional and the Appellate Authorities on various counts. The foremost that he urges is based on a development that took place in the mortal course of human nature. He has invited the attention of the Court to the Revisional Authority's judgment, where it is recorded that Smt. Sona Kunwar died pending revision and her interest is now represented by Ramji, her son. Sri Vishnu Singh has made it bold to say that even if it be assumed that when Ramji executed the sale deed dated 14.09.1959, relating to the whole of the land in dispute, he had no more title than to a half share in it, the petitioner's claim now stands established owing to the supervening death of Sona Kunwar. He submits that if the third respondent's case were accepted that at the time of execution of the sale deed of 1959 all that Ramji could transfer was a half share in the land in dispute, the other half being inherited by Smt. Sona Kunwar from her mother, once Ramji has inherited the remainder from Smt. Sona Kunwar, pending proceedings before the Revisional Authority, he is bound by his deed of 1959 to the extent of whole of the land in dispute. According to the learned Counsel for the petitioners the supervening acquisition of title by Ramji for the deficient half from his mother, if that be the case, makes the sale deed of 1959 an effective conveyance for the whole of the land in dispute by dint of the principle known as, "*feeding the estoppel*". He submits that the right based on this principle flows from the provisions of Section 43 of the Transfer of Property Act, 1882. According to the learned Counsel, the principle embodied in Section 43 (supra) mandates that a transferor's interest in immovable property, who fraudulently or mistakenly represents that he holds a certain interest in the property which, in

fact, he does not have but subsequently acquires, goes to the transferee who has taken the property believing the representation, whether mistaken or fraudulent, to be true. In these circumstances, according to the learned Counsel, the transferor cannot be heard to say that at the time he made the transfer, he had no interest in the subject matter of conveyance. Once he acquires the non-existent interest, transferred by his solemn deed, the subsequently acquired interest would go to the transferee.

25. Sri Vishnu Singh, learned Counsel for the petitioners has relied on a decision of the Supreme Court in **Hardev Singh vs. Gurmail Singh (dead) By LRs, (2007) 2 SCC 404.** He has invited this Court's attention to paragraphs 14 and 15 of the report in **Hardev Singh** (supra), where it is held:

"14. The doctrine of feeding the estoppel envisages that "where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition, goes automatically to the earlier grantee, or as it is usually expressed, feeds the estoppel".

15. The principle is based on an equitable doctrine that a person who promised to perform more than he can perform must make good his contract when he acquires the power of performance. The difference between the ambit of Sections 41 and 43 of the Act is apparent. Whereas Section 41 provides that a transfer by an ostensible owner cannot be avoided on the ground that the transferor was not authorised therefor, subject to the condition that the transferee should take reasonable care to ascertain that the transferor had power to make the transfer and to act in good faith before a benefit thereof is claimed by him. Section 43, on the other hand, enables the transferee to whom a transferor has made a fraudulent or erroneous representation to lay hold, at his option, of any interest which the transferor may subsequently acquire in the property, unless the right of any subsequent purchaser for value without notice is in effect."

26. Learned Counsel for the petitioners has placed further reliance, in support of his submission, upon a decision of the Orissa High Court in **Biswanath Sahu and others vs. Mrs. Tribeni Mohan (dead) by L.R.s and others, AIR 2003 Ori 189.** It has been held in paragraph 10 of the report in **Biswanath Sahu and others** (supra) thus:

"10. If the case is looked from another angle, it will be evident that execution of the sale deed has to be upheld as valid. Reference may be made to S. 43 of the Transfer of Property Act. Said Section provides as follows:

"Transfer by unauthorised person who subsequently acquires interest in property transferred -- Where a person (fraudulently or erroneously) represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operated on any Interest which the transferor may acquire in such property at any time during which the contract of transfer subsists."

There is no dispute that after death of Amulyanath Mitra, defendant No. 3 has succeeded to the property. Even if contention of the learned counsel for the appellant is accepted that the deed (Ext. 2) had been executed during lifetime of

Amulyanath Mitra by Sailendranath Mitra as Power-of-attorney holder, the sale was not valid because of the reasons stated earlier, the property having devolved on defendant No. 3 after death of Amulyanath Mitra, the provision contained in S. 43 of the Transfer of Property Act comes Into operation and, therefore, such sale is not only valid but also binding on defendant No. 3....."

27. Sri Bhola Nath Yadav, learned Counsel for respondents nos.3/1 to 3/3 has refuted the contention of the learned Counsel for the petitioners on this score. He submits that fair and square the principle embodied in Section 43 of the Transfer of Property Act or the principle of *feeding the estoppel*, is not at all attracted to the facts of this case. In the submission of Sri Bhola Nath Yadav, a right based on the principle of *feeding the estoppel* is available, so long as the transferee does not know for a fact that the transferor who represents title in himself, does not hold it. He submits that in a case where the transferee knows for a fact that the transferor does not hold title that he transfers by his deed, a subsequent acquisition of that title by the transferor, would not serve to feed the estoppel. In short, in the submission of the learned Counsel for the respondents, this principle is available only in cases where the transferee does not know that the transferor, in fact, holds no interest in the immovable property that he represents to possess, when he executes the conveyance; not if the transferee is also aware about the absence of title in the transferor at the time of conveyance. He submits that the petitioner, Ram Dei was aware about the fact that Phula Kunwar's interest was inherited by Smt. Sona Kunwar, being her heir entitled and Phula Kunwar having died intestate. He points out that the petitioner is a relative of Smt. Sona Kunwar, Smt. Phula Kunwar, her mother and also of Ramji, Sona Kunwar's son, her vendor. In these circumstances, he urges that the petitioner was well aware that half share in the land in dispute devolved upon Smt. Sona Kunwar, and not upon Ramji, who held as a co-tenant to the extent of a half share along with Smt. Phula Kunwar, since deceased. Learned Counsel for the respondents, therefore, submits that the provisions of Section 43 of the Transfer of Property Act would not apply and the transfer would fail under Section 6(a) of the Act, last mentioned.

28. In support of his contention, learned Counsel for the respondents has placed reliance on a decision of the Supreme Court in **Jumma Masjid, Mercara vs. Kodimaniandra Deviah and others, AIR 1962 SC 847.** He has drawn the Court's attention to paragraph 15 of the report in **Jumma Masjid, Mercara** (supra), where it is held:

"15. This reasoning is open to the criticism that it ignores the principle underlying Section 43. That section embodies, as already stated, a rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on that representation. It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled. It is to be noted that when the decision under consideration was given, the relevant words of Section 43 were, "where a person erroneously represents", and now, as amended by Act 20 of 1929, they are "where a person fraudulently or

erroneously represents", and that emphasises that for the purpose of the section it matters not whether the transferor acted fraudulently or innocently in making the representation, and that what is material is that he did make a representation and the transferee has acted on it. Where the transferee knew as a fact that the transferor did not possess the title which he represents he has, then be cannot be said to have acted on it when taking a transfer. Section 43 would then have no application, and the transfer will fail under Section 6(a). But where the transferee does act on the representation, there is no reason why he should not have the benefit of the equitable doctrine embodied in Section 43, however fraudulent the act of the transferor might have been.

(Emphasis by Court)

29. The learned Counsel for the respondents has further placed reliance to the same end on the decision of the Supreme Court in **Jharu Ram Roy vs. Kamjit Roy and others, (2009) 4 SCC 60,** where on the point in hand, it has been held thus:

"11. Fraud vitiates all solemn acts. As the appellant was aware of the fact that Nakho Ram had not expired in 1992, in our opinion, the provisions of Section 43 of the Transfer of Property Act cannot be said to have any application in the instant case."

30. Learned Counsel for the respondents has also urged that Smt. Sona Kunwar died on 05.07.1979 pending revision before the Deputy Director of Consolidation, but the plea based on Section 43 of the Transfer of Property Act was never taken before the Revisional Authority. The contention is that the failure of the transferee to urge a plea based on rights under Section 43 before the Revisional Authority, clearly shows that the transferee never exercised her option to operate on the interest that Ramji inherited, pending revision. It is also pointed out that in the writ petition, there is not as much as a whisper regarding a right based on Section 43 of the Transfer of Property Act; there is utter absence of a plea in that regard. It is urged by the learned Counsel for the respondents that in the absence of a plea based on Section 43 being taken before the Revisional Authority or in the writ petition, the petitioner cannot be permitted to urge that plea at the stage of hearing, bereft of pleadings, either before the Revisional Court or before this Court. In this connection, learned Counsel for the respondents has relied upon a decision of a Division Bench of the Patna High Court in **Mahipat Missir and others vs. Ganpat Sah and others, AIR 1963 Pat 277,** where it is held:

"15. It is, therefore, to be seen what would be the consequence of taking notice of the death of Rajmato at the appellate stage. If the sale deed of the appellants were for legal necessity, the title of Rajmato in the suit land would pass absolutely to the appellants, otherwise her life interest only would pass. Hence, after the death of Rajmato, the appellants are entitled to plead and prove that the sale deed was for legal necessity. But, while Rajmato was alive, they had only to show that her interest did not pass to the plaintiff-respondents. It would, therefore, be unjust to the appellants to hold that, after the death of Rajmato during the pendency of the second appeal, they acquired only her life interest on the ground that they had not pleaded or proved in her life time legal necessity for their sale deed. On the other hand, the plaintiff-

respondents cannot get any advantage of the death of Rajmato, unless they prove the ingredients required for the application of Section 43 of the Transfer of Property Act, and the only person who can take advantage of her death is defendant No. 6, who was a co-executanti of the plaintiffs' sale deed as well as the defendants' sale deed and duped both these parties. It is, therefore, fair and just to leave the question of the consequences of the death of Rajmato to be tried in another suit and the death of Rajmato should not be taken into account in the present litigation."

31. The absence of a plea regarding the right, flowing from Section 43 of the Transfer of Property Act, being a bar to its consideration at the hearing has been buttressed by the learned Counsel for the respondents on the strength of a decision of their Lordships of the Supreme Court in **Ram Sarup Gupta vs. Bishun Narain Inter College, (1987) 2 SCC 555,** where it is held:

"6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the licence was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Some times, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In Bhagwati Prasad v. Chandramaul [AIR 1966 SC 735: (1966) 2 SCR 286, 291] a Constitution Bench of this Court considering this question observed:

"If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then

the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the court cannot do injustice to another."

32. It is on this point further strenuously urged by the learned Counsel for the respondents that a right based on Section 43 of the Transfer of Property Act is available exclusively where the transferor, fraudulently or erroneously, represents that he is authorized to transfer certain immovable property, but in fact does not hold any such right on the date that he executes the sale deed. It is submitted that in order to succeed on a plea under Section 43 of the Transfer of Property Act, it must be shown by the party who urges that plea that the transfer in his/ her favour was based on either a fraudulent or an erroneous representation. In the submission of the learned Counsel for the respondents unless that plea is specifically taken, based on either a case of a fraudulent or erroneous representation, upon which the transferee had acted, no rights can be claimed on the foundation of Section 43 of the Transfer of Property Act. Dilating on this part of his submission, learned Counsel for the respondents emphasizes that it is necessary to support a plea based on the principle of *feeding the estoppel* that there must be a fraudulent or erroneous representation by the transferor in relation to his title, on which the transferee has acted. It is submitted by him that in the present case not only is there an utter want of a plea of this kind, but there is also no evidence or material on record to indicate that there was a fraudulent or mistaken representation by Ramji *vis-a-vis* his title to the land in dispute, acting on which the petitioner accepted the conveyance.

33. It is true, without doubt, that the stage where a plea founded on Section 43 of the Transfer of Property Act ought to have been taken had arrived before the Revisional Authority, when Smt. Sona Kunwar, the one who was contesting, passed away. A reading of the Revisional Authority's judgment shows at the outset that the fact that Sona Kunwar died pending revision, was well within the cognizance of the Deputy Director of Consolidation, as well as the parties. This is so because Smt. Sona Kunwar died on 05.07.1979, after the revisions were instituted and these revisions were decided by the impugned judgment on 26.02.1985. Evidently, during proceedings before the Deputy Director of Consolidation, the petitioner had ample opportunity to take a plea based on Section 43 of the Transfer of Property Act, which she never did. The Revisional Authority's judgment is testimony to the fact that no such plea was taken before the said Authority by the petitioner. The Revisional Authority's judgment also shows that the original respondent no.3 here, Ramji described in the Deputy Director of Consolidation's order as Ramji Tiwari son of Sarju Tiwari was substituted in place of Sona Kunwar.

Therefore, there is not the slightest doubt that if anything else, Ramji seeking substitution in place of Sona Kunwar, the one who was contesting, offered an unignoreable opportunity to the petitioner to take a plea founded on Section 43 of the Transfer of Property Act.

34. This Court is mindful of the fact that legal assistance available to a litigant before the Consolidation Authorities do not offer sterling legal acumen. There could be many a decisive slip or a lost opportunity for the litigant because he was not appropriately advised in a cause before a Lay Tribunal, like a Consolidation Authority. This Court would not hesitate to accept, if there were a faint case, much less a plea in furtherance of the petitioner's right that did not find eloquent and precise mention in her pleadings. Sadly, that is not the case here. There is not the slightest hint of a case founded on the right that Section 43 of the Transfer of Property Act envisages. Sparing all follies for the absence of good legal assistance that a litigant often faces before Authorities like those in the consolidation jurisdiction, a reading of the writ petition does not bail out the petitioner, either. Across the length and breadth of the writ petition, this Court does not find any trace of a plea that may have urged for the petitioner a case founded on Section 43, last mentioned. This Court may dare say that if that plea was ever in the petitioner's contemplation, it would have certainly found specific mention in the writ petition. This plea has come up before the Court at the hearing, to which there is no factual basis. A plea based on Section 43 of the Transfer of Property Act would always give rise to a mixed question of fact and law. It is not a plea giving rise to one of those pure questions of law that may be determined, abstracted from facts by this Court, at a stage as late as address of arguments with no foundation laid for it. A plea of that kind that may be urged, bereft of any foundation is classically associated with a case about total lack of jurisdiction in the Court, relating to the subject matter. A plea and a question of that kind is invariably based on facts, of which the Court must take judicial notice. The present plea based on Section 43 of the Transfer of Property Act is far from it. In the considered opinion of the Court, it cannot be examined on the existing state of the parties' pleadings here, and before the Revisional Authority. In taking this view, this Court is fortified by the law laid down in **Ram Swarup Gupta** (supra) and **Mahipati Missir** (supra).

35. Learned Counsel for the respondents has laid much emphasis on the fact that going by the close relationship of parties, it was known for a fact to the petitioner that a half share in the property in dispute that Smt. Phula Kunwar held, would devolve upon Smt. Sona Kunwar, on the former's decease. He has impressed upon the Court that for a proposition of law, where the transferee knows for a fact that the transferor has no title *in presenti* to convey what he purports to do by his deed, the principle of *feeding the estoppel* would not be attracted. It would be attracted only when the transferee is in ignorance about the vendor's title and acts on the vendor's representations, whether mistaken or fraudulent, alone. The argument is tempting to deal with in the facts of the present case. But, this Court would refrain from doing so as there is no pleading anywhere on which the edifice of this case may be built by parties and considered by this Court. Accordingly, this Court is not inclined to accept the petitioner's submission that the sale deed of 1959 after Smt. Sona Kunwar's

death in 1979 is enforceable against Ramji, *vis-a-vis* the entire land in dispute, by invocation of the principle of *feeding the estoppel*.

36. The next ground on which the impugned orders have been assailed by Sri Vishnu Singh, learned Counsel for the petitioner is that notwithstanding the failure of the sale deed of 1959 to convey the whole of the land in dispute, the subsequent sale deed dated 15.02.1960 executed by Smt. Sona Kunwar-I, removes that deficiency. The said sale deed conveys the remaining half share, inherited by Smt. Sona Kunwar-I, in favour of Smt. Ram Dei. It is this case of the petitioners that gives rise to the question about the identity of the woman, who executed the sale deed dated 15.02.1960. Whereas the learned Counsel for the petitioner says that the sale deed of 15.02.1960 was executed by Smt. Sona Kunwar-I, who is the mother of Ramji and wife of Sarju Tiwari, learned counsel for respondent nos.3/1 to 3/3 urged that it was executed by an impostor.

37. Sri Vishnu Singh, learned Counsel for the petitioner submits that the Consolidation Officer had before him Sona Kunwar-I, who is the real Sona Kunwar. She entered the witness-box and testified in support of her identity. She also supported the execution of the sale deed dated 15.02.1960 in favour of the petitioner. He urges that Sona Kunar-II, who has contested the petitioner's claim and disowned the sale deed dated 15.02.1960, is an impostor. It is asserted by him that the Consolidation Officer, after a careful evaluation of the oral testimony of Sona Kunwar-I, Sona Kunwar-II and Sarju Tiwari, who is admitted to be the husband of Sona Kunwar, whichever of the two women is in reality Sona Kunwar, has held that Sona Kunwar-I is the genuine person. It is further submitted by Sri Vishnu Singh that the Settlement Officer of Consolidation and the Deputy Director of Consolidation have reversed the Consolidation Officer's findings regarding determination of the identity of Sona Kunwar to hold that Sona Kunwar-II is the genuine person. Learned Counsel urges that the reasoning of the Appellate Authority and the Revisional Authority is flawed because the Authority of first instance held trial and had the advantage of watching the demeanour of witnesses. Furthering that submission, it is said by the learned Counsel for the petitioner that much turns in this case about the identity of the two women claiming to be Sona Kunwar, on the testimony of witnesses. Therefore, according to the learned Counsel for the petitioner, the opinion of the Authority of first instance, on an issue that primarily rests on evaluation of oral evidence, ought not to have been disturbed by the Appellate and the Revisional Authorities, who did not see the witnesses. It is the learned Counsel's contention that wherever an issue arises that is primarily to be decided on the basis of oral evidence, the Appellate Court should invariably accept the Trial Court's evaluation, unless the conclusions drawn or the reasoning adopted is patently flawed.

38. Learned Counsel for the petitioner draws support for the aforesaid proposition from a decision of their Lordships of the Supreme Court in **Madhusudan Das vs. Narayanibai (Deceased) by LRs and others, (1983) 1 SCC 35.** He has invited this Court's attention to paragraph 8 of the report, where it is held:

"8. The question whether the appellant was in fact adopted by Jagannathdas and Premwati has been

determined essentially on the basis of oral testimony, and reference has been made to a few documents only in supplementation of the oral evidence. At this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. In this connection, reference may usefully be made to W.C. Macdonald v. Fred Latimer [AIR 1929 PC 15, 18: 29 Mad LW 155: 112 IC 375] where the Privy Council laid down that when there is a direct conflict between the oral evidence of the parties, and there is no documentary evidence that clearly affirms one view or contradicts the other, and there is no sufficient balance of improbability to displace the trial court's findings as to the truth of the oral evidence, the appellate court can interfere only on very clear proof of mistake by the trial court. In Watt v. Thomas [LR 1947 AC 484, 486: (1947) 1 All ER 582: 176 LT 498] it was observed: "...it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." This was adverted to with approval by the Privy Council in Sara Veeraswami alias Sara Veerraju v. Talluri Narayya [AIR 1949 PC 32: 75 IA 252: 1948 All LJ 479] and found favour with this Court in Sarju Pershad v. Raja Jwaleshwari Pratap Narain Singh [1950 SCR 781, 783: AIR 1951 SC 120: 1950 SCJ 583] . It seems to us that this approach should be placed in the forefront in considering whether the High Court proceeded correctly in the evaluation of the evidence before it when deciding to reverse the findings of the trial court. The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact. Our attention has been drawn by the respondents to the Asiatic Steam Navigation Co. Ltd. v. Sub-Lt. Arabinda Chakravarti [AIR 1959 SC 597: 1959 Supp 1 SCR 979: 1959 SCJ 815] but nothing said therein detracts, in our opinion, from the validity of the proposition enunciated here."

39. Sri Bhola Nath Yadav, learned Counsel for the respondents on the other hand has refuted the aforesaid contention and submitted that it is not that the Appellate Authority and the Revisional Authority had only oral evidence in hand to decide upon the identity of the two women, claiming themselves to be Smt. Sona Kunwar. According to him, there were other relevant materials, evidence and circumstances that were taken into consideration by the Appellate and the

Revisional Authorities to opine the way they did. He submits that oral evidence is not the only evidence bearing on the identity of Sona Kunwar, and, therefore, the approach of the Appellate and the Revisional Authorities cannot be faulted.

40. It is true for a principle that wherever the decision of a question or an issue turns entirely on oral evidence, the opinion of the Trial Court carries great weight and ought not to be disturbed by a Court of Appeal, except for very compelling reasons. These reasons could be a palpabably wrong conclusion drawn by the Trial Court, which no reasonable person could reach, given the evidence of witnesses. This principle about pre-eminence accorded to the Trial Court, in the matter of appreciation of oral evidence, is based on the reasoning that the Trial Court had advantage of watching the witnesses' demeanour, which the Appellate Court or still higher fora did not. In judging the truth of a statement in the testimony, it is of prime importance that not only what the witness says be considered, but also how he says it. The demeanour reveals the unspoken truth, or the truth or falsehood of spoken words. Demeanour is a good word of formal English usage. Nowadays, it is better understood by men of contemporary education as "body language'. It cannot be gainsaid that what the Trial Court watches or is supposed to watch, peeping behind the words of a witness, is a unique opportunity of which the Appellate Court is deprived. It must be borne in mind that for a principle whatever is said in favour of the unique advantage that the Trial Judge has, in evaluating oral evidence, is sound law. In the present day, the application of the principle by Courts is witnessing dwindling adherence. The reasons why that is so are more than one. Generally, Superior Courts are mindful of the fact that trials over time have become less formal in many jurisdictions, particularly in the *Moffusil* Courts, and the Trial Judge seldom keeps or is unable to keep that eagle's eye on the demeanour of witnesses, otherwise characteristic of his/her duties. The recorded testimony of witnesses in Law Courts, let alone Lay Courts, nowadays would rarely carry remarks by the Judge on the margins of recorded evidence about the witnesses' demeanour. It is also true that overcrowded dockets of Trial Courts deprive the Trial Judge of all that opportunity, where he may bestow searching attention to the demeanour of witnesses. Despite these changed and changing conditions in the Trial Courts, the sound principle of law, under reference, cannot be discarded as rudimentary. At the same time, under the changed conditions of the day obtaining in the Trial Courts, this principle would certainly have a modified application, in this Court's opinion. This is so because the *raison d'etre* of the principle under reference is the fact that the Trial Judge, who renders judgment is the same Judge, who heard the witnesses. In present times, it is again a matter to be taken judicial notice of that the swelling dockets in Trial Courts, invariably lead to a situation where the Judge who hears, watches and records the witnesses, does not deliver judgment in the cause; some successor of his does. In a situation where another Judge records evidence and a different one decides, the pre-eminence of the Trial Judge's opinion regarding oral testimony looses its very foundation. Thus, in contemporary time, and times not so contemporary also, a party who wishes to rely on the principle that primacy be accorded to the evaluation of purely oral evidence by the Trial Judge/ Court/ Authority of first instance, must show for a

fact that the incumbent Judge or Presiding Officer, who wrote judgment for the Trial Court/ Authority of first instance, was the same Presiding Officer who had heard and recorded evidence in the matter. This would then be the modification which the long standing principle must suffer in the changed times.

41. In the present case, proceedings before the Consolidation Officer, the Authority of first instance, were instituted in the year 1970 and decided half way down the year 1972. During the period of time to which these proceedings relate, these winds of change had come where it cannot be presumed that the Presiding Officer, who decided in the Court of first instance was necessarily the incumbent, who heard evidence. There is nothing on record to suggest that the Presiding Officer in this case, Sri C.P.N. Singh, the then Consolidation Officer-II, Jamania, District Ghazipur, was the incumbent Presiding Officer, before whom the witnesses testified. This is not asserted for a fact in the writ petition, though a ground based on the principle has been taken. This Court, therefore, is not minded to accept the contention of the learned Counsel for the petitioner that urges a blanket application of the classical principle. This Court, may, however, hasten to add that the principle would still apply in all cases where a party urges a case on its basis and shows that the Judge who heard evidence was the same Judge/Presiding Officer, who delivered judgment.

42. It is submitted by Sri Vishnu Singh that the findings of the Appellate Authority and the Revisional Authority, about determination of the identity of Smt. Sona Kunwar, is vitiated on account of non-consideration of material evidence. He points out that the Consolidation Officer has considered the oral evidence of Sarju Tiwari, Smt. Sona Kunwar (both I and II) and Ramji, son of Sarju Tiwari to record his finding about the identity of Sona Kunwar. He further says that the Appellate Authority and the Revisional Authority have not at all mentioned material and relevant oral evidence of these witnesses on this issue. Sri Bhola Nath Yadav, learned Counsel for the respondents does not dispute the fact that the oral evidence, about identity of Smt. Sona Kunwar, has not been considered by the Appellate and the Revisional Authorities. He submits that not much would turn on that evidence, as it does not shed light on this rather perplexing issue, about the identity of Smt. Sona Kunwar. He submits that there are other material circumstances and documentary evidence considered by the Appellate and the Revisional Authorities, that are relevant and germane to the issue. The evidence considered by the Appellate and the Revisional Authorities, in the submission of the learned Counsel for the contesting respondents, is complete in itself to determine the identity of Smt. Sona Kunwar. According to him, the oral evidence is not at all relevant and the fact that the Appellate and the Revisional Authorities have not taken it into consideration, would in no way materially affect the conclusion.

43. The submission and its worth is to be tested on the basis whether the identity of Sona Kunwar, materially or decisively, turns upon oral evidence; or there is other evidence in the form of documents and circumstances forthcoming, in the face of which oral evidence may have little bearing on the relevant fact, if not discounted altogether. The Court of first instance has indeed looked into the oral testimony of

Sarju Tiwari, the one that is part of his cross-examination, recorded on 22.07.1971. He has also referred to some stray lines appearing in the testimony of Smt. Sona Kunwar, without indicating whether this testimony comes from Sona Kunwar-I or Sona Kunwar-II. It would be profitable to extract from his judgment, what the Consolidation Officer has relied upon in the oral evidence of Sarju Tiwari and Smt. Sona Kunwar (whichever of the two it is):

"Phool Kunwar ke bad jomukadame lare usme asali sona Kunwar thiya nakall Sona Kunwar thimai nahi Janta Apame vo Ramji se alag se mukadama baji kiye vah farzi Sona Kunwar This. Pula Kunwar ke marne ke bad jo Sona Kunwar narin Va Bishwanath se mukdama baje kiya use main nahi janta. Main nahi Janta ki phool Kunwar ke marne ke bad Jis Sona Kunwar neer verasat ke karvah nahi kiya vah asali Sona Kunwar Thi ya nakali."

Sarjoo Tewari has started at other place in cross examination.

"Meri patni ne Ramji ke kabhi bhi alag nahi kiya jis Sona Kumwar ne yah bayan diya ho ki Ramji ko mai 25 sal se Alag kar diya hai vah stri meri patni nahi hai-------- agarki yah kahe ki Ramji va Sona kilheti alag alag his vah meri stri Sona nahi hai. Ramjee koi mukadama apne asali ma se nahi lara. In contradiction to the statement of Sarjoo Teweri Sona Kunwar has state:

"Phoola Kunwar marne ke bad Basdeo Va Ram Naresh se Mukadama Baji huyi huyi main hi asali sona kunvar."

44. From the aforesaid evidence, the Consolidation Officer has concluded that Sona Kunwar-II, described in the judgment as Sona Kunwar, represented by Sri Mohd. Taufiq Khan, Advocate is not the real Sona Kunwar. This Conclusion is based on contradiction deciphered by the Consolidation Officer in the evidence of Sarju Tiwari, admittedly the husband of Sona Kunar, whoever the real one be, Smt. Sona Kunwar-II and Ramji, the son of Sarju Tiwari. This contradiction, to support the conclusion that Sona Kunwar-II is not the real Sona Kunwar, is recorded in the Consolidation Officer's judgment in the following words:

"This statement proves that Sona Kunvar represented by Taufiq Khan is not real Sona Kunwar Sarjoo Tewari Says that the lady who filed objection with Bansdeo is not his wife while Sona Kunwar says that she has filed objection against Bansdeo. Further Sona Kunwar has stated in the court B.K. Chaturvedi that she is separate for 25 years with Ramjee. This contradicts the statement of Sarjoo Tewari who says that the lady who has given such statement is not his wife. Sona further stated in the court of B.K. Chaturvedi that his son lives separately which Sarjoo Tewari says that the lady who has give such statement is not his wife Sarjoo Tewari has stated that Ramjee has never contested any case against his mother while Ramjee as stated that he has contested with Sona Kunwar in the court of A.D.M. (J) in the court of Laljee Rai. Smt. Ramdei has taken the plea from the very begining that Sona Kunwar who is represented by Taufiq Khan is a fictitious lady. She was not able to prove it in earlier proceedings suits, But now the admission of Sarjoo Tewari referred above clearly shows that the lady who has contested earlier suits was the real Sons Kunwar is valid that the name of Sona Kunwar after the sale is fictitiously recorded in the village records that suit is not barred by resjudicata that Ramjee and Sona Kunwar had right to execute sale

deed that Smt. Sona Kunwar Kunwar represented by Shri Mohamnad Taufiq Knan Advocate is fictitious lady the share of Sona Kunwar shall pass to Smt. Ramdei."

45. It is true that the Settlement Officer of Consolidation or for that matter the Deputy Director of Consolidation, have not gone about the task of analyzing the oral testimony of parties in recording conclusions contrary to the Consolidation Officer, about the identity of Sona Kunwar. They have looked into documentary evidence and circumstances that support the validity of their reasoning. On the other hand, the Consolidation Officer has referred to oral evidence of the three witnesses, above mentioned, not in wholesome detail, but somewhat torn out of context. This Court is aware of the fact that it is not its province to appreciate any kind of evidence and this Court does not propose to do that. However, it is certainly the duty of this Court to see whether the Authorities below, whose orders are brought up for judicial review, have proceeded to decision without ignoring from consideration material evidence, without taking into consideration irrelevant evidence and drawn conclusions that may not be termed perverse. These are byfar principles that have withstood the test of time. This Court has looked into the evidence of Sarju Tiwari, admittedly the husband of the woman, called Sona Kunwar. He has testified in great detail, shedding light on the identity of the two women claiming themselves to be Sona Kunwar, rivaling each other. This witness has been extensively cross-examined and much relevant material has been elucidated in that exercise. Likewise, there is a wealth of evidence coming from the two women claiming themselves to the genuine Sona Kunwar, that is to say, Sona Kunwar-I and Sona Kunwar-II. Both these women have been subjected to searching cross-examination, that sheds light on relevant facts. Again, Ramji who is the vendor of the sale deed of 1959, a central figure in this litigation and a son of Sarju Tiwari and Sona Kunwar, has testified to relevant and material facts. This witness too, has been extensively cross-examined.

46. This Court is of considered opinion that with so much evidence forthcoming in the shape of dock evidence of parties, who are involved in the entire transactions giving rise to this cause, the Appellate and the Revisional Authorities ought not to have passed over their testimony. Their evidence assumes importance, all the more, as the issue is about the identity of Sona Kunwar - the real Sona Kunwar wife of Sarju Tiwari and mother of Ramji - to be determined between two women, Sona Kunwar-I and Sona Kunwar-II. What makes it imperative for the said evidence to be considered all the more is the fact that this evidence, howsoever cursorily or in truncated form, was gone into by the Consolidation Officer, while writing his finding about the identity of Sona Kunwar. No doubt, the Appellate and the Revisional Authorities have considered very relevant circumstances and evidence to return concurrent findings about the identity of Sona Kunwar, in reversal of the Consolidation Officer, but bereft of consideration of the oral evidence referred to above, their findings cannot be sustained.

47. It is next submitted by Sri Vishnu Singh, learned Counsel for the petitioner that the Appellate and the Revisional Authorities have acted upon irrelevant material, while returning their findings in

favour of the third respondent. That irrelevant material, according to Sri Vishnu Singh, are judgments of the Mutation Authorities and the Court in the declaratory suit brought by the petitioner, where the same issues were involved *inter partes*. According to Sri Vishnu Singh, findings in mutation proceedings are absolutely irrelevant in determining a title dispute. He submits that so far as the findings in the declaratory suit are concerned, no doubt these went against the petitioner, but proceedings of that suit never attained finality. The petitioner lost the suit upto the Appellate Court, but carried the matter further in Second Appeal. Proceedings in the Second Appeal could not reach conclusion as these abated with the initiation of Consolidation Proceedings. Learned Counsel for the petitioner submits that the Appellate and the Revisional Authorities should not have taken the findings as aforesaid into consideration, while writing the judgments impugned. Sri Bhola Nath Yadav on the other hand has urged that the Appellate and the Revisional Court have referred to the judgments in mutation proceedings and the declaratory suit in order to judge the conduct of parties, but have not acted on those findings while recording their own. He submits that findings of the two Authorities below are based on their independent appraisal of evidence, unaffected by findings of the mutation Authorities or the Courts that heard the declaratory suit.

48. A perusal of the judgment passed by the Settlement Officer of Consolidation shows that after a meticulous reference to proceedings and the outcome before the Mutation Authorities, as well as the decisions in the declaratory suit that abated at the stage of Second Appeal, the Settlement Officer of Consolidation has recorded the following findings:

"अस्तु उपर्युक्त परिस्थितियों में यह निष्कर्ष निकलता है कि बैनामा दिनांक 15-2-60 नितान्त संदेहास्पद और अवैध है। चकबन्दी आने के पूर्व जितने भी निर्णय हुए है उनके बारे में ऊपर विचार किया गया है। वे सभी निर्णय श्रीमती रामदेई के विपक्ष और श्रीमती सोना कुवर अपीलकर्ता के पक्ष में हुआ है। यद्यपि वे प्राड़न्याय का प्रभाव नहीं रखते फिर भी अपने आप में महत्वपूर्ण साक्ष्य हैं जो अपीलकर्ता श्रीमती सोना कुवर के पक्ष का समर्थन करते हैं।"

49. Likewise, the Revisional Authority has construed the effect of findings of the Mutation Authorities and those in the declaratory suit, in terms of the following findings:

"उपर्युक्त तथ्यों से स्पष्ट है कि रामदेई दो बार दाखिल खारिज के मुकदमें में हार गई और एक बार डिक्लेयरिटी सूट अन्तर्गत धारा 229 बी अपर आयुक्त, वाराणसी मण्डल, वाराणसी तक आ चुकी है। यद्यपि यह आदेश अन्तिम नही है, क्योंकि उसकी अपील चकबन्दी आ जाने के कारण राजस्व परिषद में अवेट हो गयी फिर भी यह आदेश साक्ष्य के रूप में माना जा सकता है।"

50. A perusal of these findings by the Appellate and the Revisional Authorities show that these Authorities have considered for relevant evidence, the decision of the Mutation Authorities *inter partes* as also the judgments in the declaratory suit. The proceedings of the suit never reached terminus ad quem. So far as the decisions of the Mutation Authorities are concerned, it is settled beyond cavil that those findings are in no way relevant in title proceedings. Mutation proceedings are summary proceedings to identify the person

to be recorded, primarily for fiscal purposes. The proceedings in hand arise out of objections under Section 9-A(2) of the Act, which to all intents and purposes, are title proceedings. Thus, there is absolutely no justification for the Authorities below to have considered the findings of the Mutation Authorities as relevant evidence in title proceedings.

51. Likewise, proceedings of the declaratory suit instituted by the petitioner admittedly remained inchoate, as these terminated without final judgment in the Second Appeal on account of abatement, as a result of notification of Consolidation Operations. The findings recorded in the suit at lower rungs in the hierarchy of those Courts never attained finality and with abatement, whatever those findings were, stood effaced. The Authorities below were, therefore, in manifest error in relying upon findings recorded in the declaratory suit, that were snuffed out of existence with abatement of the suit in Second Appeal. In the opinion of this Court, therefore, the Authorities below acted on irrelevant evidence.

52. This Court may now venture to consider the last submission of Sri Vishnu Singh. He submits that the Appellate Authority, while writing the order impugned, has determined the identity of Smt. Sona Kunwar by doing a comparison of her thumb impression on the *Vakalatnama* before him with that on the sale deed of 1960. He has done so with the aid of a magnifying glass, without the assistance of an expert. Sri Vishnu Singh submits that while theoretically open to a Court or an Authority invested with judicial functions to do a comparison of two finger print specimen - one admitted and the other disputed - it is a course of action fraught with great peril. He submits that judicial authority frowns upon this mode of comparison, so far as finger print specimen go. Sri Bhola Nath Yadav, learned Counsel for respondents nos.3/1 to 3/3 submits that it is open to a Court to compare any kind of mark, signature or handwriting and the assistance of an expert is not an indispensable requirement.

53. This Court has looked into the relevant finding of the Appellate Authority which reads thus:

"चकबन्दी अधिकारी के समक्ष दिनांक 17-10-70 को जो स्त्री श्री बेचू सिंह वकील के माध्यम से अपने को असली सोना कुवर कहते हुए मुकदमा में सम्मिलित हुई है उसके अंगूठे के निशान भी बेचू सिंह द्वारा प्रस्तुत किए गए वकालतनामा पर हैं और अपील न्यायालय में श्री मदन मोहन चौबे द्वारा जो वकालतनामा प्रस्तुत किया गया उस पर भी उसके निशान अंगूठा है। श्री बेचू सिंह द्वारा प्रस्तुत वकालतनामा पर श्रीमती सोना कुवर का जो अंगूठा है, वह बहुत स्पष्ट नही है, किन्तु श्री मदनमोहन चौबे वाले वकालतनामा पर श्रीमती सोना कुँवर का निशान अंगूठा बहुत स्पष्ट है, वकालतनामा पर अंकित अंगूठों का मिलान मैने बैनामा दिनांक 15-2-60 पर अंकित श्रीमती सोना कुँवर के निशान से सूक्ष्म दर्शी शीशा के माध्यम से किया है। मोटे तौर पर बैनामा और वकालतनामा के निशान अंगूठा एक दूसरे से बहुत भिन्न हैं। एक में रेखाओं की दिशाएं बायी ओर हैं तो दूसरे में उसके विपरीत ठीक दाहिने। इससे भी स्पष्ट हो जाता है कि उत्तरवादिनी सोना कँवर ने जो बैनामा के ठीक 10 वर्ष बाद किसी न्यायालय में अपने को असली सोना कुँवर कहती हुई उपस्थित हुई है, बैनामा दिनांक 15-2-60 नहीं लिखा है।"

54. The Revisional Authority has recorded a similar finding, in approval of the Settlement Officer of Consolidation, which reads as follows:

"श्री बेचू सिंह द्वारा प्रस्तुत वकालतनामे पर जो सोनाकुँवर का कथित निशानी अंगूठा है,

वह स्पष्ट नहीं है, परन्तु मदन मोहन चौबे वाले वकालतनामे पर अंकित अंगूठे के निशान का मिलान उन्होने 15-2-60 पर अंकित सोनाकुँवर के अँगूठा निशान से सूक्ष्मदर्शी शीशे के माध्यम से किया जो मोटे तौर पर दोनो निशानी अँगूठे एक दूसरे से बिलकुल भिन्न हैं। इससे स्पष्ट है कि जिस स्त्री का निशान अँगूठा बैनामा पर है, वह स्त्री नहीं है जो जब सोना कँवर बनकर बेचू सिंह एडवोकेट अथवा श्री मदनमोहन चौबे एडवोकेट के माध्यम से आ रही है।"

55. A perusal of these findings reveal that the Settlement Officer of Consolidation has ventured to compare the disputed and the admitted finger prints. He has clearly done so without the assistance of an expert. A simple magnifying glass is all that has been called in aid. The law does not prohibit a Court at all from undertaking a comparison of the disputed and the admitted finger prints, but finger print identification being a perfect and highly evolved science by now, it is perilous to undertake an unassisted enterprise of this kind for any Court. In the event, for any reason should the assistance of an expert be not forthcoming, the essential requirement for a Court to record a valid finding about the identity or dissimilarity of the admitted and the disputed finger prints, is to support them by reasons familiar to the science of finger print examination. The Court if left unassisted by an expert to compare specimen of finger prints that are disputed and admitted, must first ascertain that the specimens are clear and discernible. Hazy and blurred specimens cannot be compared without the aid of professional tools and devices, which the experts alone are trained to handle. Of course, with the assistance of expert opinion, it is for the Court to record conclusions based on reasons about the identity or the variance of the admitted and the disputed finger/thumb impressions. Ultimately, it is the Court's decision that clinches the issue and not the expert's opinion. The Court's decisions where assisted by expert opinion, whether a solitary one or two divergent opinions, must rest on sound reasons recorded by the Court to accept one or to reject the other. In situations, however, where the Court is left to fend for itself, it must go about the exercise of forming its opinion with assistance of learned Counsel and on parameters known to the science of finger print identification. The opinion finally expressed must be based on relevant and commensurate reasons. It certainly cannot be an ipse dixit of the Presiding Officer. The statutory provisions that govern and regulate the jurisdiction and powers of the Court, to undertake a comparison of the disputed and the admitted finger print specimens, are the provisions of Section 73 and 45 of the Indian Evidence Act, 1872. In the case of an Authority invested with judicial functions, like the Consolidation Authorities to whom the last mentioned provisions of the Evidence Act may not apply *proprio vigore*, the same would apply on principle.

56. The law on the issue of comparison of finger print impressions in the context of the Court's jurisdiction and power to undertake it has been authoritatively laid down by their Lordships of the Supreme Court in **Thiruvengadam Pillai vs. Navaneethammal and another, (2008) 4 SCC 530.** It has been held in **Thiruvengadam Pillai** (supra):

"15. Section 45 of the Evidence Act, 1872 relates to "opinion of experts". It provides inter alia that when the court has to form an opinion as to identity of handwriting or finger impressions, the

opinion upon that point of persons specially skilled in questions as to identity of handwriting or finger impressions are relevant facts. Section 73 provides that in order to ascertain whether a finger impression is that of the person by whom it purports to have been made, any finger impression admitted to have been made by that person, may be compared with the one which is to be proved. These provisions have been the subject-matter of several decisions of this Court.

15.1. In State v. Pali Ram [(1979) 2 SCC 158: 1979 SCC (Cri) 389] this Court held that a court does not exceed its power under Section 73 if it compares the disputed writing with the admitted writing of the party so as to reach its own conclusion. But this Court cautioned: (SCC p. 168, para 30)

"30. ... Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert."

The caution was reiterated in O. Bharathan v. K. Sudhakaran [(1996) 2 SCC 704] . Again in Ajit Savant Majagvai v. State of Karnataka [(1997) 7 SCC 110: 1997 SCC (Cri) 992] referring to Section 73 of the Evidence Act, this Court held: (SCC p. 122, paras 37-38)

"37. ... The section does not specify by whom the comparison shall be made. However, looking to the other provisions of the Act, it is clear that such comparison may either be made by a handwriting expert under Section 45 or by anyone familiar with the handwriting of the person concerned as provided by Section 47 or by the Court itself.

38. As a matter of extreme caution and judicial sobriety, the Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of the slightest doubt, leave the matter to the wisdom of experts. But this does not mean that the Court has not the power to compare the disputed signature with the admitted signature as this power is clearly available under Section 73 of the Act."

15.2. In Murari Lal v. State of M.P. [(1980) 1 SCC 704: 1980 SCC (Cri) 330] this Court indicated the circumstances in which the court may itself compare disputed and admitted writings thus: (SCC p. 712, para 12)

"12. The argument that the court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and two voices of science are heard. There may be cases where neither side calls an expert, being ill-able to afford him. In all such

cases, it becomes the plain duty of the court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence."

The decision in Murari Lal [(1997) 7 SCC 110: 1997 SCC (Cri) 992] was followed in Lalit Popli v. Canara Bank [(2003) 3 SCC 583: 2003 SCC (L&S) 353].

16. While there is no doubt that court can compare the disputed handwriting/signature/finger impression with the admitted handwriting/ signature/ finger impression, such comparison by court without the assistance of any expert, has always been considered to be hazardous and risky. When it is said that there is no bar to a court to compare the disputed finger impression with the admitted finger impression, it goes without saying that it can record an opinion or finding on such comparison, only after an analysis of the characteristics of the admitted finger impression and after verifying whether the same characteristics are found in the disputed finger impression. The comparison of the two thumb impressions cannot be casual or by a mere glance. Further, a finding in the judgment that there appeared to be no marked differences between the admitted thumb impression and disputed thumb impression, without anything more, cannot be accepted as a valid finding that the disputed signature is of the person who has put the admitted thumb impression. Where the court finds that the disputed finger impression and admitted thumb impression are clear and where the court is in a position to identify the characteristics of fingerprints, the court may record a finding on comparison, even in the absence of an expert's opinion. But where the disputed thumb impression is smudgy, vague or very light, the court should not hazard a guess by a casual perusal.

17. The decision in Murari Lal [(1997) 7 SCC 110: 1997 SCC (Cri) 992] and Lalit Popli [(1980) 1 SCC 704: 1980 SCC (Cri) 330] should not be construed as laying a proposition that the court is bound to compare the disputed and admitted finger impressions and record a finding thereon, irrespective of the condition of the disputed finger impression. When there is a positive denial by the person who is said to have affixed his finger impression and where the finger impression in the disputed document is vague or smudgy or not clear, making it difficult for comparison, the court should hesitate to venture a decision based on its own comparison of the disputed and admitted finger impressions. Further, even in cases where the court is constrained to take up such comparison, it should make a thorough study, if necessary with the assistance of counsel, to ascertain the characteristics, similarities and dissimilarities. Necessarily, the judgment should contain the reasons for any conclusion based on comparison of the thumb impression, if it chooses to record a finding thereon. The court should avoid reaching conclusions based on a mere casual or routine glance or perusal."

57. In the present case, what this Court finds is that the findings with regard to difference between the admitted and the disputed specimen, recorded by the Settlement Officer of Consolidation is not reasonless. But, it is virtually that. The one line reason that has been assigned is to the

effect that in one specimen, the lines tend to the left whereas in the other they tend in the opposite direction, that is, right. Nothing more has been said to support his opinion by the Settlement Officer of Consolidation that the two specimens differ. So far as the Deputy Direction of Consolidation is concerned, his finding is absolutely without reasons. All that he says is that upon a comparison of the admitted thumb impression on the *Vakalatnama* of Sri Madan Mohan Chaubey with that on the sale deed dated 15.02.1960, executed by Sona Kunwar, undertaken with the aid of a magnifying glass, the two thumb impressions are apparently different. This kind of a finding is squarely in teeth of the law laid down by their Lordships of the Supreme Court in **Thiruvengadam Pillai** (supra).

58. Reverting to the findings of the Settlement Officer of Consolidation, this Court's remark earlier made that it is virtually without reasons, is to be understood in the context of reasons that are germane to identification of thumb impressions/ finger prints. As already said, the science of finger print identification is a perfect and highly evolved science. It has its own corpus of assimilated and systematized knowledge with a distinct methodology and terminology. If a Court is constrained to opine without the assistance of one or more experts, about the genuineness of a finger print/ thumb impression, its reasons must be expressed in terms understood and known to the science of finger print identification. For the purpose, the Court must look into an authoritative text book on the subject and seek assistance of Counsel, before recording findings based on reputed and recognized parameters.

59. In order to determine what would be the essential parameters of reasoning for a Court to hold that the admitted and the disputed finger prints/ thumb impressions do not agree, reference may be made to a reputed text book on the subject, **Saxena's Law And Technique Relating To Identification Of Handwriting, Disputed Documents, Finger Prints, Foot Prints And Detection Of Forgeries** (Third Edition, 1990) Revised by Atul Kumar Singla and Published by the Central Law Agency, Allahabad.

60. In Chapter XIX titled, "Classification of Finger Prints for Comparison Purposes', finger prints have been classified into four main types and nine sub-types detailed in this Chapter, under the head, "Introduction". The learned Author describes these types and their sub-types as follows:

1) "Different workers have suggested their own classification systems, but in and in most of other countries of this world, Henry system of classification is prevalent, in which finger prints are classified into four main types and nine sub-types as under :-

Main types	Sub-types
1. Arch type	
	Plain Arch, Tented Arch.
2. Loop type	
	Radial Loop, Ulnar Loop.
3. Whorl type	
	Whorl.
4. Composite type	
	Central Pocket Loop,
	Lateral Pocket Loop,
	Twinned Loop,
	Accidentals."

61. There is then in the second head of the chapter, a reference to finger print terminology. This head is titled "Finger Print Terminology". Some of the principal

terms and their precise connotation, detailed by the learned Author are quoted in extenso:

"2. Finger Print Terminology

Before dealing with different pattern types in detail, the basic understanding of the terminology used in finger prints is necessary.

(a) Finger

One of the terminal parts of the hand is known as finger. The fingers are named as Thumb, Index finger, Middle finger, Ring finger and Little finger.

(b) Finger Print

The impression of the bulb of a finger on a surface is known as finger print. When this print is not readily visible to the unaided eye, it is called latent finger print.

(c) Ridges

The raised portions of the friction skin of the hands and soles are known as ridges. In the black inked impression, these ridges appear as black lines. (See figure No. XVII-4).

(d) Finger print pattern

The design formed by ridges on the bulb of finger is known as finger print pattern, which can be classified.

(e) Pattern Area

The area covering the portion of finger print from which the finger print pattern can be determined, is termed as pattern area.

(f) Type Lines

The two inner most ridges which start parallel, diverge and surround or tend to surround the pattern area are called type lines.

(g) Delta

According to Federal Bureau of Investigation, the delta in finger prints is defined as "The Delta is that point on a ridge at or in front of and nearest the center of divergence of the type lines. The delta may be a bifurcation, an abrupt ridge ending, a dot, a short ridges, a meeting of two ridges or a point on the first recurving ridge located nearest to the center and in front of the divergence of the type lines'.

The delta which is also called "Outer Terminus' may also be defined as The ridge characteristic nearest to the point of divergence of type lines'.

The Delta can be a bifurcation, a ridge ending, a short ridge, a ridge dot or a point on a continuous ridge as illustrated below :-

While locating delta, the examiner has to be careful in fixing the type lines and determining the point of divergence of two type lines.

(h) Core

The approximate center about which the ridges form pattern is known as core.

The point of core is important for correct ridge counting and for the correct interpretation of loops and Whorls.

According to Mr. Henry the core of a loop may consist either of an even or an uneven number of ridges (termed "rods') not joined together or it may consist of two ridges formed together at their summit (termed "staple'). Where the core consists of an uneven number or rods, the top of the central rod is the "point of core'. If the core is a staple, the shoulder of the staple that is farthest from the delta is taken as the "point of the core', the nearer shoulder counting as a separate ridge. Where the core consists of an even number of rods, the two central ones are considered as joined at their summits by an imaginary neck, and, of these two, the shoulder farthest from the delta is the "point of the core'. In Whorls circular or elliptical in form, the center of the first ring is the "point of the core'. Where the Whorl is spiral in form the point from which the spiral begins to revolve is

the "point of the core'. "Point of the core' is synonymous with "inner terminus.

(i) Ridge characteristics

The peculiarities in the ridges such as bifurcation, ridge ending, enclosure etc. resulting from the deviations from the normal raticulation of the ridges are known as ridge characteristics (See figure No. XVII-4).

(j) Bifurcation

When one ridge splits into two ridges running in different directions, that characteristic is known as bifurcation. (See figure No. XVII-4).

(k) Ridge ending

When a normally flowing ridge ends abruptly, that characteristic is known as ridge ending. (See figure No. XVII-4).

(l) Enclosures

When a single ridge bifurcates and reunites to enclose some space, that characteristic is known as enclosure. (See figure No. XVII-4).

(m) Island

A small ridge having only one sweat pore is known as Island. (See figure No. XVII-4).

(n) Ridge counting

The number of ridges crossing or touching an imaginary line drawn between the point of core and delta of a loop pattern is known as Ridge counting.

For the determination of accurate ridge counting, the examiner must locate exact core and delta, otherwise, errors in locating these fixed points may result in wrong ridge count.

Some of the rules to be followed in the determination of ridge counting :-

1. The ridges are counted between core and delta, but the point of core and delta are not included in the count.

2. If the imaginary line passes through the enclosure, a ridge count of two is made at that time. While passing through the enclosure, the line may pass through the center or through bifurcating ends.

3. If the imaginary line touches the point of bifurcation, a ridge count of two is made at that point.

4. If the line touches a ridge dot, a count of one ridge is made at that point.

5. A white space must intervene between delta and ridge count."

(figure omitted, refer to the text book)

62. There is a wealth of other terms from this science and their characteristic types explained with reference to figures. This Court does not propose to further quote or refer to these terms, for all that is not of much relevance here. Mention of the terminology introduced by the Author has been particularly made, to serve as a reminder of the fact that reasoning based on this precise science of finger prints, must inform the Court's mind before an opinion is expressed regarding similarity or dissimilarity of admitted and disputed finger print specimen. Also, reasons given should be expressed in terms of reputed principles evolved by this science. To the comparison of finger prints, the learned Author has devoted Chapter XX in his Treatise. In this Chapter under the heading, "Comparison of pattern type', the learned Author has dealt with subject as follows:

"4. Comparison of pattern type

As already discussed in Chapter XIX finger prints can be classified into four main types mainly Arch, Loop, Whorl and Composites which can be sub-classified into sub-types i.e. Plain Arch, Tented Arch, Radial Loop, Ulnar Loop, Whorls, Lateral Pocket loop, Twinned loop, Central pocket loop and Accidentals.

When the two impressions tally in their main and sub-pattern types, it means

that they belong to the same general class and there is a need to compare their individual characteristics. Without comparing them further and in details, no definite opinion can be formed/ given about their identity or non-identity.

When the two finger prints do not tally in their main pattern type e.g. if one finger print is of Whorl type and the other is of loop type, or they tally in the main pattern type, but differ in the sub-pattern type e.g. if both the impressions are loop type, but one of them is opening towards Left and the other is opening towards Right, then it means that they do not belong to the same general class, hence they are definitely non-identical. (See figure Nos. XX-2,3)"

63. Further on, the learned Author has dealt with the topic of "Comparison of Individual Ridge Characteristics' in the following words:

"5. Comparison of Individual Ridge characteristics

When two finger prints tally in their main pattern type and sub-pattern type, or when their pattern type cannot be determined due to one or the other reason, the confirmation test to declare them identical or non-identical, rests on the comparison of their individual ridge characteristics such as bifurcation, ridge ending, enclosure, ridge dot, island etc. In short, it can be said that the true basis for comparison of finger prints is the comparison of their individual ridge characteristics.

When two finger prints tally in their main and sub-pattern type and sufficient number of ridge characteristics in their nature, positioning and number of ridges intervening between them, they are surely identical with each other and impressed by one and the same finger. (See figure No. XX-4) When two finger prints tally in their main and sub-pattern types, but they differ in the ridge details, they are non-identical impressions impressed by different fingers. (See figure No. XX-5) 4)"

64. The learned Author has then proceeded to discuss the number of points in finger prints sufficient to establish their identity. He has expressed himself on this issue going by the contemporary view at the time when the Treatise under reference was authored. Six points with identity of pattern are sufficient to opine that two impressions come from the same digit. What is further required about these six points, the learned Author has dilated. All that need not detain this Court, for here is a case where an opinion about disagreeable identity has been expressed by the Authorities below. On the issue as to what are the essentials required to hold opinion that two finger prints are non-identical, the learned Author has expressed the requirement in the following words, mentioned under a separate head, in Chapter XX:

"8. How many points are necessary to declare the non-identity of finger prints ?

Two finger prints can be declared non-identical on even a single point of material difference between them e.g. if two finger prints differ in their main pattern type or sub-pattern type or ridge counting or ridge tracing or in their ridge characteristics, they have surely been impressed by different fingers."

65. Now, a look at the reason assigned by the Settlement Officer of Consolidation would show that he has said not a word about the main pattern type and

if that were similar, about the sub-pattern type. He could have just opined about the main pattern types, if they were not similar to support his conclusion, and, if the main pattern type was similar, a dissimilarity in the sub-pattern type would have served as good reason. If both of those were similar, the conclusion would have to be supported by ridge counting or ridge tracing or the ridge characteristics. In the event, the two finger prints fell under the same main pattern type, for example loop type, with one opening to the left and other to the right, the conclusion would be justified. This example draws on the illustration mentioned in Saxena's Treatise under the heading, "Comparison of Pattern Type" (supra). This illustration is a case where diversion is found in the sub-pattern type. In his one line reasoning, the Settlement Officer of Consolidation says no more than this that the orientation or direction of the lines, in one of the specimens is to the left whereas in the other, to the right. There is no mention in the slightest measure about the main pattern type, which if similar, a distinction drawn on the basis of sub-pattern type, with reference to lines opening to the left or the right. The opinion expressed by the Settlement Officer of Consolidation, appears to be utterly uninformed and based on no more than what is popularly called, "common sense". This kind of a reasoning bereft of reference to the cardinal principles, evolved by the science of finger print identification, cannot be accepted to be any reason at all. The findings of the Settlement Officer of Consolidation on this count must be held to be bereft of reason. It would, therefore, vitiate the conclusion.

66. It must be remarked that substantially, all that is now required to be re-determined by the Consolidation Authorities is the issue about the identity of Smt. Sona Kunwar. This Court is mindful of the fact that those two women may no longer be available, but there is sufficient evidence on record, to decide the issue. It must also be remarked that evidence of witnesses already on record, who are close relatives of Sona Kunwar, whosoever is the genuine one, requires to be carefully evaluated by the Authorities below, both of whom are Authorities of fact. This evidence cannot be left unattended or undealt with, particularly so, as the Authority of first instance has referred to it. A reversal of the Consolidation Officer's order could not be validly done, unless oral evidence that he has considered or some other part of it, was considered and made basis of the reasoning by the Appellate or the Revisional Authority.

67. This Court has noticed earlier in this judgment that shares of parties appear to have been incongruently worked out. This is on account of the fact that Smt. Sona Kunwar has been granted a half share in the *Khata* in question whereas she appears to have a half share in the land in dispute. The land in dispute is a smaller part of the *Khata* in question. The parties have not addressed the Court on this issue but there appears to be some incongruity about the working out of their shares. This Court would not like to express itself at all about the entitlement of parties to the shares in the *Khata* in question, but certainly thinks that upon determination of the substantial issue hereinabove indicated, inter se the petitioner and respondent no. 3/1 to 3/3, the shares of parties in the *Khata* in question ought to be redetermined by the Settlement Officer of Consolidation. It is clarified that this Court does not propose to express any opinion about the shares of parties in the *Khata* in question which the

Settlement Officer of Consolidation would be free to determine in accordance with law. It is also clarified that in working out the shares of parties in the *Khata* in question the legal representatives of the original petitioner Ram Dei, those of original respondents no. 3, Ramji besides the LRs of original respondent nos. 4 and 5, Jagardev and Mukhdev, respectively, shall be heard.

68. To sum up, this matter would have to go back to the Settlement Officer of Consolidation, who would be obliged to decide afresh, on the basis of evidence on record or some further evidence, if forthcoming. The issue whether the sale deed dated 15.02.1960 was executed by Sona Kunwar or by an impostor shall be gone into and decided. To this end, the Settlement Officer of Consolidation would have to decide the question whether Sona Kunwar-I or Sona Kunwar-II is the genuine person. The issues/ questions that have been finally determined by this Court are no longer open to the Authorities below to examine. It is also clarified that except for the two counts on which this matter would stand remanded to the Settlement Officer of Consolidation, no other or further or fresh issues would be open to the parties to canvas.

69. In the result, this petition **succeeds** and is **allowed in part.** The impugned orders passed by the Deputy Director of Consolidation, Ghazipur dated 26.02.1985 and the Settlement Officer of Consolidation, Ghazipur dated 04.12.1972 are hereby **quashed**. The five appeals, originally filed by Smt. Sona Kunwar and Smt. Ram Dei shall be decided afresh by the Settlement Officer of Consolidation, after necessary substitution of the parties' legal representatives in accordance with law and hearing all parties concerned, bearing in mind what has been said in the body of this judgment. The Settlement Officer of Consolidation concerned shall endeavour to decide the appeals within **six months** of receipt of a certified copy of this judgment. Till decision of those appeals by the Settlement Officer of Consolidation, status quo regarding possession, nature and character of the land in dispute as exists today, shall be maintained by the parties. Costs easy.

(2021)01ILR A1170
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.12.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 3345 of 2003
with
Criminal Appeal No. 3371 of 2003

Rajendra Prasad Pandey
...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri M.C. Chaturvedi, Sri Bed Kant Mishra, Sri Dwivedi S.C., Sri Sanjay Kumar

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

Indian Evidence Act, 1872- Section 154- Hostile Witness- Injured witnesses- No corroboration with medical- The presence of (PW-2), (PW-4) and (PW-12) are concerned although PW-2 and PW-4 have been brought forward as the two injured eye witnesses but they have not supported the prosecution case and have been declared hostile. Even (PW-12) the other eye witness who is said to be

accompanying PW-2 while they were on their way to attend the call of the nature also did not support the prosecution case and has been declared hostile- The medical evidence does not corroborate at all with the prosecution version.

It is settled law that testimony of a hostile witness can be considered to the extent it supports the case of the prosecution. However, where the witness is hostile completely and his injuries are also not corroborated from the medical, it would be unsafe to rely upon such testimony.

Criminal Law-Indian Penal Code, 1860- Section 376- In so far as the statement of "R' recorded under Section 164 Cr.P.C. is concerned, she in Court has resiled from it and has in very specific terms stated that she had deposed under the threat of police. The deposition given in the statement recorded under Section 164 Cr.P.C. remains uncorroborated.

The court cannot secure the conviction of the accused where the prosecutrix not only resiles from her statement u/s 164 Cr.Pc but also fails to support the case of the prosecution and the medical also fails to corroborate the case of the prosecution.

Indian Penal Code, 1860- Section 376(2) (g) - Section 34 IPC- Conviction under- It is settled law that common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Direct proof of common intention is seldom available, and therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances.

Although common intention can only be inferred from the proved facts and circumstances but where the prosecution witnesses fail to prove the facts and attending circumstances, such intention cannot be inferred so as to convict the accused with the aid of section 34.

Since all the prosecution witnesses (excluding the ones who were part of interrogation) have not supported the prosecution case and have been declared hostile, the corroboration through medical evidence is also not available, the statement of "R' recorded under Section 164 Cr.P.C. remains uncorroborated and also that the site plan does not show the place from where the eye witnesses are said to have seen the present occurrence, it is very unsafe to rely on the prosecution case as put forward.

Criminal Appeal allowed. (E-2) (Para 45, 47, 49, 50, 51, 52)

Judgements/ Case law relied upon: -

1. C. Muniappan & ors. Vs St. of T.N, (2010) 9 SCC 567

(Delivered by Hon'ble Samit Gopal, J.)

1. The aforesaid criminal appeals are connected together and arise out of judgement and order dated 17.07.2003 passed by the Special Judge, SC / ST Act, Kanpur Dehat in Special Session Trial No. 28 of 2002 **(State of U.P. Vs. Rajendra Prasad Pandey and Another)** whereby the appellant Rajendra Prasad Pandey has been convicted and sentenced under Section 452 I.P.C. for one year Rigorous Imprisonment, under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for one year Rigorous Imprisonment and a fine of Rs. 1000/-, under Section 376 I.P.C. to life imprisonment, under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to life imprisonment and a fine of Rs. 1000/-, Section 323 read with Section 34 I.P.C. to six months Rigorous Imprisonment, under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to six months

Rigorous Imprisonment and under Section 504 I.P.C. to six months Rigorous Imprisonment.

The accused / appellant Sunil Kumar Singh has been convicted and sentenced under Section 452 I.P.C. to one year Rigorous Imprisonment, under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for one year Rigorous Imprisonment and a fine of Rs. 1000/-, Section 376 read with Section 34 I.P.C. to life imprisonment, under Section 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to life imprisonment and a fine of Rs. 1000/-, Section 323 read with Section 34 I.P.C. to six months Rigorous Imprisonment, under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to six months Rigorous Imprisonment and under Section 504 I.P.C. to six months Rigorous Imprisonment.

It has been ordered that in default of payment of fine both the accused-appellants shall undergo six months additional imprisonment. The trial court has ordered the sentences to run concurrently. The benefit of Section 428 Cr.P.C. has been ordered to be extended to the accused - appellants.

2. In view of the legislative mandate as contained in Section 228-A of the Indian Penal Code, 1860 and the observations made by the Hon'ble Supreme Court in various judgements the identity of the prosecutrix / victim is not being disclosed and she will be referred to as "R' hereinafter.

3. The prosecution case as per the First Information Report lodged by "R' / P.W.-1 is that on 31.10.2000 at about 2:00 A.M. she was present in her house wherein Inspector Rajendra Prasad Pandey and Constable Sunil reached her house and told her to open the door citing some reason of some accused on which she opened the door and then both the persons caught hold of her, took her towards the field wherein Inspector Pandey forcibly threw her on the ground and committed rape on her. It is further stated in the First Information Report that at that time one Aashiq Ali son of Khuda Baksh and Ibrar son of Tasveer Ali who are co-villagers came there to attend the call of nature and on seeing them the first informant started shouting on which the said two persons caught hold of Aashiq Ali and had mercilessly beaten him. On hearing the shouts and shrieks many persons of the village reached there and the Inspector was apprehended by them but Constable Sunil somehow managed to run away. She then states that her report be registered and appropriate action be taken.

4. The application for lodging of the First Information Report was given by "R' to the police of which Shiv Narayan Singh is the scribe, the same is marked as Exb: Ka-1 to the records. On the basis of the said application a First Information Report was registered on 31.10.2000 at 11:40 AM at Police Station Bilhaur, District Kanpur Dehat as Case Crime No. 490 of 2000, under Sections 376, 323, 34 I.P.C. and Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes Act against Sub-Inspector R.P. Pandey and Constable Sunil Kumar Singh. The said First Information Report is marked as Exb: Ka-7 to the records.

5. The prosecutrix / victim "R' was medically examined on 31.10.2000 at about 09:00 PM by Dr. Manju Agarwal P.W.- 14

at Duffrin Hospital, Kanpur. The medical examination report is marked as Exb: Ka-2 to the records. The doctor conducting the medical examination found no mark of injury on the external body. Further no mark of injury was seen on the private part of body. The hymen was torn and an old tear was present. The vagina admitted two fingers easily. The victim was referred for X-Ray for the opinion about her age.

6. A supplementary report dated 04.11.2000 was prepared by Dr. Manju Agarwal which is marked as Exb: Ka-3 to the records. While, placing reliance on the X-Ray report and pathological report and the medical examination report the doctor opined that no definite opinion regarding rape can be given as she is used to intercourse. The age of the victim was opined to be above 25 years. The said report is marked as Exb: Ka-3 to the records.

7. The accused-appellant / Rajendra Prasad Pandey was also subjected to medical examination on 31.10.2000 at about 11:20 PM by Dr. R.S. Pratihar (P.W.- 15). The doctor conducting the medical examination has mentioned in the said report that no smell of alcohol is coming out from his breath. He is in full sense and not under intoxication. While, examining the private part of the accused the doctor did not find any injury or any semen on it. The opinion as arrived by him is that he is not under intoxication and is in full sense. Further there is no semen seen on the tip of his penis. The said medical examination report is marked as Exb: Ka-6 to the records.

8. Aashiq Ali (P.W.- 2) was examined on 31.10.2000 at about 12:15 PM by Dr. R.S. Pratihar (P.W.- 15). The doctor found the following injuries on his person:-

(1) Contused 4 cm x 1.2 cm on back side of left fore-arm 6 cm below the elbow. Red colour.

(2) Contusion Swelling 9 cm x 3.5 cm on antero lateral aspect of the left leg. 9 cm below the left knee, red colour.

(3) LW of size 3 cm x 2 cm x Muscle on back side of Rt. Leg 3 cm below the knee.

The injuries were opined to be simple in nature having a duration of about half day and caused by hard and blunt object. The said medical examination report is Exb: Ka-5 to the records.

9. Rakesh (P.W.-4) was medically examined on 31.10.2000 at 12:25 PM by Dr. R.S. Pratihar (P.W.- 15) and the doctor found the following injuries on his person:-

(1) Contusion 4 cm x 2 cm on Rt. Side head11.5 cm above the Rt. Ear. Red in colour.

(2) Abraded Contusion 2.5 cm x 1.5 cm on dorsal side of left hand-- just above the root of the left ring and little finger, reddish / blue colour.

C/o pain on both side of buttock

C/o pain on Left side chest.

The injuries were opined to be simple in nature having a duration of about half day and caused by hard and blunt object / weapon. The said medical examination report is Exb: Ka-4 to the records.

10. Certain clothes being a sari, petticoat and an underwear were sent to the chemical analyst for analysis. A report dated 12.01.2001 was sent by the chemical analyst in which after analysis he found

spermatozoa to be present on sari and underwear which were marked as item nos. 1 & 3 respectively and also human semen were found on the said items. On the item no. 2 being the petticoat no spermatozoa or semen was found. The said report is Exb: Ka-15 to the records.

11. The investigation concluded and a charge-sheet dated 17.01.2001 was submitted against Rajendra Prasad Pandey the appellant in Criminal Appeal No. 3345 of 2003, under Sections 376, 354, 452, 323, 504, 34 I.P.C. and Section 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and against Sunil Kumar Singh the accused in Criminal Appeal No. 3371 of 2003 under Sections 354, 323, 504, 452, 34 I.P.C. and 3(1)(x) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as an absconder. The same is Exb: Ka-14 to the records.

12. The trial court vide its order dated 15.03.2002 framed charges under Sections 452 I.P.C. read with Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 376 I.P.C. read with Section 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 323 / 34 I.P.C. read with Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Section 504 I.P.C. read with Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 against accused Rajendra Prasad Pandey.

13. Against accused Sunil Kumar Singh, the trial court vide its order dated 15.03.2002 framed charges under Sections 452 I.P.C. read with Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, 376/34 I.P.C. read with Section 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 323/34 I.P.C. read with Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Section 504 I.P.C. read with Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

14. Both the accused persons pleaded not guilty and claimed to be tried. They have also led their defence by way of producing defence witnesses.

15. The prosecution in order to prove its case produced "R' as P.W.-1 who is the prosecutrix / victim and the first informant also. Aashiq Ali (P.W.-2) is one of the injured persons and a co-villager, Rajesh Kumar (P.W.-3) is also a co- villager, Rakesh (P.W.-4) is the other injured person and a co-villager who runs a general merchant shop in the village, Sipahi Lal (P.W.-9) is a relative of the husband of the prosecutrix / victim being the elder brother of the brother-in-law of Nandram who is the husband of the prosecutrix / victim. Ibrar (P.W.-12) is the nephew of Aashiq Ali as the eye-witness of the incident. Amongst the formal witnesses Shiv Narain (P.W.-5) is the scribe of the First Information Report, Smt. Samina wife of Ibrar is the daughter-in-law of Aashiq Ali, Shri Krishna (P.W.-7) is the witness of the recovery of clothes of the accused and the victim, Dinesh Kumar (P.W.-8) is the witness like Shri Krishna (P.W.-7) as being the witness of the clothes of the accused and the victim, Dr. Ram Narain (P.W.-10) provided first aid and dressing to Aashiq Ali, Nandram (P.W.-11) is the husband of "R', Praveen Kumar

(P.W.-13) is a Constable in police who states to have got his ravangi recorded at the police station along with accused Sunil Kumar Singh for duty in village Dalelpur, Dr. Manju Agarwal (P.W.-14) conducted the medical examination of "R', Dr. R.S. Pratihar (P.W.-15) conducted the medical examination of Aashiq Ali (P.W.-2) & Rakesh (P.W.-4) and Rajendra Prasad Pandey the accused, Dharmendra Kumar Mishra (P.W.-16) is the head Constable who transcribed the First Information Report, prepared its chik and states to have received an information on telephone through Village Pradhan that Sub-Inspector Rajendra Prasad Pandey has been apprehended by villagers, Smt. Kamleshwari Chand (P.W.-17) is the Circle Officer and is the second Investigating Officer who took up the investigation from 01.11.2000 from Sri B.N. Chaturvedi, Circle Officer, Bilhaur, concluded the investigation and submitted the charge-sheet, B.N. Chaturvedi, Circle Officer (P.W.-18) is the Investigating Officer who had the case in his hand up to 01.11.2000 and then the same was transferred to Smt. Kamleshwari Chand (P.W.-17) and lastly, Sukh Sagar Shukla, Sub-Inspector (P.W.-19) who received information about some dispute between Sub-Inspector Rajendra Prasad Pandey and Constable Sunil Kumar Singh with the villagers through the head Constable of Police Station- Bilhaur and also the fact that they have been apprehended by the villagers who then proceeded to the place of occurrence along with other police personnels.

16. In defence, accused / Rajendra Prasad Pandey produced two witnesses being Krishna Narain Bhatt the Station Officer, Police Station Bidhnu as D.W.-1 who has stated about some dispute between S.B. Pathak, S.P.R.A. with the accused-appellant / Rajendra Prasad Pandey and then Madan Prasad Sharma, Sub-Inspector Police Station Bidhnu (D.W.-2) who also states about some dispute between S.B. Pathak, S.P.R.A. and accused-appellant / Rajendra Prasad Pandey.

17. The trial court after considering the entire evidence on record came to the conclusion that there is sufficient evidence against accused-appellant / Rajendra Prasad Pandey for committing rape on "R'. In so far as, the accused Sunil Kumar Singh is concerned the trial court came to a conclusion that although Sunil Kumar Singh did not commit rape on the prosecutrix but still under the amended Section 376(2)(g) I.P.C., he is guilty of gang rape and although he has not committed actual rape but still would be guilty of the same and further that "R' is a downtrodden women belonging to the Scheduled Castes / Scheduled Tribes community, hence, provisions of Scheduled Castes and Scheduled Tribes Act would also be applicable and thus convicted the accused persons as stated above.

18. We have heard Sri Bed Kant Mishra, learned counsel for the appellants in both the appeals and Mrs. Archana Singh, learned A.G.A. for the State and perused the record. Since both the appeals arise out of a common judgement and order, the same are being decided by this judgement.

19. Learned counsel for the appellants made the following submissions:-

(i) The prosecutrix / victim is a major lady. She is a married women. There is no evidence whatsoever in the present matter to show that rape has been committed on her.

(ii) The medical evidence does not in any manner corroborate with the prosecution case. The doctor did not find any mark of injury either on the external body of the prosecutrix or on her internal part. She was opined to be used to sexual intercourse. The link which comes forward by way of medical evidence for corroborating an incident of rape is totally missing as the doctor in the supplementary medical examination report herself has opined that no definite opinion about rape can be given and she is used to intercourse.

(iii) All the prosecution witnesses being "R' (P.W.-1), Aashiq Ali (P.W.-2), Rajesh Kumar (P.W.-3), Rakesh (P.W.-4), Shiv Narain (P.W.-5), Smt. Samina (P.W.-6), Shri Krishna (P.W.-7), Dinesh Kumar (P.W.-8), Sipahi Lal (P.W.-9), Dr. Ram Narain (P.W.-10), Nandram (P.W.-11) and Ibrar (P.W.-12) have not supported the prosecution case and have been declared hostile.

(iv) The report of the chemical examination cannot be given reliance upon as a fact of corroboration as the witnesses of the recovery of the said clothes being Shri Krishan (P.W.-7) and Dinesh Kumar (P.W.-8) have not supported the prosecution case and have been declared hostile and as such the said report is of no worth. Even if the same is considered to be of any worth, the same cannot be given credence as there is no evidence whatsoever to show that the stains present on the said clothes were due to the act of rape as committed by the accused-appellant and as such the same cannot in any manner be linked and associated with the present incident.

(v) The accused Rajendra Prasad Pandey has come forward with a specific defence of his superior police officer being annoyed with him due to which he has been falsely roped in for which two defence witnesses were produced by him which have wrongly been not disbelieved by the trial court.

20. On the other hand, the learned Additional Government Advocate for the State opposed the submissions of the learned counsel for the appellants on the ground that although the said 12 witnesses have been declared hostile but the manner in which they have been declared hostile shows that they were at some point of time won over and thus they changed their version before the trial court. The evidence of the prosecutrix / victim is sufficient enough to prove a case of rape. It is argued that the statement of "R' was recorded under Section 164 Cr.P.C. wherein she very clearly states about the entire story as to how rape was committed on her. It is argued that the present occurrence occurred as stated by the prosecution at the date, time and place by the accused persons named therein. It is argued that since the accused persons are police personnels, they have won over the witnesses under threat and pressure. It is argued that the appeal lacks merit and is liable to be quashed.

21. "R' (P.W.-1) is the prosecutrix / victim and the first informant of the present case. She in her exaimination-in-chief states that on 30/31.10.2000 the accused persons came to her house at about 2:00 A.M. At that time she, her five children, Guddi wife of her son and her *nandoi* / Sipahi Lal were present. Her husband Nandram had gone to village Biharipur. The accused persons came and from outside asked her to open the door as some persons of bad antecedents were living there and a raid is being conducted for arresting them. Sipahi Lal the *nandoi* of "R' opened the door. Both the accused were in their uniforms. Both of them disclosed their name to her. She states that Inspector was

not in a state of intoxication. She identifies the accused in the court as Rajendra Prasad Pandey and Sunil Kumar Singh Constable and states that both of them were in their uniform. She further states that both the accused persons then took Sipahi Lal her *nandoi* out of the house to a near by road crossing. She was not taken out of the house. She states that the accused persons did not take her out of the house towards the field. She further states that neither the said persons assault her on her body nor they committed rape on her. She further states that she was then waiting for her *nandoi* to return wherein 2-3 unknown persons wearing *kurta-pyjama* came and took her towards the field and all the said 03 persons committed rape on her against her wish. She raised shouts on which Aashiq Ali reached there. It was night. No other person came. Aashiq Ali was not assaulted by the said persons. While, running he fell down and received injuries. She states that Sipahi Lal was not beaten by the accused persons present in court before her. She states that the accused persons were not apprehended by the villagers. She went to the police station along with Shiv Narain. The Inspector of police present at Police Station Bilhaur had got her thumb impression affixed on plain paper and had told her that she may go back and her report will be registered. She states to have not dictated any First Information Report to Shiv Narain. She further states that police Inspector present there had himself got her medically examined and her X-Ray examination was also got conducted. She states that the Inspector had taken her petticoat and had taken the sari of her daughter-in-law which was called from the house. She states that no clothes of the accused were taken before her. Bundle of clothes present before the trial court were opened from which the sari and the petticoat were identified by "R' as that of her but she states that she does not know about the underwear. The said witness was then declared hostile at the request of the A.D.G.C. and was allowed cross-examination. In the cross-examination "R' admits her thumb impression on the written report. She denies the fact that the accused persons took her from the house and committed rape on her. She further denies the fact that Aashiq Ali received injury during the course of saving her from the accused persons on which he was beaten by them. Even the fact of beating Sipahi Lal and Rakesh is being denied by her. She denies the fact that the accused-appellant Rajendra Prasad Pandey was apprehended at the place of occurrence. She denies the fact of getting a report prepared at the village from Shiv Narain and then affixing her thumb impression. To her statement recorded under Section 161 Cr.P.C. twice, she denies and states that she never gave any such statement. While, being countered to her statement recorded under Section 164 Cr.P.C. she states that the police Inspector had threatened her that if she does not give the statement as stated by him then she would be implicated in a case of charas. She states that she did not make any complaint to any police official about the fact that she was threatened to give the name of the present accused persons in the matter. To a suggestion that she has sided with the accused persons who have threatened her and as such she is giving such statement, she denies. She further denies the fact that the underwear of accused Rajendra Prasad Pandey was taken into custody in her presence. The trial court drawing her attention to the statement recorded under Section 164 Cr.P.C. clarified to which she has stated that when her statement was being recorded Inspector Sukh Sagar Shukla was not standing inside

the court but was standing outside and even no police personnel was standing inside the court then further in the cross-examination she states that her elder son is aged about 22-23 years, she was married around 25 years back and there is no other person by the same name as that of her and her husband in the village.

22. Aashiq Ali (P.W.-2) states that on the day and time of the incident or at any time or date the accused persons did not commit rape on "R' and did not assault her. He further states that even the said persons did not assault him. He was declared hostile and was permitted cross-examination by the A.D.G.C. In his cross-examination he denies giving any statement under Section 161 Cr.P.C. to the Investigating Officer. To a suggestion that he under pressure of the accused who are police personnels and under threat is giving the said statement and not stating the truth, he denies. He further denies the fact that under threat he and "R' had given affidavit in the court. He specifically denies that the accused persons assaulted him as a result of which he received injuries. To the fact that villagers had apprehended the accused he states that he does not know about it.

23. Rajesh Kumar (P.W.-3) is a businessman, he states that on 30.10.2000 the accused persons at about 9:00 PM came to his shop along with Constable Praveen. He states that they did not instruct him to call anyone. He further states that Dipu son of Ram Asrey Katiyar was not called by them through him. He states that Sipahi Lal the relative of "R' was present with them. "R' was not with them. He further states that neither Aashiq Ali was apprehended by the accused persons nor he was beaten before him. He even states that Aashiq Ali did not get medical aid in front of him. He further states that it is incorrect that "R' was with the accused persons and they were assaulting her and had committed rape on her. He states that the accused persons stayed throughout the night at his shop. He further states that Sipahi Lal the relative of "R' was there for some time and then he went back. This witness has also been declared hostile and was permitted cross-examination by A.D.G.C. To his statement recorded under Section 161 Cr.P.C., he denies the same to have been given to anyone. He further denies the fact that "R' was with the accused persons and they were committing immoral acts on her. He further denies that Aashiq Ali was also present there, was beaten and was then provided first aid. Lastly, to a suggestion that the accused are police personnels and as such under threat and pressure he is giving a false testimony, he denies.

24. Rakesh (P.W.-4) is also a businessman and a general merchant and is also an injured. He states that on 30/31.10.2000 at about 2:00 PM Inspector Rajendra Prasad Pandey and Constable Sunil Kumar Singh came to his house and Sunil Kumar Singh asked for a packet of spices on which he while going down the ladder he slipped and received injuries. He states that it is incorrect that the accused persons had assaulted him. He states that the police personnels and persons of the village took him to the doctor but he was unconscious. He states to have re-gained consciousness at his house after returning from the hospital. He was informed by the villagers that they and the police took him. He states that he does not know that Inspector Rajendra Prasad Pandey had committed rape on "R' who is the wife of Nandram and further states that even he has not heard of any such incident. He was then declared hostile and the A.D.G.C. was

permitted cross-examination. The witness then denies his giving statement under Section 161 Cr.P.C. and further states that he did not give any such statement that on the night of the present incident Inspector Rajendra Prasad Pandey and Constable Sunil Kumar Singh had assaulted him as a result of which he received injuries. He states that he has not heard on any such fact that Inspector Rajendra Prasad Pandey had committed rape on "R' wife of Nandram and senior police officials had come there and further denies that he, "R', Aashiq Ali and Inspector Pandey were taken to the police station and then were sent to the hospital for medical examination. On a suggestion that since the accused are police personnels he is giving a false testimony under their threat and pressure, he denies the same.

25. Shiv Narain (P.W.-5) is the scribe of the application given for lodging of the First Information Report. He in his examination-in-chief identifies his handwriting and signature on the application. He states that the Station House Officer, Sukh Sagar Shukla dictated him the same which he transcribed. He states that no thumb impression of "R' was affixed in front of him. He identifies his handwriting and signature and the said document is marked as Exb: Ka-1 to the records. He was also declared hostile and the A.D.G.C. was permitted cross-examination. He denies the fact that "R' had dictated the First Information Report and after reading it to her, her thumb impression was got affixed. He denies that the statement which he has given in court in the examination-in-chief that the application was dictated to him by Sukh Sagar Shukla, Station House Officer is because of threat and pressure of accused persons. He denies his giving any statement under Section 161 Cr.P.C. to anyone. He further states that he did not make any complaint to any police official or court regarding the fact that the said application was not dictated by "R' but was dictated by Sukh Sagar Shukla, Station House Officer.

26. Smt. Samina (P.W.-6) states that Aashiq Ali is her father-in-law. She states that her father-in-law was not assaulted by police on 31.10.2000. She states that on 02.11.2000 she had not given any statement to police. She was declared hostile and the A.D.G.C. was permitted cross-examination. To her statement recorded under Section 161 Cr.P.C., she states that she did not give any such statement that the police personnels regarding assault in the night on her father-in-law and Chhotey Lal had managed first aid. She states that she does not know the accused persons from before. To a suggestion that the accused persons are police personnels and she is giving the said statement under threat and pressure, she denies the same.

27. Shri Krishna (P.W.-7) has been produced as a witness of the recovery of clothes of the accused, Rajendra Prasad Pandey and "R'. In his examination-in-chief he denies the fact that any recovery of any underwear of Rajendra Prasad Pandey and sari and petticoat of "R' were effected before him and Dinesh Kumar. He states that they were made to sign on plain papers and even "R' did not sign before them. He states that nothing was written on those papers. He identifies his signatures on two papers and states again that when he had signed them then there was nothing written on them. He was declared hostile and the A.D.G.C. was permitted cross-examination. He states that he knows Inspector Rajendra Prasad Pandey who was posted at the Police Station- Bilhaur. He denies the fact

that clothes of "R' and the accused were recovered before him. He further states that it is incorrect to state that the recovery memo was drawn, read out to them and then they were made to sign on it. On his statement recorded under Section 161 Cr.P.C., he states that he has not given any such statement to anyone and he has not given any such statement that police Constable Dharmendra Mishra had taken the clothes of the accused and "R' in possession. To a suggestion that he is giving the statement under threat and pressure of police Inspector, he denies the same.

28. Dinesh Kumar (P.W.-8) is also said to be a witness of the recovery of the clothes of "R' and the accused. As like Shri Krishna (P.W.-7) he has also been declared hostile and has stated the same as has been stated by Shri Krishna (P.W.-7) and as such the same is not being repeated being identical.

29. Sipahi Lal (P.W.-9) is a relative of "R'. The relationship of Sipahi Lal has been disclosed by him and he states to be the elder brother of Chedi Lal who is the brother-in-law of Nandram the husband of "R' and as such in short he is the elder brother of the brother-in-law of the husband of "R'. He has been addressed by "R' a her *nandoi*. In his examination-in-chief he states that on 30/31.10.2000 he was in the house of Nandram in the night. In the house on that day "R' and her daughter-in-law were present. Nandram was not in the house and his son Ram Gopal had gone to village Biharipur for processing of paddy. He states that he, "R', her two children, his daughter had gone to the parental house of "R'. He further states that in the night at about 1-1:30 PM two police personnels came who were not known to him since before and they said to open the door disclosing their identity and stating that persons of bad antecedents are living there. He states that it was dark and as such he was unable to identify as to who was a Constable and who was an Inspector. He was then taken for some distance up to a godown nearby which is of fertilizers and there is a crusher nearby. He states that "R' was not taken to accompany them. He was then in between questioned by them and was then let off. He was even given one or two slaps by them. He states that Aashiq Ali was beaten by the police personnels before him and they had got him provided first aid. He further states that no Inspector or Constable committed any immoral act with "R'. He further states that even "R' did not inform him of the police either molesting her or committing any illegal act on her. He further states that he did not inform Nandram of any such incident of rape and molestation being committed on his wife by Inspector and Constable. He was declared hostile and permitted cross-examination by the A.D.G.C. To his statement recorded under section 161 Cr.P.C., he states that he had not given any such statement to police. On seeing the accused persons present in the court, he states that he cannot tell as to they were the two persons present at that night or not. On a suggestion to him that the accused are police Inspector and Constable and under threat and pressure he is giving such statement, he denies to the same.

30. Dr. Ram Narain (P.W.-10) is said to be the doctor who had provided first aid and dressing to Aashiq Ali. In the examination-in-chief he states that on 30/31.10.2000 at about 12:00 PM he had done dressing and provided first aid to Aashiq Ali for the injuries received by him. He states that he was not brought by the

accused persons present in the court. He states that Aashiq Ali had come all alone. He further states that Aashiq Ali had informed him that he had a boil which had burst. He further states that "R' was not accompanying Aashiq Ali. He states that blood was oozing out of the boil present on the body of Aashiq Ali. He further states that Aashiq Ali did not give him money at that time but stated that he will give it in the morning. He denies the fact that Aashiq Ali was brought to him by Inspector Rajendra Pradad Pandey and Constable Sunil Kumar. He was declared hostile and the A.D.G.C. was permitted cross-examination. He was read over his statement recorded under Section 161 Cr.P.C. to which he states that he did not give any such statement that Inspector Rajendra Pradad Pandey along with "R' and her relative Sipahi Lal and Constable Sunil Kumar Singh had come with Aashiq Ali for providing him first aid and after the dressing was done Inspector Rajendra Pradad Pandey told him that he will give money in the morning. To a suggestion, he states that it is incorrect that he is giving such statement under threat and pressure of Inspector and Constable.

31. Nandram (PW-11) is the husband of "R'. He states that in the night of 30/31.10.2000 he had gone for the harvesting paddy crop and his son also accompanied him. He states that his wife, children and his daughter-in-law were in the house. He further discloses the name of his wife who is prosecutrix/victim in this matter. He states that in the night his brother-in-law Sipahi Lal was present in his house where his wife and children were there. He states that on 31.10.2000 in the morning, Sipahi Lal or any other person did not give any such information to him in Biharipur that Inspector of Bilhaur R.P. Pandey and Constable Sunil Kumar Singh had come to his wife and asked for Rs. 500/- and on not giving the same, had insulted his wife. The said witness was declared hostile and A.D.G.C. was permitted to cross examination. The witness was read over his statement recorded under Section 161 Cr.P.C. to which he said that he did not give any such statement. He denies the fact that he was informed by his wife about the incident of rape and insult after he came back and also that Inspector R.P. Pandey has been apprehended in the village and also that he took his wife to the police station for getting the report lodged. He further denies the fact that Sipahi Lal gave any information to him.

32. Ibrar (PW-12) is the nephew of Aashiq Ali one of the injured persons. In Court, he fails to identify accused Inspector R.P. Pandey and Constable Sunil Kumar Singh. He states that on 30/31.10.2000 between 12:00 AM to 2:00 PM or any other time, he did not see the accused persons committing rape and insulting "R'. He denies the fact that Inspector R.P. Pandey committing rape on "R'. He denies the fact that he was accompanying his uncle Aashiq Ali while going to attend the call of the nature and as soon as Aashiq Ali coughed, he and his uncle Aashiq Ali were assaulted by Inspector R.P. Pandey and Constable Sunil Kumar Singh. He further states that it is not true that under the threat and pressure of Inspector R.P. Pandey and Constable Sunil Kumar Singh, he is not telling the truth. He states that he was not medically examined nor his uncle was medically examined. The said witness was also declared hostile and was permitted cross examination by the A.D.G.C. He denies recording of his statement under Section 161 Cr.P.C, he states it is incorrect that due

to threat and pressure of the accused persons, he is not speaking the truth.

33. Praveen Kumar (PW-13) is a Constable Police. He states that on 30/31.10.2000 his ravangi was recorded along with Constable Sunil Kumar Singh for duty in village Dalelpur. In the night at about 7:00-8:00 PM, sub-Inspector R.P. Pandey who was the In-charge of the area reached there and then R.P. Pandey took him for dinner to village Garheva where they had their dinner and brought food for Constable Sunil Kumar Singh. He states that till that time, it was too late in the night. Later on, he states that Inspector R.P. Pandey told him to stay there and he went away along with Constable Sunil Kumar Singh and after sometimes both of them came back and along with them there was a lady and a man also present who were talking to each other. After having some talks, both the persons went back. He states that he did not pay any attention as to what they were talking as there was nothing special at that time. He states that later on the Inspector went out for sleeping. In the morning, when he and Constable Sunil Kumar Singh were about to go to the police station then he woke up the Inspector. He was quite sleepy, on which, he said that they may leave and he will come later on and they went to the police station and got their return registered in the records. He states that when the police Inspector and Constable Sunil Kumar Singh had come to the police picket along with lady, the Inspector was talking to her. He further states that he then asked the Inspector as to why he had brought the lady and in the night he should not have brought the said persons and whatever had to be discussed could have been done in the morning, to which, he did not pay any attention. He had taken the lady at a lonely place and Sunil Kumar Singh remained with him. He states that he did not let Sunil go with the Inspector. Then, after about 30-40 minutes both of them came back and the lady and a man accompanying her were sent back. He further states that on 30/31.10.2000 his ravangi was recorded on 19:40 hrs in GD No. 36 to which he had signed. He states that he and Inspector R.P. Pandey was together from the gate of police station and went to village Deva. They reached the police picket at village Dalelpur in the night at about 7:00-7:30 PM he remained at the picket till morning. He returned back to the police station in the morning and got his return registered there. He states that he had eaten his food in village Garheva at about 08:30-09:00 PM and had brought the food for the Inspector and constable with him. He states that he did not see Constable Sunil Kumar Singh and Rajendra Prasad Pandey consuming liquor together and neither was any smell coming out from their mouth. He states that after having their meals, two persons went to raid the house of Nandram. Sipahi Lal along with 2-3 other persons and one lady had come to the police picket. Sipahi Lal was being interrogated separately by the Inspector and then Chotey Lal Katiyar was called and Sipahi Lal was left. All the persons were interrogated and had left. He states that he cannot tell as to who all persons were present there but states that one person was getting himself treated by Dr. Vishwash at the place near the picket to which he asked him as to who had assaulted him but he did not tell him. He states that Rakesh was not present at the picket point but the Sipahi Lal was being interrogated separately at a distance of about 15-20 steps. There was no light present at the picket. The Inspector In-charge had convened a meeting at the police station, in which, he had told them to conduct the raid. He further states that he

did not know Sipahi Lal from before. He states that he was also suspended for about four months in the present incident and was reinstated on 10.03.2001. He states that the Officers had not pressurized him that if he will not give any statement like this then he will remain suspended. He states that after interrogation the lady and Sipahi Lal both went back together. The lady and the man was then not called again to the picket point. To a suggestion that he is giving the statement under the threat and pressure of Inspector Sukh Sagar Shukla, he denies the same. He further states that he did not see Constable Sunil Kumar Singh talking to any man or any woman. He states that Constable Sunil Kumar Singh and he remained at the picket and had got their return registered at the police station together. He states that during interrogation at the picket, no one came there and in the morning at 05:30 or after he and Constable Sunil Kumar Singh both went to the police Station. He states that while being with Constable Sunil Kumar Singh he did not see him interrogatting anyone or indulging in any *marpeet.* He states that it is incorrect that he has given his statement under the pressure and threat of Inspector Sukh Sagar Shukla.

34. Dr. Manju Agarwal (PW-14) had examined "R' on 31.10.2000 at about 09:00 PM. She states that on external examination, she did not find any mark of injury on her body. Further, she states that on internal examination, she did not find any injury on her private parts. The hymen was old and torn and admits two fingers easily. She states to have prepared a slide of vaginal smear and had referred her for X-Ray examination for estimation of age. She states that after receipt of pathological report and X-Ray Report, she prepared a supplementary report wherein she did not find any dead or alive spermatozoa. As per the X-Ray Report of "R' she was aged about 25 years. She states that no specific opinion about rape can be given. The medical examination report and the supplementary report were prepared by her which are marked as Exb: Ka-2 and Ka-3 respectively to the records. She states that dead or alive spermatozoa can be found or cannot be found even after wash till 72 hrs. Both the situations are possible.

35. Dr. R.S. Pratihar (PW-15) is the doctor who conduct the medical examination of Aashiq Ali, Rakesh and accused Rajendra Prasad Pandey.

He states to have examined Aashiq Ali on 31.10.2000 and had found three injuries. The same are not being reproduced herein as they have been already quoted above.

He further states that on the same day i.e. 31.10.2000 at about 12:25 PM, he had examined Rakesh brought by constable police and had noted the injuries in the injury report. The said injuries have already been reproduced above and as such are not being reproduced here as being repetitive.

Further, he states that he examined Rajendra Prasad Pandey on the same day i.e. 31.10.2000 at about 01:20 AM and prepared a medical report about the same. The details of the same have already been stated above and are also not being stated herein as being repetitive.

The said medical reports have been proved by him and marked as Exb: Ka-4, Ka-5 and Ka-6 respectively to the records.

He further states that smell of alcohol remains for about 8-10 hrs and depends upon the quantity consumed. The larger the quantity consumed the longer is its effect. He states that he had examined

Rajendra Prasad Pandey physically but had not referred him for pathological analysis for determination of alcohol. He states that if blood is tested then the result may defer from that of physical examination. He states that blood was not sent for examination. He further states that if the penis is washed then sperms will not come in the slide. In the cross examination, he states that in the letter received by him which is known as *chitthi majroobi* there was no mention of any section or case crime number. He states that he did not know as to what was the offence. He states that in the injury report in the time of examination there is an overwriting which has been attested by him. He states that the injuries can be as a result of fall. He denies the suggestion that he has given the injury report under the pressure of Inspector Sukh Sagar Shukla.

36. Dharmendra Kumar Mishra (PW-16) is the head *moharrir.* He states that on 31.10.2000, he received a telephone information through village Pradhan that Sub-Inspector R.P. Pandey has been apprehended by villagers. He communicates the same to the S.H.O, Sukh Sagar Shukla who proceeded along with force to village Dalelpur at about 08:30 AM and returned to the police station at about 11:40 AM along with some police personnels accompanying him, "R', Nandram and other persons and Sub-Inspector R.P. Pandey. He further states that an application was given to him by "R' which is marked as Exb: Ka-1 to the records on the basis of which he registered the First Information Report and prepared the chik and later on, prepared the GD to the same. The chik FIR and the GD are marked as Exb: Ka-7 and Exb: Ka-8 respectively to the records. He states that information about the incident was sent through R.T. Set to higher officials for which a GD was also recorded at about 08:30 AM being GD No. 25 dated 31.10.2000, the same is Exb: Ka-9 to the records. He states to have sealed the clothes of "R' and accused R.P. Pandey in front of the witnesses. Thus two cloths being the petticoat and sari of "R' were marked as material Exb: Ka-1 and Ka-2 respectively and underwear of accused R.P. Pandey was marked as material Exb: Ka-3. He states that the clothes were sent for chemical examination. The recovery memo of the clothes of R.P. Pandey is marked as Exb: Ka- 10 and the clothes of "R' is marked as Exb: Ka- 11. He states that at the time of lodging of the First Information Report, injured Rakesh and Aashiq Ali had also come. He then states that "R', Rakesh and Aashiq Ai were sent for medical examination to C.H.C. Bilhaur and later on R.P. Pandey after being arrested by the Station House Officer, Bilhaur was also sent to the same place for medical examination. In the cross examination, he states that as per the records of police station dated 31.10.2000 Sub-Inspector R.P. Pandey has been shown to be present at the police station on that date. He states that on the information of village Pradhan, he did not launch a search in the campus of police station for the Sub-Inspector. He states that he had informed that Station House Officer, Bilhaur about the telephonic information received to him. The concerned Station House Officer did not launch a search for the Sub-Inspector but instead proceeded for the place of occurrence along with police force. He states that he did not register the absence of Sub-Inspector R.P. Pandey regarding the information received by him on telephone. He states that he did not register the telephonic information in the records at the police station on the instructions of the Station House Officer

but did so on his own. He states that police station Bilhaur is situated after a distance of 13 kms from village Dalelpur. There is a metalled road between the two places. He states that prior to 10:00 AM Aashiq Ali, Rakesh and R.P. Pandey were not sent for medical examination. The medical examination reports were not received at the police station upto 10:30 AM. He states that the medical reports were not sent to the hospital for getting the date and time changed in the same. To the cutting on the same, he states that it is incorrect to say that the cutting in the reports were done at the police station and small signatures were affixed to it. He states that he does not know as to how "R', R.P. Pandey, Aashiq Ali and Rakesh were taken to the hospital. He states that when "R' came to the hospital, she was accompanied by her husband Nandram and other persons of village. He states that after lodging of the First Information Report, the clothes taken off by "R' were immediately taken into custody. In the last, he has been given a suggestion while being cross examined for accused R.P. Pandey that he did not receive any information on telephone and the entire paper work has been done at the police station itself under the supervision of Inspector Sukh Sagar Shukla in a forged manner. For being cross examined for accused Sunil Kumar Singh, he states that he did not recognize the voice of village pradhan on phone but the person disclosed his identity. He states that from the voice, he could not confirm as to that the person calling is village Pradhan or not. He states that on 30.10.2000 at about 08:00 PM R.P. Pandey was present in the police station campus at the time of attendance. He states that as per the records of police station, R.P. Pandey was present at the police station on 31.10.2000 at about 06:05 AM. Constable Sunil Kumar Singh was also present at the police station on 31.10.2000. On the suggestion that he has given a false testimony, he denies. He denies the suggestion that both the persons were detained at the police station and all paper work was done there which is a fabrication.

37. Smt. Kamleshwari Chand (PW-17) is the Circle Officer and the second Investigating Officer of the case. She took up the investigation on 01.11.2000 and concluded it by submitting the charge sheet which is Exb: Ka-14 to the records. She states that after taking over the investigation, she recorded the statement under Section 161 Cr.P.C. of "R', Rajesh Kumar, Dr. Ram Narain Vishwash, Aashiq Ali, Masooque Ali, Masoom Ali, Sipahi Lal, Nandram etc. She inspected the spot and prepared the site plan. She states that she got the statement under Section 164 Cr.P.C. of "R' recorded. She submitted charge sheet against R.P. Pandey and as Sunil Kumar Singh was absconding, he was mentioned as an absconder in the charge sheet which was submitted against him, he had later on surrendered in Court. She states that she does not remember as to whether she took any sanction for prosecution against a government servant. She states that in the site plan, she has not shown the place from where the witnesses are said to have seen the present incident. She states that at the time of lodging of the present case, Sri S.P. Pathak was posted as S.P. (Rural Area). She states that she does not know whether "R' is a lady of criminal antecedent and a case under Section 302 I.P.C. is registered against her. To a suggestion to her that the accused persons have been falsely implicated in the present matter at the behest of S.P. (Rural Area) Sri S.P. Pathak and Sukh Sagar Shukla, she denies. She further denies the fact that she did not interrogate the witnesses and has

submitted charge sheet in an incorrect manner. Further, she states that in the CD dated 31.10.2000, the medical reports are not enclosed. She states that she has read the medical report and as per the medical report, the case is made out and hence she submitted charge sheet. To the over writings in the medical reports, she states that they are not related to her. To a suggestion that under the pressure of higher officials, she has done the proceedings in the matter and submitted charge sheet to the same, she denies the same.

38. Sri B.N. Chaturvedi (PW-18) is the Circle Officer and the first Investigating Officer in the matter. The investigation remained with him only upto 01.11.2000. He states that on 31.10.2000 at about 08:30 AM, some unknown person made a telephonic call to him and informed him that Sub-Inspector R.P. Pandey of Police Station Bilhaur has been apprehended by villagers of village Dalelpur and some unrest is there. He informed Inspector Sukh Sagar Shukla about the same, on which, he was informed that the information has been received by Sukh Sagar Shukla and he is proceeding to the said place. This witness also proceeds for the said place. He states that on reaching there, he saw 50-60 people and Sub-Inspector R.P. Pandey present there. The persons present there complained to him that Sub-Inspector R.P. Pandey had raped a lady named "R' and had also indulged in *marpeet* with some persons. He states to have then talked with "R' and Ibrar who stated about the incident, on which, he instructed the Station House Officer, Bilhore to get a First Information Report registered. After registration of the FIR, he started investigation, recorded the statement of "R' who supported the said occurrence then the statement of accused Sub-Inspector was recorded and asked him as to why he had gone to village Dalelpur as his ravangi is not recorded, to which, he did not reply. He states that superior officers also came at the place of occurrence. The investigation was then transferred from him on 01.11.2000. In the cross examination, he states that at the time when the present incident was reported he was posted as C.O., Bilhaur. Sukh Sagar Shukla was at that time posted as Inspector Bilhaur. Sri S.B. Pathak, S.P. (Rural Area) was also posted there. He states that he, Sukh Sagar Shukla and accused R.P. Pandey were subordinates to Sri S.B. Pathak, S.P. (Rural Area). He states to have received telephonic information that Sub-Inspector R.P. Pandey has been apprehended by persons in village Dalelpur. The said information was received by him on 31.10.2000 at about 08:30 AM when he was at his residence. He does not know as to who informed him about the same and from which number the information came to him. He denies the fact that he did not receive any information and on the pressure of S.P. (Rural Area), the said story has been planted. He states to have recorded the statement of "R', R.P. Pandey and Pradeep Kumar when he had reached the place. He states that he did not record the statement of the injured person as the investigation was transferred from him. He states that Inspector Sukh Sagar Shukla had reached the said place at a prior time. He denies the suggestion that he did not go to the place of occurrence and the case has been lodged against R.P. Pandey in a fictitious manner. He further denies that under the pressure of S.P. (Rural Area) the present case has been registered in a forged manner.

39. Sukh Sagar Shukla (PW-19) was posted as the Station House Officer of Police Station Bilhaur at the time of the

said incident. He states that he received an information from head *moharrir* that Inspector R.P. Pandey and Constable Sunil Kumar Singh have indulged in some dispute in village Dalelpur and they have been apprehended there, on which, he with other police personnels reached the said place and saw the village pradhan and other people. He further states that "R' and Inspector R.P. Pandey were also present there. The people present there informed him that at about 02:00 AM, Inspector R.P. Pandey and Constable Sunil Kumar Singh had taken "R' from her house and committed rape on her and the same was witnessed by some persons who were assaulted by them due to which, they were detained but Constable Sunil Kumar Singh who was along with constable Praveen Kumar on daily gust duty somehow managed to run away and constable Praveen Kumar got his return registered at the police station all alone. He states that people also informed him about the same and gave him a written report, on which, he directed the constable clerk to register a First Information Report and directed him to give the investigation to the Circle Officer and brought Inspector R.P. Pandey with him. "R' and some other persons of the village and the injured persons were also brought to the police station. He states that Senior Officials had reached the police station and on finding that the matter is against a police officer, the said officer was immediately suspended. The Sub-Inspector had without getting his ravangi registered took an official revolver with him and went to Dalelpur. He further states that in the same sequence, he directed the head constable to take into possession the clothes of "R' and the accused. Inspector R.P. Pandey being suspended was arrested by him and lodged in the lock up.

40. The accused Rajendra Prasad Pandey in his defence produced two witnesses.

41. Krishna Narayan Bhatt (DW-1) Station House Officer, Police Station Bidhnu. He states about some dispute between him and S.B. Pathak, S.P. (Rural Area). He further states that the S.P. (Rural Area) used to probe him for getting information against R.P. Pandey but no substantial information could be provided to the S.P. (Rural Area) by him. He states that there was a dispute going on between the S.P. (Rural Area) and Sub-Inspector R.P. Pandey.

42. Madan Prasad Sharma (DW-2) is the Sub-Inspector, Vidhnu. He states to be posted there from January 2000 onwards from a period of seven months. He also stated that there was a dispute between Sub-Inspector R.P. Pandey and the S.P (Rural Area).

43. The trial court from the material on record came to the conclusion that "R' is a downtrodden women, he husband was not at home, the accused on the pretext of conducting raid took her to the fields and committed the occurrence. The witnesses were beaten, received injuries, rape was committed by no one gave evidence. They have either been pressurised or won over and have turned hostile. It is stated that although the prosecutrix/victim has not spoken anything but the circumstances speak for it. The incident cannot be said to be false. Only on the basis of all the witnesses turning hostile, declaring the prosecution to be false, is incorrect.

44. It is apparent that PW-1 is the informant of the present case and also the prosecutrix/victim. Aashiq Ali (PW-2) and

Rakesh (PW-4) are the injured persons and also eye witnesses of the incident. Ibrar (PW-12) is also an eye witness of the incident. All the said four witnesses have not supported the prosecution case and have been declared hostile. Apart from these four witnesses Rajesh Kumar (PW-3), Shiv Narain (PW-5) the scribe of the FIR, Smt. Samina (PW-6), the daughter-in-law of Aashiq Ali, Shri Krishna (PW-7) the witness of recovery of clothes of accused and "R', Dinesh Kumar (PW-8) also the witness of recovery of cloths of accused and "R', Sipahi Lal (PW-9) the relative of the husband of "R', Dr. Ram Narayan (PW-10), the doctor who provided first and dressing to Aashiq Ali and Nandram (PW-11) the husband of "R' have also not supported the prosecution case and have been declared hostile.

45. The law regarding the appreciation of evidence of a hostile witness is well settled and very clear. The Hon'ble Apex Court in the case of **C. Muniappan and others Vs. State of Tamil Nadu: (2010) 9 SCC 567** has in para 81 to 83 summarised the same and has held as follows:

"Hostile Witness:

81. It is settled legal proposition that:

"6..... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (vide Bhagwan Singh v. The State of Haryana: (1976) 1 SCC 389; Rabindra Kumar Dey v. State of Orissa: (1976) 4 SCC 233; Syad Akbar v. State of Karnataka: (1980) 1 SCC 30; and Khujji v. State of Madhya Pradesh: (1991) 3 SCC 627).

82. In State of U.P. v. Ramesh Prasad Misra & Anr.: (1996) 10 SCC 360, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P.: (2006) 2 SCC 450; Sarvesh Naraian Shukla v. Daroga Singh & Ors.: (2007) 13 SCC 360; and Subbu Singh v. State, (2009) 6 SCC 462.

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

46. It is the case of the prosecution that two accused persons one of whom is a Sub-Inspector of Police and the other is a Constable Police raided the house of "R' and accused Rajendra Prasad Pandey committed rape on her.

47. The accused particularly Rajendra Prasad Pandey has been challenging the entire prosecution case on the ground of being inimical to the Superintendent of Police (Rural Area) and has suggested the same to the witnesses and even led evidence in defence for the same. In so far as the presence of Aashiq Ali (PW-2),

Rakesh (PW-4) and Ibrar (PW-12) are concerned although Aashiq Ali and Rakesh have been brought forward as the two injured eye witnesses but they have not supported the prosecution case and have been declared hostile. Even Ibrar (PW-12) the other eye witness who is said to be accompanying Aashiq Ali while they were on their way to attend the call of the nature also did not support the prosecution case and has been declared hostile.

48. The fact that Sub-Inspector Rajendra Prasad Pandey was detained by villagers of village Dalelpurva also does not get corroboration from the evidence of "R' and the eye witnesses. The presence of Sub-Inspector Rajendra Prasad Pandey within the territory of Dalelpurva cannot be said to be at a place beyond his official territory as he was posted at the police station within whose jurisdiction, the said village fell. There has been hectic cross examination and suggestion and even the accused persons Rajendra Prasad Pandey has led defence evidence to show his enmity with a superior officer. It has been also admitted in the cross examination of B.N. Chaturvedi (PW-18) the Circle Officer, Bilhaur that he, Sukh Sagar Shukla Station House Officer, Police Station Bilhaur and the accused Sub-Inspector R.P. Pandey, all the three were subordinates to Sri S.B. Pathak, the Superintendent of Police (Rural Area).

49. The medical evidence does not corroborate at all with the prosecution version.

50. In so far as the statement of "R' recorded under Section 164 Cr.P.C. is concerned, she in Court has resiled from it and has in very specific terms stated that she had deposed under the threat of police. The deposition given in the statement recorded under Section 164 Cr.P.C. remains uncorroborated. "R' has however retracted from her previous statement, though she was confronted with her statement under Section 164 Cr.P.C. She in her statement under Section 164 Cr.P.C. had affirmed that she was raped by Rajendra Prasad Pandey and Constable Sunil Kumar Singh also instrumental in bringing her from her house with Rajendra Prasad Pandey but he was not present where rape was committed and was standing away on the road. However, since she has retracted from her previous statement the prosecution cannot avail any assistance, for her earlier statement recorded under Section 164 Cr.P.C.

51. In so far as accused-Constable Sunil Kumar Singh is concerned, he has been convicted with the aid of Section 34 IPC. It is settled law that common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Direct proof of common intention is seldom available, and therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. He has although not been held guilty under Section 376 IPC but has been held guilty under Section 376(2)(g) IPC.

52. Since all the prosecution witnesses (excluding the ones who were part of interrogation) have not supported the prosecution case and have been declared hostile, the corroboration through medical evidence is also not available, the statement of "R' recorded under Section 164 Cr.P.C. remains

uncorroborated and also that the site plan does not show the place from where the eye witnesses are said to have seen the present occurrence, it is very unsafe to rely on the prosecution case as put forward. There is a sharp variation in the version as brought forward regarding the beating of Ashiq Ali and his injuries received by him. We are conscious enough of the sensitivity with which offence of rape and/or gang rape has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused persons.

53. In the result, this Court comes to the conclusion that the benefit of doubt deserves to be extended to the appellants, namely, Rajendra Prasad Pandey and Sunil Kumar Singh.

54. The trial court while recording the sentence of the appellants as apart from the sentences in other sections has recorded once that the appellants shall be convicted and sentenced under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for one year rigorous imprisonment and a fine of Rs. 1,000/- and later on has again convicted and sentenced the appellants under Section under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for six months rigorous imprisonment. Thus, the sentence under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been provided twice in the impugned judgment and order.

The sentence awarded under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for six months rigorous imprisonment to both the appellants is as such set aside.

55. The conviction and sentence as awarded by the trial court is hereby set aside. The impugned judgement and order dated 17.07.2003 passed by the trial court is liable to be set aside, which is accordingly set aside.

56 The present appeal is **allowed.**

57. The appellants are on bail. They are not required to surrender. Their bail bonds are cancelled and sureties stands discharged.

58. Keeping in view, the provisions of Section 437-A Cr.P.C., the accused appellants, namely, Rajendra Prasad Pandey and Sunil Kumar Singh are directed to forthwith furnish a personal bond in terms of Form No. 45 prescribed in the Code of Criminal Procedure of sum of Rs. 25,000/- with two reliable sureties in the like amount before the Court concerned 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 the instant judgment or for grant of leave, the aforesaid appellants on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

59. The lower court record along with a copy of this judgment be sent back immediately to the trial court concerned for compliance and necessary action.

60. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

61. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

62. 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.

(2021)01ILR A1191
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 2161 of 2007

Ravi ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Shree Prakash Giri, Sri Noor Mohammad

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

Criminal Law-Indian Penal Code, 1860- Section 304-B- Conviction under- Sentenced to life imprisonment- Challenge only to the quantum of sentence- The present case is a case of dowry death. The motive for the offence is that of non-fulfilment of the demand of dowry. The death is unnatural and within seven years of marriage, to be more precise after 3-1/2 years of marriage. The Apex Court has in the case of Hem Chand Vs. State of Haryana: (1994) 6 SCC 727 held that in a case under Section 304-B IPC, awarding extreme punishment of imprisonment for life should be in rare cases and not in every case.

In view of the law laid down by the Hon'ble Supreme Court, Section 304-B of the IPC only raises presumption and lays down that minimum sentence should be seven years but may extend to imprisonment for life, hence extreme sentence for life imprisonment should be awarded only in rare cases.

Indian Penal Code, 1860- Section 304-B- In the present case the appellant has served out about 14 years and 4 months (without remission) and there is no special and rare feature attracting maximum punishment. Accordingly, while confirming the conviction of the appellant under Section 304-B IPC appellant sentenced to 12 years' (twelve years') rigorous imprisonment and the sentence imposed by the trial court under Section 304B I.P.C. is hereby set aside. The other convictions and sentences passed by the trial court are, however, confirmed.

As there is no special feature in the case, the applicant has served out more than the minimum punishment, hence sentence modified to 12 years.

Criminal Appeal partly allowed. (E-2) (Para 29, 30, 31, 32)

Case Law/ Judgements cited (Distinguished on facts):-

1. 2009(2) All JIC 318: Rajesh Pandey Vs St. of U.P.

2. (2013) 9 SCC 190: Manoj & ors. Vs St. of Har.

3. (2018) 8 SCC 228: Deepak Vs St. of U.P. (now Uttarakhand)

4. Crl. Appeal No. 1284 of 2019: Suresh @ Kala Vs St. of NCT of Delhi: Order dated 27.08.2019.

Case law/ Judgements relied upon: -

1.Hem Chand Vs St. of Har.: (1994) 6 SCC 727

(Delivered by Hon'ble Samit Gopal, J.)

1. The present appeal has been preferred against the judgment and order dated 08.02.2007 passed by the Additional Sessions Judge, Court No. 18, Agra in Sessions Trial No. 666 of 2006 (State of U.P. vs. Ravi), whereby the accused-appellant Ravi has been convicted and sentenced under Section 304-B of the Indian Penal Code, 1860 (in short referred to as 'IPC') to life imprisonment, under Section 498-A IPC to two years rigorous imprisonment and a fine of Rs. 5,000/-, in default of payment of fine to one year rigorous imprisonment, under Section 4 of The Dowry Prohibition Act, 1961 to one year rigorous imprisonment, a fine of Rs. 500/- and in default of payment of fine to one month rigorous imprisonment. The sentences have been ordered to run concurrently. The Trial Court has further directed that the period, for which the accused has already been in jail shall be set off against the sentence recorded against him.

2 The prosecution case as per the first information report lodged by Maya Ram P.W.-1 is that his daughter Mamta was married around 3-1/2 years back with Ravi S/o Kailash Chandra R/o Behind Balkeshwar Mandir, Police Station-New Agra, District-Agra and in the marriage he had given dowry as per his capability. He further states that after one year of marriage Ravi started beating his daughter and started creating pressure on her for bringing a motorcycle in dowry, failing which she would be murdered. The said fact was told by his daughter Mamta many times to him and inspite of repeated attempts to sort out the issue Ravi used to beat his daughter. Mamta got disturbed and was living in her maternal house since the last six months. He further states that he pacified Ravi, on which he told him that he will come on Raksha Bandhan on 09.08.2006 and had stated that if he wants his daughter to be taken then a motorcycle be given to him, otherwise he will kill his daughter. On 22.08.2006 in the absence of the first informant Ravi came to his house at about 10.00 a.m., wherein the daughter-in-law of the first informant namely Smt. Kranti and Smt. Vimlesh were at the house and in front of them beat his daughter Mamta and when the wife of the first informant went to give him his food then Ravi assaulted Mamta with knife on her stomach and ran away. It is further stated that on the shrieks, the daughter-in-law of the first informant reached there and they and his wife informed him. They went and saw Mamta lying on the floor in a pool of blood. She was taken to the hospital and on the way she died. It was then prayed that a report be registered and appropriate legal action be taken.

3. Maya Ram gave a typed application at the police station, which is dated 22.08.2006 for getting a first information report lodged, the same is marked as Exhibit Ka-1 to the records.

4. On the basis of the said application a first information report was lodged on 22.08.2006 at 16.45 hrs. at Police Station-Jagdishpura, District-Agra as Case Crime No. 297 of 2006, under Sections 498-A, 304-B, 506 IPC and Section 3/4 of The Dowry Prohibition Act against Ravi S/o Kailash Chandra, the same is marked as Exhibit Ka-3 to the records.

5. An inquest was conducted on the dead body on 22.08.2006, which started at

17.30 hrs. and concluded at 18.45 hrs., the same is marked as Exhibit Ka-2 to the records.

6. Post-mortem examination of the deceased Smt. Mamta was conducted on 23.08.2006 at 3.15 p.m. at Dr. B.D. Bhaskar P.W.-6. The doctor found the following anti-mortem injury on the body of the deceased :-

"Stab wound size 02 cm. x 01 cm. x abdominal cavity deep on the lower abdomen, 2 cm. away from right side anterio mid line and 1-1/2 cm. below umbilicus."

The doctor opined the cause of death due to shock and hemorrhage as a result of anti-mortem injury.

The time since death has been opined to be about one day.

7. The knife said to be used in the assault was recovered by the Investigating Officer on 22.08.2006 on the pointing out of Smt. Vimlesh W/o Kali Charan alias Khillu from the room, where the incident took place, which was said to have been thrown by the accused after the assault. The recovery memo of the said knife is Exhibit Ka-5 to the records.

8. The investigation of the present matter concluded and a charge-sheet no. 232/2006, dated 29.08.2006, under Sections 498A, 304-B, 302, 506 IPC and Section 3/4 of The Dowry Prohibition Act was filed against the accused-appellant Ravi, the same is marked as Exhibit Ka-12 to the records.

9. The Trial Court framed charges against the accused-appellant Ravi vide its order dated 08.11.2006, under Section 304-B IPC with an alternate charge under Section 302 IPC, under Section 498-A IPC and Section 4 of The Dowry Prohibition Act, 1861.

The accused-appellant denied the charges and claimed to be tried.

10. The prosecution in order to prove its case produced Maya Ram P.W.-1, who is the first informant and the father of the deceased. Khillu P.W.-2 is the son of the first informant Maya Ram and the brother of the deceased. Umesh Yadav P.W.-3 is the Head Constable, who transcribed the chik first information report. Smt. Vimlesh P.W.-4 is the wife of Khillu P.W.-2, daughter-in-law of Maya Ram P.W.-1 and is an eyewitness of the incident. Kundan Lal, Sub-Inspector P.W.-5 prepared the inquest and the other relevant and required papers of the dead body. Dr. B.D. Bhaskar P.W.-5 conducted the post-mortem examination of Smt. Mamta. S.K. Singh P.W.-7 is the Circle Officer, who conducted the investigation and concluded it by filing the charge-sheet against the appellant.

11. The accused-appellant denied the occurrence and claimed false implication. No defence evidence was led.

12. The Trial Court after considering the entire evidence on record came to the conclusion that looking to the evidence on record and the medical evidence also offences under Sections 304-B, 498-A IPC and Section 4 of The Dowry Prohibition Act are made out. It came to a conclusion that no such circumstance has been placed by the defence, by which the prosecution story be suspected and thus, convicted the accused and sentenced him as stated above.

13. We have heard Shri Noor Mohammad, learned counsel for the

appellant and Shri Irshad Hussain, learned Additional Government Advocate for the State of U.P. and perused the record.

14. Learned counsel for the appellant at the very outset states that he is not challenging the conviction as recorded by the Trial Court vide the impugned judgment and order dated 08.02.2007. He argues that only the quantum of sentence as awarded to the accused-appellant Ravi being life imprisonment under Section 304-B IPC is being challenged by him as the same is excessive. He argues that the accused-appellant is in jail since 23.08.2006 and has served out about 14 years and 4 months (without remission) in jail and as such the sentence as imposed of life imprisonment be reduced. Learned counsel for the appellant has in support of his argument relating to the quantum of punishment has relied upon the following judgments :-

(i) 2009(2) All JIC 318 : Rajesh Pandey vs. State of U.P.

(ii) (2013) 9 SCC 190 : Manoj and others vs. State of Haryana.

(iii) (2018) 8 SCC 228 : Deepak vs. State of U.P. (now Uttarakhand).

(iv) Criminal Appeal No. 1284 of 2019 : Suresh alias Kala vs. State of NCT of Delhi : Order dated 27.08.2019.

15. Per contra learned Additional Government Advocate for the State of U.P. opposed the sole submission of the learned counsel for the appellant on the grounds that the present case is a case, in which there is consistent evidence of two witnesses being Maya Ram (P.W.-1) and Khillu (P.W.-2) regarding the demand of a motorcycle as dowry by the appellant from the deceased and due to non-fulfillment of the same she was murdered by him. It was further argued that the incident was witnessed by Smt. Vimlesh (P.W.-4), who is the wife of Khillu (P.W.-2) and is a natural witness of the incident as she resides in the same house. It is argued that even the medical evidence corroborates with the prosecution story. It is argued that the appellant does not deserve any sympathy whatsoever and the sentence awarded is appropriate as it is dowry death and the ingredients of a dowry death are fully satisfied in the present case. In the last it is argued that the appeal be dismissed and no sympathy be extended to the accused-appellant.

16. P.W.-1 Maya Ram is the first informant and the father of the deceased Smt. Mamta. He has stated in his examination-in-chief that the marriage of his daughter Mamta was solemnized with Ravi as per Hindu rites and rituals around 3-1/2 years back. He states to have given gift and dowry as per his capability, which were quite sufficient. Ravi used to demand a motorcycle as dowry from his daughter and for the same used to beat and trouble her. After one year of marriage he used to trouble his daughter a lot and used to say that if he does not bring a motorcycle she will be murdered. On 09.08.2006 Ravi came to the house of Maya Ram and at that time his daughter was in the house, who had come around six months back as she was being troubled a lot by him and was brought by him to the house. On that day, Ravi came and told him to give a motorcycle in dowry and stated that he will not take his daughter back until the motorcycle is given or else she will be murdered. On 22.08.2006 Maya Ram went to his shop at about 9.00 a.m. After sometime his wife came to give him food. Ravi came to his house at about 10--10.25 a.m. and started beating his daughter. At

that time apart from his daughter, his daughter-in-law Smt. Kranti and Smt. Vimlesh were in the house and therein Ravi assaulted his daughter with knife on her abdomen. Information about the incident was given to him by his daughter-in-law, on which he came to the house and saw his daughter lying in a pool of blood and then took his daughter and proceeded towards hospital, wherein on the way at the gate of the hospital she died and was brought back to the house. An information about the incident was given by him to Bodala Police Chauki, on which he was told to give a written report. He then got a report typed. He states that whatever he dictated was typed. He proves the said application, which was marked as Exhibit Ka-1 to the records. He further states that the police personals at the Police Chowki sent him to the Police Station-Jagdishpura, where his report was registered. He states that then police came to his house and conducted the inquest, on which he had signed. He identifies his handwriting on the inquest, which is marked as Exhibit Ka-2 to the records.

In his cross-examination, he states that his marriage was performed about 25-26 years ago with Saiya. About 7-8 children were born out of the said wedlock amongst whom 3 are alive. He has 2 sons, in which Khillu is the elder one and Raju is the younger son and Mamta is the elder daughter and the younger daughter is named Lalo. As of now 3 children are alive. He states that the marriage of his daughter Mamta was solemnized with Ravi of Balkeshwar. About 250 baraties came in the wedding. He had given the entire items of household. He had spent about Rs. 1 lakh in the marriage. He states that he has nurtured children in the same house, in which he is living. His son earns separately. The house, in which he lives, has 3 rooms. Both his children are married. They have separate households. They live in different rooms. Khillu was married about 11 years back. Khillu has 3 children and one is about to be born. Raju also got married at the same time when Khillu was married. Raju has one daughter. Both of his sons have separate kitchens and also work separately. The plot of the house has a length 43.50 yards and breadth of 22.50 yards. Two rooms are in a straight line on the third is in the side. All the 3 rooms are constructed in "L" type. The house has a small courtyard, it has one toilet. It has no kitchen. His daughter Mamta lived with him. His other daughter also lived with him. He is a barber. He does Pooja at the place demarcated for God. He does Pooja for about 1-1/2 hours. His shop is on the foot - path in a *Khokha* , which is situated at a distance of about 150-200 yards from the house. He earns about Rs. 70-80 daily. The business used to be good on Sundays. His son-in-law was having a business of flower at the time of marriage. He states that he does know as to what his son-in-law was doing when he had brought his daughter back to the house. His daughter, who is the deceased, had one son aged about one and half years. He has spent money for her delivery. In-laws of Mamta had left her at her parental house at the time of delivery and had run away and then he had taken her to the hospital, where delivery was done. Mamta was brought back to his house after delivery and then she was sent with Ravi to her maternal house. Ravi and his elder brother had left Mamta at the house at the time of delivery. At that time his daughter had told her that Ravi used abuse her, torture her and beat her and used to say that he has not got anything and if motorcycle is not given then he will murder her. He states that when Ravi had left his daughter and had run away, he did not inform the police and other high officials about the incident. He states

that the child was born in the hospital in Bodala. She was in the hospital for 3 days. She was brought back to the house after 3 days. Ravi himself had taken Mamta after the delivery and had abused him on that day. He did not inform the police and other high officials about the incident and abuse. He had stopped going to the house of Ravi after delivery. He had gone to his shop at 9.00 a.m. on day of incident. His wife had later on brought food at the shop for him. When his wife had brought food for him he was alone at the shop and there was no customer present. The information about the murder was given at the shop by his son Raju. On receiving the said information he immediately left the shop. He received the information at about 10.30 a.m. On receiving the information Om Prakash, Chaturi and Chand, who were sitting with him immediately ran towards the house. When all the 4 persons reached the house about 400-500 people were present there. His daughter, who was murdered, was wearing a Salwar Kurta with a black Dupatta. She had a small child in her lap. His daughter was breathing and was in a pool of blood when she was taken to the hospital. She was taken to the hospital on a Thela. His daughter was lying in the room of his son Khillu and a knife was also lying there. Blood was present on the floor. He was not in his senses and could not see the blood on the knife and the knife. Thela, which was used, was of the neighbour. His daughter was taken to a Nursing Home in Bodala and she died on the way. 4-5 persons had accompanied him. He does not know the name of the persons, who had gone to the hospital with him. The hospital is situated at a distance of about 400-500 yards from his house. It took him about 45 minutes in reaching the hospital. The doctor attended his daughter and declared her to be dead and sent him back. He then brought his daughter to the house. The injury of knife was on the abdomen of his daughter. He kept the body at the door of the house. The police had come thereafter. On the saying of the police, he went to the Police Chowki and gave his report. A police constable took him from the Police Chowki to police station, where his report was registered. They went on a Tempo from the Police Chowki. Police reached his house at about 5.00 p.m. He is illiterate, he can write his name. He had signed the papers given to the police. He had dictated the report, which was typed on an electronic typewriter in Bodala. The report was given at 11.00 a.m. at police station. The police had reached at about 5.00 p.m. and till that time he was detained at the police station. He along with his son and police constable had taken his daughter for post-mortem. When he reached his house on receiving the information of murder, his both daughter-in-laws and their brother who had come to them were present in the house. His daughter-in-law told him that Ravi has murdered Mamta. He does not remember as to whether the blood stained clothes were given to the Investigating Officer or were burnt during cremation. To a suggestion that after the delivery he had broken his relationship with his son-in-law and his daughter, was living with him, he denies. To a further suggestion that his daughter and son-in-law had strained relations and as such she left her matrimonial house and came to her maternal house, he denies. To a further suggestion that his daughter has been murdered by someone else and to save themselves a false case has been instituted against Ravi, he denies the same.

17. Khillu P.W.-2 is the son of the first informant, brother of the deceased Smt. Mamta and husband of Smt. Vimlesh, who is the eyewitness of the incident. In his examination in - chief, he states that the marriage of his sister Mamta was solemnized about 3-1/2 years back. His

father had given dowry at the time of marriage as per his capability, but Ravi was not happy with the gifts and dowry and was demanding a motorcycle, for which he used to torture and beat his sister. His father had gone one or two times to the house of Ravi for mediating, but he did not stop and continued to demand motorcycle and also continued to trouble his sister and used to say that if motorcycle is not given then he will murder her. He states that due to the said reason his father had brought Mamta back to her house about 9 months back and his sister was living in the house since then. He states that on Raksha Bandhan, Ravi had come to the house and had said that if they want to send the girl then motorcycle be given or else she will be murdered. On 22.08.2006 at about 10.00 a.m. he went to his shop and his after had also gone. His wife and the wife of his younger brother, who are named Vimlesh and Kranti were at the house. Ravi came to the house and started beating his sister and assaulted her on her abdomen with a knife. Information about the incident was given to him by his wife. His shop is near the house. His father has a different shop. He came to the house and saw that his sister is lying in a pool of blood and a blood stained knife is also lying there. His father also came from the shop. His father took Mamta to the hospital and as soon as he reached at the gate of the hospital she died. Her dead body was then brought to the house. He along with his father went to the Police Chowki to give information, but they did not register his report and told them to bring a written report. Then his father got a report typed on a electronic typewriter and went to the Police Chowki, from where he was told to go to the police station and give it there and then he went Police Station-Jagdishpura. Police came immediately thereafter and did paper work and sealed the dead body.

In his cross-examination he states that amongst sisters and brothers he is the eldest. Mamta, who has been murdered, was younger than him. He states that he is a barber, his shop is at Bodala Chauraha. His shop is situated at a distance of about 2--2-1/2 kms. from his house. On the day of occurrence he left his house for the shop at 8.00 a.m. On the day of occurrence his brother-in-law had come to take his wife to her maika. His younger sister Lalo was not at the house on the day of occurrence. She was in her matrimonial house. He received the information about the occurrence at about 10.00 a.m. through a boy, who was sent by his wife. On the said information he went to the house and took around 2 hours reaching there. When he reached the house he saw Mamta lying in a pool of blood and a knife was lying beside her. She was then taken to the hospital on a Thela and on the way she died. He states that his sister had died while on the way to the hospital near Bigha Mandir, from where she was brought back to the house and the dead body was then kept at the house. Blood also spilled on the Thela. They went for lodging the report after bringing Mamta to the house. The report was got typed on a typewriter. His father had gone with him for getting the report typed. His father had dictated the report. His father had signed on the said report. They had gone to the police station directly after getting the report typed. They had gone to Police Station-Jagdishpura, but did not meet anyone and had then come back to the house. Police had come at around 5.00 p.m. to the house. 2-3 police personals had come. The police had then sealed the dead body. Police had after conducting the inquest sealed the dead body and had taken it with them. They had not brought the typed application with them. The dead body was taken for post-mortem after sealing it. He states that his

sister was lying in the pool of blood when he reached home from his shop. The dead body was taken for post-mortem by the police on a Tempo. Blood was present at the place, where the dead body was kept at the door. The dead body was taken for cremation directly after post-mortem. They had returned home after cremation. Police had come after they had returned home after cremation. Police did not recover the blood stained mud. His brother-in-law Om Prakash had come on the day of occurrence. His sister had told him about Ravi troubling her after marriage. He did not make any complaint to the police or any high official about it. His sister had come on her own when she was pregnant and he had not gone to bring her. Her delivery was done, for which they had spent money. His sister and her child were living with him. He and his father were looking after the expenses of them. The knife was blood stained. The police had taken the knife. He did not see the knife. He had seen the knife at the time of the incident in the room. He does not know as to whether it was a knife or a chhuri. No wood of the Thela was cut and kept. The Thela was returned with the blood on it. He did not tell the same to the Investigating Officer. His statement was recorded immediately after the incident. To a suggestion that his brother and his wife were not happy with his sister living in the house, he denies. To a further suggestion that due to the same there used to be fight in the house, he denies. To a further suggestion that due to the fight, which had increased some maar-peet took place and his brother-in-law assaulted his sister with a knife due to which she died, he denies. He further denies the suggestion that due to the said reason, the said incident was not told to others and the report has been lodged with a delay.

18. Umesh Yadav P.W.-3 is the Head Constable, who had transcribed the first information report of the present case, the same is marked as Exhibit Ka-3 to the records. He had also transcribed the Qayami G.D. No. 51 at 16.45 hrs. on 22.08.2006 after lodging the first information report, the same is marked as Exhibit Ka-4 to the records.

In his cross-examination he states that Maya Ram, Khillu, Chaturi Ram had come for getting the first information report lodged. He states to have informed the officials about the same and the Incharge Sub-Inspector was sent to the place of occurrence.

19. Smt. Vimlesh P.W.-4 is the wife of Khillu P.W.-2, the daughter-in-law of Maya Ram P.W.-1 and an eyewitness of the incident. She in her examination-in-chief states that the marriage of her nand Mamta was solemnized about 3-1/2 years back with Ravi as per Hindu customs. In the marriage, her father-in-law and mother-in-law had given gifts and dowry as per their capability. Ravi and his family members were not happy with the gifts and dowry and had demanded a motorcycle as dowry from Mamta and due to the non-fulfillment of the same Mamta used to be beaten. Mamta, whenever she came to the house, used to tell about the demand of motorcycle by Ravi and also about the beating done by Ravi. She states that due to the demand of motorcycle Ravi had left Mamta back to her house and she was living since the last six months in her maternal house. On Raksha Bandhan, Ravi had come and had asked for a motorcycle and had beaten Mamta. On 22.08.2006 Ravi came to the house and had again said that his demand of motorcycle has not been fulfilled and he will take her back home only when

motorcycle is given. She states that even prior her father-in-law and other persons had tried to talk to Ravi about it, but he did not agree. On 22.08.2006 Ravi committed maar-peet and assaulted her nand with knife on her abdomen due to which she got injured and fell on the ground. She was present in the room at that time. She raised hue and cry, on which Ravi pushed her and threw knife in the room and ran away. Then she sent an information to her husband, who came to the house and after that her father-in-law also came. The incident is of around 10.00 a.m. A boy of the locality had gone to call her husband. Her nand was taken on a Thela by her father-in-law and her husband to the doctor for treatment. Police had come in the evening. She had shown them the place of occurrence and the place, where the knife was lying. Knife was taken into possession by the police after doing paper work. She had signed on the said document, the same is marked as Exhibit Ka-5 to the records.

In her cross-examination she states that she is illiterate but can sign. She has a younger sister named Kranti. The two sisters are married to two real brothers. Both marriages were solemnized together. Kranti was married with Raju. Both marriages were solemnized on the same day. She states that on the day of occurrence she was in her room. Mamta was also in the same room. Her children were playing in the courtyard. She has 3 children, the eldest child is about 7 years old. No one was present in the other room. In the adjacent room her sister was present. The other room is of her father-in-law and the adjacent room is of her sister. Her nand Mamta and her sister Kranti were present in the house on the day of occurrence. Her husband had gone to the shop at 8.00 a.m. Her father-in-law had gone to the shop at 9.00 a.m. She goes to her maika. She had gone about six months ago to her maika. She states that on the day of incident no one had come from her maika to take her, she goes and comes on her own. She denies the suggestion that her brother Om Prakash had come to the village to take her on the day of incident. She states that she has two nands. Her other nand was in her Sasural. Ravi had come to the house at about 10.00 a.m. She had greeted him when he came. He sat with her for some time. He did not talk much to her but started quarreling with his wife. To a question about what Ravi had talked to his wife, she answers that he said that will she go to which she replied that she will not and then fight started, on which he assaulted her with a knife. He did not beat her prior to assaulting her with the knife, but was saying as to whether she is going or not. To another question that what her nand was doing at the time of incident and what was she wearing, she states that she was standing and was talking to her and was wearing a salwar suit. She states that she has seen the knife, the blade was as long as the butt. After the incident she started crying and shouted but and no one from outside came. She sent an information through a boy of the neighbourhood. Her husband reached the house at about 11.00 a.m. and then her father-in-law came. He dever also came with her father-in-law. She states that she does not know, from where Ravi had brought the knife. On her raising shouts, her sister Kranti had come. Ravi had run away after the incident. Mamta fell down after receiving the knife injury. She did not do any first aid of the injury. Blood was coming out from the injury. The clothes were wet with blood. No treatment was given before her husband, father-in-law and dever had come. She along with her sister were with Mamta till the said persons arrived. Police had reached her

house at about 5.00 p.m. She had told the police that on an attempt to catch Ravi he pushed her and ran away. She had told it to her father-in-law and her husband. Police had sealed the knife before her and had taken it. To a suggestion that Ravi did not come to the house and had not assaulted with a knife, she denies. To a further suggestion that her nand was a quarrelsome lady and her staying at the house was not liked by her, she denies. To a further suggestion that her brother Om Prakash was present in the house at the time of occurrence, she denies. She further denies the suggestion that on the day of occurrence a fight took place between her and Mamta and during the fight her brother intervened and assaulted Mamta with a knife, due to which she died on the spot. She further denies the suggestion that due to the said reason she did not raise a shout about the incident. She further denies the suggestion that she gave a wrong information to her husband and father-in-law. She further denies the suggestion that she has involved the name of Ravi in the present matter and informs her father-in-law and husband about it. She further denies that the evidence, which she is giving, is only to save her brother and denies the suggestion that she gave information late to her father-in-law and husband as a result of which the first information report was registered with delay just to save her brother. She further denies the suggestion that Mamta died on the spot and she was not taken to the hospital.

20. Kundal Lal P.W.-5 is the Sub-Inspector, who had conducted the inquest on the body of the deceased on the dictation of Rajesh Kumar Prajapati, the Additional City Magistrate-II, who had also signed on the same, the same is marked as Exhibit Ka-2 to the records. He has further proved the other documents relating to the papers prepared for the dead body, which were also signed by the Additional City Magistrate-II, the same were marked as Exhibit Ka-6 to Exhibit Ka-9 to the records.

In his cross-examination he stated that the first information report was registered at 16.40 hrs. at the police station and he reached the place of occurrence on the direction of the SHO concerned along with other police officials on their motorcycle. He states that when he had reached there, there was no official present, but later on ACM-II had arrived on the information from the police station. He had found the dead body outside the house, where the entire paper work was done. The dead body was then sealed and handed over to the police constable for post-mortem.

21. Dr. B.D. Bhaskar P.W.-6 conducted the post-mortem examination of the deceased. The injuries, opinion regarding cause of death and the time since death has already been noted above. He has proved the post-mortem report, which is marked as Exhibit Ka-10 to the records.

In his cross-examination he stated that the left lung was pale due to excessive bleeding. The post-mortem was conducted on 23.08.2006 at about 3.15 p.m. and the time since death was shown to be about one day prior and as such death might have occurred at about 3.00 p.m. on 23.08.2006. He stated that injury was caused by some pointed sharp edged weapon. He further stated that Mamta could have been saved if the blood collected in her abdomen, could have been taken care off. He states that the deceased could have taken food on 22.08.2006 about 4-5 hrs. prior.

22. S.K. Singh P.W.-7 is the Circle Officer and the Investigating Officer of the matter. He recorded the statement of the witnesses and prepared the recovery memo of the knife, which is marked as Exhibit Ka-6 to the records. He prepared the site plan, which is Exhibit Ka-11 to the records. He arrested the accused-appellant Ravi on 23.08.2006. He concluded the investigation and submitted a charge-sheet no. 232/2006, under Sections 498-A, 304-B, 302, 506 IPC and Section 3/4 of the Dowry Prohibition Act, the same is marked as Exhibit Ka-2 to the records.

In his cross-examination he stated that he reached the place of occurrence at 5.30 p.m. He found the dead body of the deceased at the door of the house. He found the ACM-II and other police personals along with the first informant, other family members of the deceased and public present there. He states that the knife was recovered from the room, where the incident took place on the pointing out of Smt. Vimlesh. He did not find blood at the place of occurrence as the incident had taken place in the morning. He did not collect blood stained mud. He states that Maya Ram had told him that Ravi assaulted Mamta with knife and information about it was given to him by his daughter-in-law and his wife. He further states that Maya Ram had told him that Mamta died on the way while being taken to the hospital, but did not tell him that she was taken back to the house from the way in between. He further states that Maya Ram did not tell him as to the mode, by which Mamta was taken to the hospital. To a suggestion that he has done the investigation while sitting at the police station and the investigation is not proper and a false charge-sheet has been submitted against accused Ravi, he denies. To a further suggestion that accused Ravi has been falsely implicated in the present, he denies.

23. The accused Ravi in his statement recorded under Section 313 Cr.P.C. has stated that he has been falsely implicated in the present matter. He further states that his wife used to fight with him and did not discharge her duty as a wife. She used to be under the guidance of her father and mother and used to stay in her maika often. She had left him and had gone alone and did not return back and he also did not go to her. On 23.08.2006 he was taken by the police from Balkeshwar. At the police station he came to know about the death of Mamta. He does the work of repairing punctures. He did not make any demand of dowry. He and his in-laws are poor persons.

He did not lead any defense evidence.

24. Since the learned counsel for the appellant has confined his argument on the question of sentence only, this court is not examining the truthfulness and the veracity of the statements of the witnesses and is neither examining the issue regarding the death of Smt. Mamta nor the case of the defense as suggested to the witnesses.

25. Section 304-B of the Indian Penal Code, 1860 reads as under:

"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.

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."

26. The necessary ingredients of Section 304-B IPC are as follows:

(1) The death of the woman was caused due to burns or bodily injury or due to unnatural circumstances.

(2) The death should be within seven years of marriage.

(3) It is shown that soon before her, the victim was subjected to cruelty or harassment by her husband or any relative of the husband.

(4) The cruelty or harassement was for or in connection with any demand for dowry.

(5) The cruelty or harassment is shown to have been meted out to the woman soon before her death.

27. Dealing with the cases laws relied upon by the learned counsel for the appellant this court after going through them is not at all impressed about the point canvassed before it as the said case laws do not at all apply in the present matter.

The first case relied upon is **Rajesh Pandey (supra)** was a case in which the Apex Court has reduced the sentence as awarded by the trial court and affirmed by the High Court to eight years under Section 304-B IPC. The sentence in the case as awarded has been reduced by the Apex Court. No guidelines have been prescribed in the same.

The second case relied upon is **Manoj (supra)** was a case in which the trial court had awarded life imprisonment to the accused under Section 304-B IPC which on an appeal was reduced to 10 years imprisonment by the High Court. The appeal against the same was filed before the Apex Court where one of the arguments was to consider reducing the sentence from 10 years to 7 years, which was not accepted and the appeal was dismissed.

In the third case of **Deepak (supra)** the conviction of the appellant was under Section 302 IPC for life imprisonment by the High Court by reversing the judgment and order of acquittal. The accused therein was acquitted of the charges levelled against him by the trial court which was reversed by the High Court and he was convicted for offence under Section 302 IPC. An appeal was preferred against the said judgment of conviction by the High Court before the Apex Court in which the case was of a single sword-blow given by the accused on the deceased which caused his death. It was argued that the case would fall under Section 304 Part II IPC and not under Section 302 IPC, which was accepted by the Apex Court and the conviction was altered from 302 IPC to 304 Part II IPC and the sentence was ordered to be undergone to the period of custody already undergone.

In the fourth case **Suresh @ Kala (supra)** the conviction and sentence was recorded under Section 302 IPC to life imprisonment by the Trial Court. The appeal to the High Court was dismissed which was challenged before the Apex Court. The said case was a case of a single injury. The Apex Court came to the conclusion that the case would come under Section 304 Part I IPC rather that under

Section 302 IPC and granted the benefit to the accused by converting his conviction from Section 302 IPC to Section 304 Part I IPC and sentenced hm to 10 years rigorous imprisonment.

28. The last two case laws relied by the learned counsel for the appellant relate to offences under Section 302 IPC wherein it was a case of a single blow. Although in the present case also, the case is of a single knife blow, but the same would stand on a different footing as that of the said two cases as the present case is of dowry death for which consistent evidence of demand of dowry and torture is on record.

29. It is not to be lost sight off that the present case is a case of dowry death. The motive for the offence is that of non-fulfillment of the demand of dowry. The death is unnatural and within seven years of marriage, to be more precise after 3-1/2 years of marriage.

30. The Apex Court has in the case of **Hem Chand Vs. State of Haryana : (1994) 6 SCC 727** held that in a case under Section 304-B IPC, awarding extreme punishment of imprisonment for life should be in rare cases and not in every case.

31. In the present case the appellant has been in jail since 23.08.2006 and has served out about 14 years and 4 months (without remission) and there is no special and rare feature attracting maximum punishment.

32. We, accordingly while confirming the conviction of the appellant under Section 304-B IPC sentence the appellant to 12 years' (twelve years') rigorous imprisonment and the sentence imposed by the trial court under Section 304B I.P.C. is hereby set aside. The other convictions and sentences passed by the trial court are, however, confirmed.

33. In the result, the appeal is partly allowed and the judgment of the trial court is modified to the above extent.

34. The lower court record along with a copy of this judgment be sent back immediately to the trial court concerned for compliance and necessary action.

35. The party shall file computer generated copy of such judgment downloaded from the official website of High Court Allahabad before the concerned Court/Authority/Official.

36. The computer generated copy of such judgment shall be self-attested by the counsel of the party concerned.

37. 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)01ILR A1203
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 1701 of 2013

Jitendra @ Gabbar Jatav
...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Sri Shivam Yadav, Sri Dinesh Kumar Verma, Sri Rajesh Kumar Mishra

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

Criminal Law-Indian Penal Code, 1860- Section 376(1)- Rape of minor- Question of sentence- The appellant has served out minimum sentence of ten years for the offence under Section 376(1) IPC - The trial court convicted the appellant for the offence under Section 376(1) IPC for life imprisonment- From the impugned judgement and order passed by the trial court, it reveals that while considering the quantum of sentence for the offence in question it had gone through the plight of the victim who was a minor helpless girl against whom such a heinous crime was committed by the appellant who brutally subjected her to rape and further ramifications of the offence and it impact on the society has been considered in great details- Court has to take balance between reformatory theory and principle of proportionality.

Settled law that the quantum of punishment depends upon the gravity and heinousness of the offence, manner of its commission, its effect upon the victim and impact upon the society and entails striking of balance between the reformative and retributive theory of punishment- Minor girl brutally raped by the accused hence sentence awarded found to be just and proper.

Criminal Appeal accordingly rejected.
(E-2) (Para 33, 34)

Judgements/ Case law relied upon: -

1. 2012 (1) All JIC 319 Bavo @ Manubhai Ambalal Thakore Vs St. of Guj. (Cited)

2. AIR 2013 Supreme Court 2209 Shyam Narain Vs St. of NCT of Delhi (relied)

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

1. The present Criminal Appeal has been preferred against the judgment and order dated 08.03.2013 passed by Additional Session Judge, Court No.6, Etawah in S.T. No.55 of 2010 convicting and sentencing the appellant to undergo for life imprisonment under Section 376(1) IPC and to pay a fine of Rs.20,000/- in default of payment of fine, further imprisonment for one year additional rigorous imprisonment.

2. The brief facts of the case are that the informant Indrapal Singh Katheriya submitted a written report at Police Station Chaubiya, district Etawah on 23.12.2009 stating that his daughter who was aged about 10 years and studying in class IVth had gone to the gram field of Birendra Singh Jatav, resident of Simariya who was known to him for taking gram greens (Chane Ka Saag) and while she was taking the gram greens, the nephew of Birendra Singh namely Jitendra @ Gabbar S/o Rajendra Jatav committed rape on her. His daughter came to her house crying and informed about the entire incident to her mother who in turn informed the informant then the informant inquired from his daughter who told him that Jitendra had dragged her from gram field to mustered field where he committed rape on her. The incident has taken at 1 p.m. in the afternoon. On the basis of written report submitted at police station Chaubiya Case Crime No.231 of 2009 under Section 376 IPC was registered on 23.12.2009 at 17.45 hours against the appellant Jitendra @ Gabbar Jatav which was also endorsed in the G.D. No.19 time 17.45 hours on 23.12.2009 at the said police station.

3. In view of the legislative mandate as contained in Section 228-A of the Indian Penal Code and the observation made by

the Apex Court in it's *catena* of judgments, the identity of the prosecutrix/victim is not being disclosed and she is referred to as 'A' hereinafter.

4. The investigation of the case was entrusted to the Investigating Officer who prepared a site plan of the place of occurrence and took the clothes of the prosecutrix/victim "A" (hereinafter referred as the prosecutrix/victim "A") and prepared the recovery memo of the same. The emergency doctor Jyotsana Bhatiya conducted the medical examination of the victim girl and Dr. Dinesh Singh, Radiologist conducted the ossification test of the victim girl. After completing the investigation of the case the Investigating Officer submitted a charge sheet against the appellant Jitendra @ Gabbar Jatav under Section 376 IPC before the competent court.

5. The learned Magistrate took the cognizance of the offence and committed the case to the court of Sessions. The learned trial court framed charges against the appellant Jitendra @ Gabbar Jatav under Section 376 IPC who denied the same and claimed trial.

6. The prosecution in support of it's case produced P.W.1 prosecutrix/victim "A", P.W.2 Indrapal, P.W.3 Smt. Shiv Kumari, P.W.4 Dr. Jyotsana Bhatiya, P.W.5 Sub-Inspector Dharampal Singh (Investigating Officer), P.W.6 Constable Clerk Tilak Singh, P.W.7 Alok Prabhakar Awasthi 2nd Investigating Officer, P.W.8 Constable Clerk Roshan Lal and P.W.9 Dr. Dinesh Singh Radiologist.

7. The statement of the accused was recorded u/s 313 Cr.P.C who denied the prosecution case and has stated that the police has falsely implicated him in the present case and the witnesses have falsely deposed against him and on the date of the incident he had gone to the house of his maternal uncle at Mainpuri. It was further stated by him that Sunil, Rambabu, Pappu, Ashok, Durgpal, Raj Bahadur, Bhanwarpal had grabbed his land due to said enmity in collusion with the Village Pradhan the appellant has been falsely implicated in the present case.

8. The accused in his defence has produced D.W.1 Nand Ram, D.W.2 Rajeshwar Dayal and D.W.3 Dr. Ravindra Kumar Gupta.

9. The prosecutrix/victim "A" in her deposition before the trial court has stated that she had gone from her house to a field where she was all alone while taking gram greens (chane ka saag), the accused Jitendra @ Gabbar Jatav suddenly came there and squeezed her mouth and further put a country-made pistol on her and slapped her and threatened her that if she raise any alarm she would be killed by country-made pistol. Thereafter he carried her forcibly to a mustered field and put off her clothes and sat on her and committed rape on her. Blood started oozing from her vagina and it also pained. While committing rape on her, the accused had pressed her mouth. The incident has taken place at 1 p.m. in the afternoon and while he was committing rape, "Shit' (faecal matter) of the victim also came out.

10. The accused told her to go and attend call of nature. The prosecutrix/victim "A" came to her house and narrated the entire incident to her mother. At the time of the incident her father had gone on work. Her father had took her to the police station where he

lodged the FIR and on the same day she was sent to the district hospital by the police where she was medically examined. She was admitted in the District Hospital Etawah. The Investigating Officer had recorded her statement and inquired about the incident.

11. The P.W.2 Indrapal who is the informant and father of the victim had stated before the trial court that at the time of the incident the age of the victim was ten years and she was studying in class 4th. She had gone to village Simariya in the field of Birendra Singh Jatav for taking chaney ka saag where the nephew of Birendra Singh Jatav had committed rape on prosecutrix/victim "A". After the incident his daughter came to her house crying and narrated the entire incident to her mother. His wife had informed about the incident and thereafter the witness inquired about the same from his daughter who reiterated the version which has been given by her in the FIR as well as before the trial court. Thereafter this witness took his daughter to the police station Chaubia and got the report written from one Anoj Kumar of his village and gave the same at the said police station. Anoj Kumar had written the report on the dictation given by P.W.2 Indrapal which was read over to him and he put his signature on the same on the basis of which the FIR was registered against the accused appellant. The witness has proved paper no.5 Ka to be the written report which he he got written by Anoj Kumar and identified his signature on the same and he proved the said report as Ext. Ka-1. He deposed that the incident had taken place at 1 p.m. in the afternoon. The incident was narrated by the prosecutrix/victim "A" to him which he got written in the report.

12. P.W.3 Smt. Shiv Kumari who is the mother of the prosecutrix/victim "A" (P.W.1) has deposed before the trial court that her daughter was studying in class 4th. At about 10 a.m. in the morning her daughter had gone to the field of Birendra Singh Jatav for taking gram greens (chane ka saag) and when she did not return then she sent her husband to search her out and when her husband had gone to search her daughter, then her daughter was coming from the field. When her daughter came to her house, her clothes were blood-stained and she was crying and told her that when she had gone to take gram greens (chane ka saag) then accused Jitendra @ Gabbar Jatav came there and pressed her mouth in the mustard field and committed rape on her. Blood was oozing out from her private parts and she tried to console her and put the clothes etc. for stopping blood. She informed her husband as has been told by her daughter the prosecutrix/victim "A". Her husband had gone to trace out accused Jitendra @ Gabbar in the field but he was not there. Thereafter her husband had gone to the concerned police station for lodging the FIR. She also had accompanied her husband along with her daughter prosecutrix/victim "A". Besides them her father-in-law Subedar and Sister-in-law had also gone to the police station. After the registration of the FIR the police had sent all of them including her daughter to the District Hospital, Etawah for medical examination where the same was conducted and for medical treatment prosecutrix/victim "A" was admitted. Her X-Ray was also conducted on the next day. There was no enmity between the accused-appellant Jitendra @ Gabbar Jatav with his family prior to the incident.

13. The Investigating Officer has recorded her statement under Section 161 Cr.P.C. Her daughter remained in the hospital for about 10 to 11 days.

14. P.W.4 Dr. Jyotsana Bhatiya was examined by the trial court and she deposed that on 23.12.2009 she was posted at women hospital as a medical officer. She examined the prosecutrix/victim "A" at 10.30 p.m. and she was brought by constable Anar Singh and C.P.M Constable Shiv Kumari. She has proved the medical examination report of the prosecutrix/victim "A" as Ext. Ka-2 which was in his handwriting and signature. On medical examination she found following injuries on the person of the prosecutrix/victim "A".

"Height 127 cm, weight 20 kg, teeth 12/12. No mark of injury on external surface of body. Breasts not developed. Pubic axillary hair not developed."

The witness on the internal examination of the prosecutrix/victim "A" found that her hymen was torn and it was bleeding. There was blood clot and vagina admits one finger and after removing the blood clot, vaginal smear was taken and sent to pathological report. There was perennial tear at 6 "O' clock position which was stitched laceration on lateral vaginal wall."

15. She also prepared a supplementary medico legal report of the prosecutrix/victim "A" on the same day and has proved the same as Ext.Ka-3, which is reproduced as under:-

"A black mole on left side of abdomen 7 cm. away from umbilicus.

Pathology report- Given by pathologist District Hospital Etawah No.89, dated 24.12.2009 No alive or dead Spermatozoa seen.

Radiology report- Given by radiologist District Hospital Etawah No.1004/09 dated 24.12.2009.

X-Ray Elbow A.P- Epiphyses of elbow joint are not fused.

X-Ray Wrist Joint A.P- Epiphyses of lower and of radius, ulna and 1st metacarpal not fused Plsiform not appeared.

X-Ray Knee joint- Epiphyses of knee joint are not fused.

Opinion- Injury is simple and caused by insertion of some hard and blunt object. Duration of injury about 24 hours. The age of the girl is below 11 years."

16. As per pathological report no.89 dated 24.12.2009, there was no live or dead Spermatozoa was found. As per X-Ray report bones of elbow, wrist and knee were not found to be fused. As per opinion of the doctor, the injuries sustained on the internal examination injury was found to be simple and caused by insertion of hard and blunt object and duration of the injury was 24 hours. The age of the prosecutrix/victim "A" was below 11 years and she further stated that the said injuries could be caused on 23.12.2009 in the afternoon at 1 p.m. She further deposed that if a male person aged about 22 to 25 years commits rape on a girl then the injury which has been caused to the prosecutrix/victim is possible. She has proved the supplementary report which is paper no.9 Ka/3 as Ext.Ka-3. The prosecutrix/victim "A" was admitted in the district hospital for medical examination as her wounds were stitched.

17. P.W.5 S.I. Dharmpal Singh in his deposition before the trial court has stated that he was posted on 23.12.2009 at P.S. Chaubia on the post of Sub-Inspector. On the said day the FIR was registered on the written report submitted by the informant Indrapal Singh against Jitendra @ Gabbar Jatav which was registered as Case Crime No.231 of 2009 under Section 376 IPC.

The investigation of the said case was entrusted to him. He recorded the statement of the informant Indrapal Singh at village Beena who met him at his house and at the pointing out of the informant, he visited the place of occurrence and prepared the site-plan in his handwriting and signature and proved the same as Ext.Ka-4. He also recorded the statement of the persons of the nearby field. The said Investigating Officer was transferred, hence the investigation was entrusted to P.W.7 S.I. Alok Prabhakar Awasthi thereafter.

18. P.W.6 Constable Clerk Tilak Singh has stated that on 24.12.2009 he was posted at police station on the said post. On the said date Constable Anar Singh and woman constable Shiv Kumari has handed over underwear of blue colour, one white salvar (terricot), one kurta green and one piece of old saari and one piece of white clothe which was torned and blood stained were found on the same were submitted at the police station which was sealed in a bundle as the same was police property which he prepared in his handwriting and signature and also prepared recovery memo of the same and proved the same as material Ext.-1 which was opened in the court and was again proved as material Ext. 2 to 6 and the same was thereafter sent to Vidhi Vigyan Prayogshala, Agra for Chemical analysis report.

19. P.W.7 Alok Prabhakar Awasthi who was produced before the trial court has stated that on 27.12.2009 he was posted at police station Chaubia on the post of Sub-Inspector and on the said date, he had taken over the investigation of the case from the earlier Investigating Officer S.I. Dharmpal Singh who was transferred. He recorded the statement of the accused Jitendra @ Gabbar Jatav on 27.12.2009 and further recorded the statement under Section 161 Cr.P.C. of Smt. Shiv Kumari. He also recorded the statement of other witnesses under Section 161 Cr.P.C. including Dr. Jyotsana Bhatiya and thereafter submitted the charge sheet against the accused-appellant under Section 376 IPC and proved the same as Ext.Ka-6. He also received the report of the Vidhi Vigyan Prayogshala on 26.3.2010 which is on record as paper no.33 Ka/1. According to the chemical analysis report on material Ext.1 underwear Spermatozoa was found and on the underwear, salvar, kurta and piece of cloth which was material Ext.1 to 4 human blood was found and in material Ext.1 human semen was found and he has proved the chemical analysis report as Ext. Ka-7.

20. P.W.8 Constable Clerk Roshan Lal has stated that while he was posted at police station Chaubia on the said post on 23.12.2009, the informant Indrapal Singh on the said day had submitted a written report against the accused-appellant Jitendra @ Gabbar Jatav on the basis of which the present case was registered under Section 376 IPC and he has prepared the Chik FIR in his handwriting and signature and proved the same as Ext.Ka-8. He further endorsed the said FIR in the G.D No.19 at 17.45 hours on 23.12.2009 in his hand and signatures. A carbon copy of the same which is on record and proved the same as Ext.Ka-9.

21. P.W.9 Dr. Dinesh Singh, has stated before the trial court that on 24.12.2009 he was posted on the post of Radiologist in the District Hospital Etawah and on the said date, he conducted the X-Ray of the prosecutrix/victim "A" who was brought by woman constable Shiv Kumari and constable Amar Singh of police station Chaubia and on X-Ray report following

features were noticed which are reproduced here under

"(ossification test): X-Ray Elbow A.P- Epiphyses of elbow joint are not fused.

X-Ray Wrist joint A.P- Epiphyses of lower end of radius, ulna and Ist Metacarpal not fused. Dissiform not appeared.

X-Ray right knee joint A.P- Epiphyses and knee joint are not fused."

22. He has proved the same as Ext.Ka-10 in his handwriting and signatures. The X-Ray plates have been marked as material Ext.1.

23. The accused-appellant in his defence has produced three witnesses in support of his case i.e. D.W.1 Nand Ram, D.W.2 Rajeshwar Dayal and D.W.3 Dr. Ravindra Kumar Gupta.

24. D.W.1 Nand Ram has stated before the trial court that adjacent to his field there is a field of Dayaram, Birendra, Rajesh and Visheshwar in which there is crop of Potato, Onion and Garlic. On 23.12.2009 when he was working on his Garlic field, there were five other labours working with him. The water engine in the field of Birendra was running because of which the water was coming in the field of Garlic and nearby persons Gangaram, Visheshwar, Rajeshwar and Shyam Babu were also there and there was agricultural work going on in their field and in the said field also there were 25 labours working. From 6 a.m. to 6 p.m. he was working in his field and others were also present till the evening in the field. They had taken their lunch in the field and in the nearby area, there was no field of Mustard. From 6 a.m. till 6 p.m. in the evening the daughter of Indrapal had not come to the field of Birendra Singh. In the field of Birendra Singh, there was crop of Garlic. Jitendra @ Gabbar Jatav had gone to his maternal uncle four days prior to the incident and was not present at village Simariya. The plot of the father of Jitendra which was in village Beena was grabbed by Dragpal Singh and others with the help of the informant Indrapal Singh and the said persons have falsely implicated the accused Jitendra @ Gabbar Jatav after bribing the police. The Village Pradhan has also given a plot to the informant Indrapal as an allurement and thereafter the said plot was also allotted in the name of informant Indrapal. In the evening he heard that daughter of Indrapal had gone to the field of Arhar where she received injuries on her private part. The accused Jitendra @ Gabbar is innocent and he has been falsely implicated in the present case due to deep rooted conspiracy.

25. D.W.2 Rajeshwar Dayal has stated before the trial court that his agricultural field is near the field of Dayaram and he too reiterated the version given by D.W.1.

26. D.W.3 Dr. Ravindra Kumar Gupta in his deposition before the trial court has stated that on 27.12.2009, he was posted on emergency duty in District Hospital Etawah and at 3.30 p.m. Constable Mohar Singh and Constable Shiv Prakash of police station Chaubia had brought the accused-appellant Jitendra @ Gabbar Jatav aged about 18 years for medical examination. In the medical examination he did not find any injuries on his private part and there was no Spermatozoa or blood found on his person who had not weared any underwear which could also be examined. He was referred to the pathologist for smear examination on the basis of chitthi

majroobi his medical examination report was prepared which was brought by constable Shiv Prakash which is on record. He had stated about the age of accused-appellant Jitendra @ Gabbar to be 18 years of his appearance and that can be a margin of 1-1/2 years plus and minus. He stated that the opinion about the age is given by the CMO on the basis of an X-Ray report. He has identified the appellant before the court. He has produced the original register of the medical examination before the trial court as paper no.16-Kha/1 and proved the same as Ext.Kha-1.

27. The trial court after scanning the prosecution as well as defence evidence came to a conclusion that it was the appellant who had committed rape on the prosecutrix/victim "A" and has convicted and sentenced him under Section 376(1) IPC for life imprisonment. Aggrieved by the impugned judgement and order, the appellant has preferred the instant appeal.

28. Heard Sri Rajesh Kumar Mishra, learned counsel for the appellant and Mrs. Archana Singh, learned AGA for the State and perused the record.

29. The learned counsel for the appellant has confined his argument and addressed the Court only on the question of sentence. He argued that the appellant has served out minimum sentence of ten years for the offence under Section 376(1) IPC as he is in jail for last eleven years since 27.12.2009 and be released on this count. He submitted that the maximum sentence which has been provided by the trial court for the offence under Section 376(1) IPC for life imprisonment is too severe and should be set-aside and the appellant be released to the period already undergone. In support of his argument he has placed reliance on the judgement of the Apex Court in the case reported in ***2012 (1) All JIC 319 Bavo @ Manubhai Ambalal Thakore Vs. State of Gujarat*** wherein The Apex Court has considered the question of sentence where the said accused was sentenced to life imprisonment by the trial court which was maintained by the High Court and the accused was released as he had served out minimum sentence of 10 years where the victim was 7 years old minor girl.

30. The learned AGA on the other hand has vehemently opposed the argument of learned counsel for the appellant on the question of sentence and has argued that the present case is a case where a minor girl aged about 10 years was subjected to rape by the appellant and the prosecution has further proved it's case beyond reasonable doubt against the appellant for his conviction under Section 376(1) IPC and the trial court has rightly convicted him and sentenced for life imprisonment for the said offence and it has also categorically given cogent reason for awarding sentence of life imprisonment to the appellant which does not call for any interference by this Court and the appeal may be dismissed by this Court. She in support of her argument has placed reliance of a judgement of the Apex Court reported in ***AIR 2013 Supreme Court 2209 Shyam Narain Vs. State of NCT of Delhi*** has stated that the proposition of law for imposition of sentence in offence of rape has been dealt by the Apex Court considering the impact of such offences on the society as a whole and its ramifications on immediate collection as well as reparations on the victim. She pointed out that in the said case the victim girl was eight years who narrated the incident and the threat given to her by the accused. The deposition of the

prosecutrix corroborated by testimony of treating physician and medical evidence conviction of the accused was upheld by the Apex Court and further the sentence awarded to him for life imprisonment by the trial court, upheld by the High Court and confirmed by the Apex Court.

31. The learned counsel for the appellant fairly states that he is not challenging the conviction but questioning the question of sentence only and State has opposed the argument of learned counsel for the appellant on the quantum of sentence in view of the limited submissions we deem it that there is no need to go into the finding regarding the conviction under Section 376(1) IPC and the only question to be considered is whether the sentence of life imprisonment and fine of Rs.20,000/- is reasonable or excessive. Section 376 speaks about the punishment for rape. Sub-Section 2(F) makes it clear that who ever commits rape on a women under ten years, shall be punished 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. Proviso appended to Sub-Section (2) makes it clear that the Court may, for adequate and special reasons to be mentioned in the judgement impose a sentence of imprisonment of either descriptions for a term of less than ten years. It is clear from the above statutory provision that for the offence of rape on a girl under twelve years of age, punishment shall not be less than ten years but which may extend to life and also to fine shows that the legislature intended to adopt strictness in awarding sentence if the victim is below twelve years of age. No doubt, the provision of Section 376(2) IPC lays down that the Court may, for adequate and special reason to be mentioned in the judgement, impose a sentence of imprisonment of either description for a term of less than ten years, it is settled law that Courts are obliged to respect legislative mandate in the matter of awarding of sentence in all such cases. In the absence of any special and adequate reasons, recourse to proviso mentioned above cannot be applied in casual manner.

32. Thus in the light of the above mandate of law we proceed to consider the argument of learned counsel for the appellant regarding the quantum of sentence awarded to the appellant for the offence for which he has been convicted i.e. under Section 376(1) IPC. It is evident from the prosecution case that the prosecutrix/victim "A" was aged about ten years at the time of incident and she was studying in class 4th. While she had gone in the field of one Birendra Singh Jatav for taking gram greens (chane ka saag) then the appellant Jitendra @ Gabbar Jatav suddenly came and dragged the deceased towards the mustard field by pressing her mouth and committed rape on her. The medical evidence of the prosecutrix/victim "A" shows that her hymen was torn which was also bleeding, vagina admits one finger, smear was taken perennial tear at 6 "O' clock position which was stitched, lacerations present on the lateral vaginal wall. As per the supplementary medical report of the prosecutrix/victim "A", she was also found to be below 11 years of age. On her underwear spermatozoa was found where on her clothes i.e. underwear, salvar, kurta and piece of clothe blood stains were found. The prosecutrix/victim "A" in her deposition before the trial court has categorically stated that it was the appellant who had committed rape on her and she after the incident went crying and informed her mother P.W.3 Smt. Shiv Kumari about the entire incident who further informed her husband i.e. P.W.2 Indrapal on which the P.W.2 immediately lodged an FIR of the

incident on the same day at 7.45 hours. As per prosecution case the incident has taken place on 23.12.2009 at 1 p.m. in the afternoon which is 16 km. away from the place of occurrence. It is further noteworthy to mention here that the prosecutrix/victim "A" in her deposition before the trial court has stated that because of the rape being committed by the appellant, she felt pain in her private part and her faecal matter also came out and the accused told her to go and attend the call of nature. The appellant had led evidence in defence showing his false implication in the present case on account of the fact that 10 to 14 years back, he had left the village because some people of the village namely Drag Pal, Sunil, Rambabu, Pappu and Raj Bahadur had grabbed the plot of his father on account of which in collusion with the village Pradhan the appellant has been falsely implicated in the present case. The appellant has further taken a defence that he was not present at the time time and place of the occurrence as he was at Mainpuri and gone to the house of his maternal uncle. In this regard he has produced the defence witness D.W.1 and D.W.2 and further D.W.3 Doctor Ravindra Kumar Gupta who had examined the appellant. When the appellant was brought on 27.12.2009 by the police constable in the present case and he did not find any injuries on the private part of the appellant and no Spermatozoa or blood was found on his person. He was not wearing any underwear which could be taken for examination. The appellant was examined on the basis of Chitthi Majroobi brought by the two constables. The appellant was aged about 18 years as per the said Doctor. The defence taken by the appellant was rightly rejected by the trial court giving sound reasons.

33. The suggestion was also given by the defence to the victim that she received some injury on her private part due to fall on a pointed substance in the Arhar field which she has categorically denied and has stated that it was the appellant who has committed rape on her. It has come in the evidence of P.W.2 Indrapal and P.W.3 Smt. Shiv Kumari who are the father and mother prosecutrix/victim "A" that they had no enmity prior to the incident with the appellant. The defence witnesses i.e. P.W.1 Nand Ram and D.W.2 Rajeshwar Dayal were disbelieved by the trial court on the ground that the two defence witnesses were the uncle of the appellant and they had just given evidence to save the appellant from the present case. The evidence of P.W.4 Dr. Jyotsana Bhatiya who has examined the prosecutrix/victim "A" has categorically stated before the trial court that the nature of injury sustained by the prosecutrix/victim "A" on her private part could be caused by hard and blunt object i.e. of erect of penis and if a person of 20 to 25 years commits such an offence against a victim till such injury as has been received by the prosecutrix/victim "A" is quite possible. She has further stated that the victim was admitted in the hospital as her wounds were stitched and she remained in the hospital for about 10 to 11 days. The injuries found on the prosecutrix/victim "A" was fresh one. She further denied the suggestion given by the defence that the victim could have received injuries on account of fall on a pointed wood. She identified the victim of whose medical examination she conducted after the incident. Thus the trial court arrived at a conclusion convicting the appellant for the offence under Section 376(1) IPC for life imprisonment. From the impugned judgement and order passed by the trial court, it reveals that while considering the quantum of sentence for the offence in question it had gone through the plight of the victim who was a minor helpless girl

against whom such a heinous crime was committed by the appellant who brutally subjected her to rape and further ramifications of the offence and it impact on the society has been considered in great details. The judgement cited by the learned counsel for the appellant in the case of **Bavo @ Manubhai Ambalal Thakore Vs. State of Gujarat (Supra)** wherein the Apex Court considered the quantum of sentence has considered that the award of life imprisonment which is maximum prescribed is not warranted taking into account that the accused was aged about 18/19 years and the incident has occurred nearly ten years ago and awarded him sentence of ten years R.I and further considered the imposition of fine of Rs.20,000/- by the trial court which was reduced to Rs.1,000/- as the accused belong to poor family and working as agricultural labour was not in a position to pay such huge amount and, therefore, the present appellant is also entitled to be sentenced for ten years R.I as he had already undergone eleven years in jail as stated to be in jail since 27.12.2009.

34. We have very humbly considered the judgement of the Apex Court as has been cited by the learned counsel for the appellant but we cannot lose sight of another judgement of the Apex Court as has been relied upon by the learned AGA in the case of **Shyam Narayan Vs. State of NCT Delhi (Supra)** where the victim girl was aged about eight years and the Apex Court confirmed the conviction of the said accused for the offence under Section 376(2) (F) IPC by the trial court which sentenced him for life imprisonment and High Court also upheld the said sentence imposed by the trial court and further the Apex Court confirmed the said sentence of life imprisonment on the said accused observing that sentencing has a social goal awarding just sentence is complex exercise. Court has to take balance between reformatory theory and principle of proportionality. While considering the quantum of sentence in the said case, the Court has very widely considered various aspects of the matter such as the plight of the victim, social ramifications of the offence on the society. In this regard it would be not out of place to mention to quote paragraphs 11, 12, 13, 14, 15, 17, 18, 19, 20, 21 of the said judgement which are reproduced here as under:-

11. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

12. In this context, we may refer with profit to the pronouncement in Jameel

v. State of Uttar Pradesh[1], wherein this Court, speaking about the concept of sentence, has laid down that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

13. In Shailesh Jasvantbhai and another v. State of Gujarat and others[2], the Court has observed thus:

"Friedman in his Law in Changing Society stated that: "State of criminal law continues to be - as it should be -a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration".

14. In State of M.P. v. Babulal[3], two learned Judges, while delineating about the adequacy of sentence, have expressed thus : -

"19. Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is prescribed by law. The award of sentence is consequential on and incidental to conviction. The law does not envisage a person being convicted for an offence without a sentence being imposed therefore.

20. The object of punishment has been succinctly stated in Halsbury's Laws of England, (4th Edition: Vol.II: para 482) thus:

"The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided".

15. In Gopal Singh v. State of Uttarakhand[4], while dealing with the philosophy of just punishment which is the collective cry of the society, a two-Judge Bench has stated that just punishment would be dependent on the facts of the case

and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors.

17. In Madan Gopal Kakkad v. Naval Dubey and another[5], it has been observed as follows:-

"... though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms."

18. In State of Andhra Pradesh v. Bodem Sundra Rao[6], this Court noticed that crimes against women are on the rise and such crimes are affront to the human dignity of the society and, therefore, imposition of inadequate sentence is injustice to the victim of the crime in particular and the society in general. After so observing, the learned Judges had to say this: -

"The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's crime for justice against such criminals. Public abhorrence of the crime needs a reflection through the Court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment."

19. In State of Punjab v. Gurmit Singh and others[7], this Court stated with anguish that crime against women in general and rape in particular is on the increase. The learned Judges proceeded further to state that it is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection of the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. Thereafter, the Court observed the effect of rape on a victim with anguish: -

"We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female."

20. In State of Karnataka v. Krishnappa[8], a three-Judge Bench opined that the courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. It was further observed that to show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced.

21. In Jugendra Singh v. State of Uttar Pradesh[9], while dwelling upon the

gravity of the crime of rape, this Court had expressed thus: -

"Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu."

35. Thus in view of the foregoing discussions and the law as has been enunciated by the Apex Court in the case **Shyam Narayan Vs. State of NCT Delhi (Supra)** applying to the instant case we have no hesitation to hold that the conviction of the appellant for the offence u/s 376(1) IPC and sentence for life imprisonment with fine of Rs.20,000/- and in default of the same 1 year R.I as has been awarded by the trial court is fully justified in the facts and circumstances of the present case which has in a very detailed manner has discussed the issue of imprisonment of sentence and given cogent reason for awarding a sentence for imprisonment of life to the appellant which is a sound one. Therefore, we upheld the conviction and sentence awarded by the trial court to the appellant for the offence for which he has been charged with, and the same does not call for any interference by this Court, hence the appeal of the appellant lacks merit and is accordingly **dismissed**.

36. The accused-appellant is stated to be in jail. He shall remain in jail to serve out the sentence awarded by the trial court.

37. Let a copy of this judgment be transmitted to the trial court concerned forthwith along with lower court record for necessary information and follow up action.

38. The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person (s) (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked before the concerned Court/Authority/Official.

39. The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)01ILR A1216
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 2220 of 2015

Smt. Ruksana & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Shivam Yadav, Sri Pankaj Srivastava, Sri Rakesh Kumar Singh, Sri Syed Wajid Ali

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

Indian Evidence Act, 1872- Section 32 (1)- Dying Declaration- The dying declaration of the deceased was recorded by the PW5 Naib Teshildar Sadar in presence of the Emergency Medical Officer who stated that the patient is fit to give the dying declaration before and after recording of the dying declaration and the thumb impression is also found of the deceased on the same and the same has also been identified by the Naib Tehsildar, as is apparent from the dying declaration.

Where the prosecution establishes that the maker of the dying declaration was in a fit mental and physical condition to give the same, then the same can be relied upon the Court for securing the conviction of the accused.

Indian Evidence Act, 1872- Section 32 (1)- Dying Declaration – Deceased sustained 100% burn injuries- **It is trite law that a dying declaration recorded of a person who has received 100% burn injuries cannot be rejected on that ground alone on the ground that she may not be in a position to speak. The same has to be tested and if the court comes to a conclusion that it is trustworthy then believe it. In cases of dying declaration the legal maxim *"Nemo Moriturus Praesumitur Mentire"* i.e. the man will not meet his maker with a lie in his mouth comes in operation.**

The law is settled that if the court comes to the conclusion that the dying declaration is truthful and voluntary, then the same has to be believed and the court cannot substitute it's own opinion in place of the medical examiner's opinion unless there are some inherent defects in the dying declaration.

Criminal Appeal rejected. (E-2) (Para 44, 45, 47)

Judgements cited/ relied upon: -

1. Sampat Babso Kale & anr. Vs St. of Maha. 2019 (2) JIC 34 (SC)

2. Paparambaka Rosamma & ors. Vs St. of A.P, 1999 (7) SC 640 (Distinguished on facts)

3. St. of M.P. Vs Dal Singh: (2013) 14 SCC 159

4. Paniben (Smt) Vs St. of Guj. (1992) 2 SCC 474 (relied)

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

1. The present criminal appeal has been preferred against the judgment and order dated 19.5.2015 passed by Additional Sessions Judge, Court No.4, Saharanpur in S.T. No.502 of 2011 (State Vs. Smt. Ruksana and others), convicting and sentencing the appellants to undergo for life imprisonment under Section 302/34 I.P.C. and fine of Rs.30,000/- each and in default of payment of fine they shall further to undergo for one year additional imprisonment

2. The prosecution case, as per the F.I.R. which was lodged by Yusuf Ali alias Pathan, Resident of Kaliar Sharif, Police Station Kotwali Roorkhi, District Haridwar on 28.5.2011 at about 22:35 hrs. at Police Station Kotwali Dehat, District Saharanpur on the basis of a written report submitted by him, is that his daughter, namely, Khushboo was married eight years ago in Village Rasoolpur, Police Station Kotwali Dehat, District Saharanpur to Ashraf @ Nanu and though sufficient dowry given in the said marriage, but Ashraf @ Nanu (husband), Ruksana (Mother-in-law), Noori (Nanad) and Sultan Akhtar (Nandoi) used to demand more dowry and indulged in marpeet with his daughter Khushboo. The informant on many times had given Rs.10,000/- (twice) and Rs.15,000/- to

them for keeping his daughter happy. Few days prior to the incident, in-laws of his daughter Khusboo were pressurizing her to ask her parents to give Rs.50,000/- and also indulged in marpeet with her, which was informed to him by his daughter Khushboo and the informant told her that after making arrangement of Rs.50000/- it would be paid to her in-laws, but on 28.5.2011, one Rashid of Rasoolpur had informed the informant on phone that his daughter had been burnt alive by her in-laws and the villagers had admitted his daughter in the hospital. On receiving the said information, the nephews of the informant, namely, Mirza Hussain and Liyaqat Ali immediately rushed to District Hospital, Saharanpur and at that time Khushboo was conscious and she told Mirza Hussain and Liyaqat Ali that her husband Ashraf @ Nanu, mother-in-law Ruksana, nanad Noori and and nandoi Sultan Haider had poured kerosene oil on her and set her ablaze. Thereafter, his daughter, namely, Khushboo had died in the District Hospital at 7:00 p.m. in the evening. When the informant reached the hospital, his nephews, namely, Mirza Hussain and Liyaqat Ali informed and told him about what his daughter Khushboo had narrated about the incident to them. Thereafter, the informant had got the report written and submitted the same to the Police Station Kotwali Dehat, District Saharanpur, on the basis of which the F.I.R. was registered against the five accused persons and the same was also endorsed in the G.D. of the concerned police station.

3. The dying-declaration of the deceased was recorded on 28.5.2011 at 6:20 p.m. by Satish Kumar Kushwaha, Naib Tehsildar Sadar in the presence of Doctor Emergency Medical Officer of S.B.D. ,District Hospital Saharanpur. The said dying-declaration has been proved and marked as Ext. Ka.3, which is reproduced here-in-below:

''प्रश्नः तुम्हारा क्या नाम है ?
उत्तरः मेरा नाम खूशबू है।
प्रश्नः तुम्हारी कितनी उम्र है ?
उत्तरः मेरी उम्र 25 वर्ष है।
प्रश्नः तुमहारे पति का क्या नाम है ?
उत्तरः मेरे पति का नाम अशरफ है।
प्रश्नः तुम किस गॉव की रहने वाली हो ?
उत्तरः मैं रसूलपुर गॉव की रहने वाली हूॅ।
प्रश्नः तुम किस प्रकार जल गयी ?
उत्तरः मुझे मेरी सास रूखसाना नन्द नूरी, सुल्तान ननदोई ने मुझे जलाया है। मेरे पति का मुझे जलाने में कोई हाथ नहीं है। इन लोगों ने मेरे उपर मिट्टी का तेल डालकर आग लगा दी। अपराहन लगभग एक–डेढ़ बजे की घटना है। मेरा पति उस समय घर से बाहर बच्चो को सामान दिलाने गया था। मेरी सास व ननद ने मुझे आग से इसलिए जलाया कि वह मुझे बदचलन समझते है और कहते है कि घर से निकल जाओ। इस बात को लेकर मेरी सास व नन्द से रोज झगड़ा होता है मेरे पति से इस बात को लेकर कोई झगडा नहीं होता है। इस बात को लेकर ससुर से मेरा कोई झगड़ा नहीं है। मेरी शादी को लगभग सात साल हो गये है। आग लगने पर मैं चिल्लाई तो पड़ोसियों ने मुझे बचाया। मुझे और कुछ नहीं कहना है।''

4. The information about the death of the decedased was given by the Medical Officer to the Police Station Janakpuri. Thereafater, from the police station Kotwali Dehat S.I. Naresh Pal on 28.5.2011 at 20:15 hrs left the police station and reached to S.B.D. Hospital at 20:15 hrs. and conducted the panchayatnama of the dead body of the deceased and also prepared the photo-lash, chalan-lash, letter to R.I., letter to C.M.O. and thereafter he sealed the dead body of the deceased Khushboo and sent the same for post mortem through Constable .

5. The post mortem of the deceased was conducted on 29.5.2011 at 3:30 p.m. and in the opinion of the doctor the

deceased died on account of burn injuries and smell of kerosene oil was coming out from the body of the deceased.

6. The investigation of the case was entrusted to Station Officer Suresh Babu Itoria, who recorded the statements of the witnesses, made spot inspection of the place of occurrence and prepared the site plan. From the place of occurrence, he recovered pieces of burnt clothes which were stucked on the floor of the room and the same were taken into possession by the Investigating Officer who prepared the recovery memo of the same, which was signed by witnesses, namely Irfan son of Inam and Irfan son of Ali Hasan. A plastic 5 liters vital mark cane which was of yellow colour, was also recovered from the room and the same was also taken into possession by the Investigating Officer and recovery memo of the same was also prepared which was signed by the said two witnesses also.

7. The Investigating Officer further endorsed the dying declaration in the G.D. and deposited the case property to the police station and after completing all the formalities of investigation, he submitted charge sheet against the three appellants and exonerated the husband of the deceased namely, Ashraf @ Nanu and one Haider.

8. The case was committed to the Court of Sessions and the trial Court framed charges against the appellants under Sections 498A, 302/34 I.P.C., who denied the charges and claimed their trial.

9. The prosecution in support of its case has examined PW1- Yusuf, PW2-Mirza Hussain, PW3-Dheeraj Chawla, PW4- Liyaqat Ali, PW5-Satish Kumar Kushwaha, Naib Tehsildar, PW6-S.I. Naresh Pal, PW7-Constable Mehkar Singh, PW8- Dr. Gopal, PW9-Irfan, PW10-Rashid Naim and PW11-Suresh Babu Itoria.

10. The statements of the accused-appellants were recorded under Section 313 Cr.P.C. by the trial Court and they denied the prosecution case and stated that the dying declaration of the deceased which was recorded is a false one. The fingers of the deceased were burnt and she could not put her thumb impression on the dying declaration.The Investigating Officer in collusion with the informant had got a false dying declaration recorded and because they being the in-laws of the deceased, false case has been set up against them.

11. The appellant Ruksana, mother in-law of the deceased, has stated that there was dispute between her son Ashraf @ Nanu and deceased with respect to a house and she had already been ousted from the house. She was living at the house of one of her relative's Nafisa in Noor Basti. The deceased died while cooking food in the house and stove had burst, on account of which she died. A false case was registered against her in collusion with Ashraf @ Nanu with his in-laws.

12. The accused appellant Noori has stated that she along with her husband Sultan were running a academy in Mohalla Nadeem Colony and they did not visit the house of the deceased nor they had any concern with her. On the date of the incident, i.e., on 28.5.2011 from 7:00 a.m. morning till 5:00 p.m.in the evening she along with her husband was in school and they were in the school distributing the results of the children and other teachers were also present and hence she is innocent.

13. Similarly, accused appellant Sultan Akhtar has also categorically reiterated the statement made by the accused appellant Noori.

14. In support of their defence, the accused appellants produced DW1-Paigam Rasool and DW2-Ayesha.

15. PW1-Yusuf Ali, who is the informant of the case and father of the deceased, in his examination-in-chief before the trial Court has stated that the deceased Khushboo was his daughter and she got married ten years ago with Ashraf @ Nanu. Accused Ruksana is the mother-in-law of the deceased Khushboo and he does not know the relationship of the deceased with the appellant Sultan with Khushboo. The accused Noori is the Nanad of his daughter Khushboo. The marriage of his daughter Khushboo was solemnized in mohalla Nai Basti. At the time of the incident, deceased Khushboo used to live in a village at Saharanpur and he does not know the name of the said village. He further deposed that his daughter Khushboo had not told him about any demand being made by her in-laws and he came to know from the persons of the mohalla of the deceased that she died on account of burn injuries due to bursting of stove.He had lodged a report about the incident and has identified his thumb impression on the written report, i.e., Ext. Ka.-1. As this witness has not supported the prosecution case, hence, he was declared hostile by the trial Court.

16. PW2-Mirza Hussain in his examination-in-chief before the trial Court has deposed that the deceased Khushboo was the daughter of his uncle Yusuf Ali. Her marriage was performed eight years ago with Ashraf @ Nanu, son of Ashiq Ali.The accused Ruksana is the Mother-in-aw, accused Sultan is the Nandoi and Noori is the Nanad of the deceased Khushboo respectively. All the three accused were pressurizing the deceased to bring money in dowry and when she refused to bring the same, all the three accused indulged in marpeet with her. His uncle many times, i.e., 2-3 times had given Rs.10,000/- to her in-laws. Khushboo had come to her house on 2-3 occasions and she told him about the demand of dowry and marpeet with her to him. Prior to the incident, all the three accused had asked the deceased Khushboo to bring Rs.50,000/- from her parents. The said fact was also told by the deceased Khushboo and his uncle.

17. This witness further deposed that his uncle Yusuf Ali had made a call on phone to him and told that the in-laws of Khushboo had set her ablaze. His uncle had also informed him that people of the mohalla of the deceased Khushboo had taken her to the hospital. On receiving the said information, he along with son of his uncle, namely, Liyaqat reached to District Hospital Saharanpur. He reached to Saharanpur at about 6:45 p.m. in the evening and on coming to know at hospital that Khushboo was admitted in Burn Ward. When they reached at the Hospital, Khushboo was alive, she was conscious and medical treatment was being given to her. He along with Liyaqat had talked Khushboo and she told that mother-in-law Ruksana, her Nandoi Sultan and Nanad Noori had poured kerosene oil on her and set her ablaze.Thereafter, Khushboo died in the hospital. A report of the incident was lodged by his uncle Yusuf Ali. He told to his uncle what Khushboo had told him. The panchayatnama of the deceased Khushbo was conducted in his presence, he signed the same and proved his signature on

panchayatnama and proved the same as Ext. Ka.-2.

18. PW-3 Dheeraj Chawla is the scribe of the F.I.R. This witness in his deposition before the trial Court has stated that he knew Yusuf Ali who is a resident of Village Kaliar Sharif. On 28.5.2011 Yusuf Ali, Mirza Hussain, Liyaqat Ali and 5 others had come to his house at 7:30 p.m. in the evening. Yusuf Ali told him that his daughter had been set ablaze by her in-laws, for which he requested him to accompany with them to Kotwali Dehat and to write an application. When this witness reached at Kotwali Dehat, District Saharanpur, the police of the concerned police station informed him to bring a written report, which was written outside the police station at a tea shop.What was told by Yusuf Ali, was written by a boy who had come along with them. When the report was written, then the Yusuf Ali had put his thumb impression on the same and thereafter the same was submitted to the police station and he had also signed the written report as was instructed by Yusuf Ali. He identified his signature on the written report. His statement under Section 161 Cr.P.C. was recorded by the Investigating Officer.

19. PW4- Liyaqat Ali in his deposition before the trial Court has stated that he knew the accused Smt. Ruksana, Noori and Sultan Akhtar.The deceased Khushboo was the daugther of his uncle Yusuf. Her marriage was solemnized with Ashraf @ Nanu. Her mother in-law Ruksana, Nanad Noori and Nandoi Sultan Akhtar used to demand dowry from her and harassed her at regular intervals for the same. Twice Rs.10,000/- was given by his uncle Yusuf to them. Prior to the death of the deceased, accused had made a demand of Rs.50,000/- from her. On 28.5.2011, he received an information that the accused had burnt his cousin sister Khushboo. On receiving the said information, he went to the house of the accused persons but they had fled away from there. After some time, the father of the deceased namely, Yusuf reached the house of her in-laws. Thereafter, firstly he along with Yusuf, Mirza and several other persons had gone to the house of Dheeraj Chawla between 7:00 p.m. to 8:00 p.m. where his uncle Yusuf had told Dheeraj that his daughter has been burnt to death for want of dowry by the three accused appellants who are present in Court and he should accompany them for lodging the report at the police station. Thereafter, they went to the Police Station Kotwali Dehat and at the outside of the police station at a tea shop they got a report written from a boy who had come along with them from Kalinger. What was dictated in the report by Yusuf, the same was written and Yusuf had put his thumb impression on the same and after giving the report at the police station they had gone to District Hospital Saharanpur where they came to know about the condition of Khushboo who was in serious condition and later on she died on the same day in the night.

20. PW5-Satish Kumar Kushwaha, Naib Tehsildar, in his deposition before the trial Court has stated that he was posted as Naib Tehsildar Sadar, Saharanpur. He admitted before the trial Court the dying declaration to be of the deceased Khushboo which was shown to him before the trial Court and identified the same and further stated that on 28.5.2011 he had recorded the said dying declaration of the deceased Smt. Khushboo who burnt due to fire under the orders of the superior officers. He stated that he reached the hospital at 6:00

p.m. in the evening and contacted the doctor who was on duty in the Emergency Ward, for recording the dying declaration of the deceased who accompanied him to the Burn Ward where the medical treatment of the deceased Khushboo was going on. The said doctor had informed him that the deceased was fit to give the dying declaration, for which he had also given a certificate that she was completely fit to give the dying declaration. Thereafter, he put questions to Smt. Khushboo who replied the same which was noted by this witness. After recording the dying declaration of the deceased Khushboo, he got thumb impression of left hand affixed on the dying declaration and before putting thumb impression he read over the same to the deceased. This witness has proved the said dying declaration of the deceased in his hand writing and signature, which has been marked as Ext. Ka.3.

21. PW6- S.I. Naresh Pal has stated before the trial Court that on 29.5.2011 he was posted at Police Station Kotwali Dehat on the post of Sub Inspector. On the said date, on the information of police station Janakpuri death memo of Smt. Khushboo, wife of Ashraf was given at police station Kotwali Dehat which is paper no.11211, which was endorsed in G.D. No.43. At 20:15 hrs he left the police station. He has proved the death memo as Ext. Ka.4. This witness has further deposed that he reached the mortuary of S.B.D. Hospital where the dead body of the deceased Khushboo was on the ice brick. Thereafter he took the dead body down and conducted the panchayatnama on the dead body of the deceased, sealed the same for post mortem and handed it over to the Constable Rajpal and Homeguard Satish. He has proved the panchayatnama in his hand writing and signature and proved the same as Ext. Ka.2. He has proved the challan-lash, photo-lash, letter to R.I., letter to C.M.O. in his hand writing and signature and proved the same as Ext. Ka. 4 to Ext. Ka.7.

22. PW7 Constable Mahkar Singh has proved the chick F.I.R. which was in his hand writing and signature. He stated that on 28.5.2011 at about 22.35 hrs. on the basis of a written report of Yusuf Ali alias Pathan, he prepared a Chick No.127 of 2011, on the basis of which F.I.R. was registered as Case Crime No.261 of 2011, under Sections 498A, 302/34 I.P.C and 3/4 D.P.Act against Ashraf @ Nanu and others and proved the same as Ext. Ka.8. This witness has further stated that he has endorsed the Chick F.I.R. at G.D. No.47, carbon copy of which is in hand writing and signature and proved the same as Ext. Ka.9.

23. PW8- Dr. Gopal in his deposition before the trial Court has stated that he conducted the post mortem of the deceased. He stated that on 29.5.2011 on the instructions of C.M.O.,Saharanpur, Constable 400 Rajpal and Homeguard Satish of Police Station Kotwali Dehat handed over the dead body of the deceased Khushboo along with 11 police papers and dead body of the deceased was in sealed condition and he conducted the post mortem of the dead body of the deceased Khushboo at 3:30 p.m. and found the following injuries :-

"Superficial and deep burn all over the body except both sole Shringing of scalp pubic eye brow eye lasheshes and axillary hair. Line of redness present and smell of kerosene oil was coming from the dead body and on the left leg canula present."

24. In the opinion of the doctor, the cause of death of the deceased was as a result of shock and haemmhorage as a result of ante mortem burn injuries. He stated that the whole body was burnt except sole and he has proved the post mortem report as Ext. Ka.10.

25. PW9-Irfan in his examination-in-chief has stated that he knew the accused Sultan Akhtar, Ruksana and Noori who were the resident of his mohalla. Deceased was the wife of Ashraf alias Nanu. On 29.5.2011, the Investigating Officer had come to his Mohalla who had gone to the house of the accused and recovered the burnt clothes, dupatta etc. in his presence and also 5 liters plastic cane of vital mark and further took some sticky substance from the floor of the room and recovery memo of the same was prepared which was read over to him and he had signed the same and proved the same as Ext. Ka.11.

26. PW10- Rashid in his deposition before the trial Court has stated that on 28.5.2011 he was doing some work in the hosue of Sajid. He knew the accused Ruksana, her house is situated at the place where he was working, which was at a distance of 25 paces. He heard some noise coming out from the house of Ruksana and at that time it was about 3:00 p.m. to 4:00 p.m.. He saw that the daughter-in-law of Ruksana who had burnt, came out of the house and he along with other persons of mohalla had tried to extinguish the fire on her. At that time Ruksana was in the house and she thereafter came out from the house and went on motorcycle with a boy and he did not know any other person.

27. PW11-Suresh Babu Itoria has stated that he was posted as Senior Sub Inspector at the concerned police and in his presence the F.I.R. was registered, thereafter he took the investigation of the case and recorded the statements of the witnesses in the case diary, made spot inspection of the place of occurrence and prepared the site plan. He recovered some pieces of sticky clothes from the place of occurrence which were found on the floor of the house of the burnt room and took them in his possession and prepared recovery memo of the same in the presence of Irfan son of Inam and Irfan son of Ali Hasan which was sealed by him in their presence and he proved the same as Ext. Ka.11. This witness further stated that he also took a 5 liters plastic cane in his possession from the room of the deceased which was yellow colour in presence of the said two witnesses and also proved the same as Ext. Ka.12. This witness has proved the site plan as Ext. Ka.13.He deposited the items recovered in the Malkhana of the concerned police station and endorsed the same in G.D. No.26 at 13:05 hrs. and proved the same as Ext. Ka.14. He had copied the dying declaration of the deceased in the case diary and after concluding the investigation submitted the charge sheet against the three appellants and proved the same as Ext. Ka.17 and further sent the recovered clothes to Vidhi Vigyan Prayogshala and also wrote letter in this regard and proved the same as Ext. Ka.15.

28. On behalf of the appellants Sultan Akhtar and Noori, who in their defence, have examined DW1-Paigam Rasool and DW2 Ayesha to prove the plea of *alibi*.

29. DW1 Paigam Rasool has stated before the trial Court that he runs St. Jehra Academy which is situated in Mohalla Nadeem Colony and he is the President of the said School. He further stated that

Sultan Akhtar is the partner and Manager whereas his wife Noori is the teacher in the School and they both live in a room above the said school. The school is from Class 1 to 5. In the month of May, 2011 there was three teachers in the school. Hussain Ahmad, Ayesha and Noori were the teachers. Noori is the wife of Sultan Akhtar. On 28.5.2011 it was working day in his school from 9:00 a.m. in the morning till 4:30 p.m. in the evening and during the said period the results of the students were being distributed and during the said period Sultan Akhtar, Noori and Ayesha were present in the school along with the students and their parents from 9:00 a.m. till 4:30 p.m. in the evening. On 28.5.2011 Sultan Akhtar and Noori remained in the school and did not go outside.He had also brought the original register of the school and filed a photocopy of the same and proved the same as Ext. Kha.1.This witness has stated that on 28.5.2011 there is attendance of Noori and Ayesha in the said register and they have signed, whereas the attendance of Sultan Akhtar has not been endorsed as he was the Manager.

30. DW2-Ayesha has deposed before the trial Court that earlier she used to teach in St. Jehra Academy School in the years 2010 and 2011 and Noori and Hussain Ahmad were also the teachers in the said school and Sultan Akhtar was the Manager of the said school.Paigam Rasool was the President of the said school. Above the school there was a room of Sultan Akhtar and Noori who are the husband and wife. On 28.5.2011 the school was opened from 9:00 a.m. in the morning and there was distribution of report cards of the students in the school and she was also present there. Along with her, Noori Sultan Akhtar and Paigam Rasool were also present and they all remained present till 4:30 p.m. in the school and during the said period parents of the students were coming and going. On 28.5.2011 from 9:00 a.m. in the morning till 7:00 p.m. in the evening Noori, Sultan Akhtar and Paigam Rasool were present in the school and they did not go out. On 28.5.2011 her attendance along with Noori was endorsed in the attendance register of the school and she proved the same as Ext. Kha-1 in which she identified her signature. She further stated that in the attendance register, the attendance of Paigam Rasool and Sultan Akhtar were not filled as they were President and Manager of the school and attendance is only taken of the teachers.

31. The trial Court after examining the prosecution evidence and defence evidence came to the conclusion that the accused appellants have committed murder of the deceased by setting her ablaze and has convicted and sentenced them for the offence in question.

32. Heard Sri Rakesh Kumar Singh, learned counsel for the appellants, Ms. Archana Singh, learned A.G.A. appearing for the State and perused the material brought on record.

33. It has been argued by the learned counsel for the appellants that PW1 who is the father of the deceased Smt. Khushboo has not supported the prosecution case and has turned hostile. So far as PW2 Mirza Hussain and PW4 Liyaqat Ali are concerned who are the cousin brothers of the deceased and nephew of PW1, on receiving the information from PW1 about the incident reached Saharanpur Hospital where the deceased was admitted after she received injuries in the incident. She told them that it was the three appellants who had poured kerosene oil on her and set her

ablaze as they thought that she was a woman of a bad character. He further submitted that the deceased received 100% burn injuries on her person, hence, she was not in a position to speak and moreover, as per the evidence of the two witnesses they had reached the hospital at about 6:45 p.m. and their evidence is unworthy to be believed as they are highly interested and partisan witnesses as they are related to the deceased.

34. So far as the dying-declaration of the deceased is concerned, it has been argued by the learned counsel for the appellant that the same does not inspire confidence and it is an after thought document. In this regard, he assailed the dying declaration on two counts; firstly, PW5 Naib Tehsildar Satish Kumar who has recorded the dying declaration of the deceased, has failed to show before the trial Court that under whose instruction he reached the District Hospital to record the dying declaration and further the fitness certificate for recording the dying declaration which was given of the emergency doctor of the said hospital is also doubtful as the deceased who had received 100% burn injuries could not make such a dying declaration; secondly, as the fingers of the deceased were burnt, hence, there was no occasion for her to put her thumb impression on the dying declaration. He further argued that the Ruksana mother-in-law of the deceased was living separately to her at the house of one of her relative's Nafisa in Noor Basti and Nand Noori and Nandoi Sultan Akhtar of the deceased were living separately from the deceased and her husband in the school in a room above the said school in which they were working, and they were not present on the date and time of the occurrence and they have been falsely implicated in the present case as they happens to be in-laws of the deceased and related to her husband.

35. He argued that the trial Court has misread the evidence on record and particularly, the dying declaration of the deceased and has convicted and sentenced the appellants without there being any reliable evidence against them. Hence, the conviction and sentence of the appellants be set aside. The appellants, namely, Smt. Ruksana and Smt. Noori are in jail since 10.6.2011 and appellant, namely, Sultan Akhtar is in jail since 14.7.2011 respectively.

36. In support of his argument, learned counsel for the appellants has placed reliance of the judgement of the Apex Court in the case of **Sampat Babso Kale & Anr. Vs. State of Maharashtra reported in 2019 (2) JIC 34 (SC) and Paparambaka Rosamma & Ors. Vs. State of Andhra Pradesh reported in 1999 (7) SC 640.**

37. Learned A.G.A. on the other hand has vehemently opposed the arguments of the learned counsel for the appellants and submitted that the deceased died in her matrimonial house and she in her dying declaration (Ext. Ka.2) has categorically stated that kerosene oil was poured on her by the three appellants who set her ablaze as the three appellants had doubted the chastity of the deceased and they wanted to oust the deceased from their house and the dying declaration has been recorded by the Naib Tehsildar Sadar Satish Kumar Kushwaha (PW5) and the fitness certificate has been given by the Emergency Medical Officer of the S.B.D. District Hospital, Saharanpur before and after the dying declaration which bears the thumb

impression of left hand on the same and there appears to be no material on record to doubt the said dying declaration of the deceased, who died on account of ante-mortem burn injuries and the defence which has been set out that the deceased died while preparing the food in the house and stove had burst, is a false explanation given by the appellants as the Investigating Officer did not find any burst stove at the place of occurrence, moreover, he found the pieces of clothes and dupatta of the deceased which were burnt and a 5 liters cane of vital mark from which smell of kerosene oil was coming out and from the dead body smell of kerosene oil was coming out as was noticed by the doctor who conducted the post mortem of the deceased.

38. The case law which has been relied upon by the learned counsel for the appellants in the case of ***Paparambaka Rosamma & Ors. Vs. State of Andhra Pradesh*** (supra) on the point of dying declaration, is totally distinguishable from the facts of the present case as the said dying declaration was disbelieved by the Apex Court only on the ground that no independent witness had come to support the prosecution case and further, in the dying declaration the doctor has only stated that the deceased was conscious but there was no fitness certificate given by the doctor who recorded the dying declaration, hence, the dying declaration was disbelieved by the Apex Court in the said case.

39. The other case law relied upon by the learned counsel for the appellants in the case of **Sampat Babso Kale & Anr. Vs. State of Maharashtra** (supra) is also not of any help to the appellants as the dying-declaration was disbelieved by the Apex Court on the ground that the the Doctor has not given any fitness certificate before recording the dying-declaration and given it after the statement was recorded of the deceased, but in the instant case the Doctor has given the fitness certificate before and after recording the dying-declaration of the deceased, hence, the same cannot be doubted.

40. After having considered the submissions advanced by the learned counsel for the parties. We have perused the impugned judgment and order as well as record thoroughly.

41. It transpires from the prosecution case that the deceased was the wife of Ashraf @ Nanu and she was done to death by the three appellants who poured kerosene oil on her and set her ablaze between 1:00 p.m. to 1:30 p.m. in the afternoon.The dying declaration of the deceased was recorded by PW5 Satish Kumar Kushwaha, Naib Tehsil Sadar, District Saharanpur on 28.5.2011 at 6:20 p.m. in the presence of the doctor who had given a fitness certificate that the patient is fit for dying declaration. From the dying declaration it is apparent that the deceased was done to death by the three appellants as they doubted her chastity and were pressurizing her to leave the house and because of the said fact frequently there was quarrel between them. The F.I.R. of the incident was lodged on the same day of the incident, i.e. on 28.5.2011 at 22.35 hrs. by the father of the deceased, namely, Yusuf Alia alias Pathan against five persons, namely, Ashraf @ Nanu (Husband), Ruksana (Mother-in-law), Noori (Nanad) and Sultan (Nandoi) of the deceased respectively and one Haider and the charge sheet was submitted against the three appellants only and other two accused were exonerated.

42. So far as the argument of learned counsel for the appellants that the dying declaration of the deceased is a manipulated document and is unworthy to be believed on the ground that as the whole body of the deceased was burnt except both sole shringing of scalp pubic eyebrow, eye lashes and axillary hair. Line of redness present. Thus, as the fingers of the deceased were also burnt, hence, it was not possible for her to put thumb impression on the dying declaration and further from the evidence of PW5 Naib Tehsildar Sadar Satish Kumar Kushwaha who had recorded the dying declaration of the deceased, it is also not apparent that under whose order he went to the District Hospital to record the dying declaration of the deceased, which creates doubt about the truthfulness of the dying-declaration of the deceased. The said argument of the learned counsel for the appellants is not at all acceptable as it is apparent from the dying-declaration of the deceased that the same was recorded by the PW5 Naib Tehsildar, Sadar Satish Kumar Kushwaha who in his evidence has categorically stated that under the orders of the S.D.M. concerned the days were fixed for recording the dying declaration in a week to two Naib Tehsildars, i.e., on Wednesday, Friday and Saturday dying declaration to be recorded by Naib Tehsildar Mubarka, whereas on the rest four days dying declaration to be recorded by Naib Tehsildar Sadar and on the day on which he had recorded the dying declaration of the deceased, there was an order of the S.D.M. concerned and in pursuance of which he recorded the dying declaration of the deceased in the presence of the doctor who had given the fitness certificate before and after recording of the dying declaration of the deceased that she was in a fit state of mind.

43. PW8 Dr.Gopal who had conducted the post mortem of the deceased has also stated that it is not correct that a person who has received 100% burn injuries becomes unconscious within 15 minutes and he is not able to speak.

44. So far as putting of the thumb impression of the deceased on the dying-declaration is concerned, it is noteworthy to mention here that as the dying declaration of the deceased was recorded by the PW5 Naib Teshildar Sadar in presence of the Emergency Medical Officer who stated that the patient is fit to give the dying declaration before and after recording of the dying declaration and the thumb impression is also found of the deceased on the same and the same has also been identified by the Naib Tehsildar, as is apparent from the dying declaration. Hence, in view of the same, there appears to be no room of doubt that the said dying declaration of the deceased which has been relied upon by the trial Court on the basis of which the appellants have been convicted and sentenced for the offence in question.

45. It is trite law that a dying declaration recorded of a person who has received 100% burn injuries cannot be rejected on that ground alone on the ground that she may not be in a position to speak. The same has to be tested and if the court comes to a conclusion that it is trustworthy then believe it. The submission that the deceased after receiving 100% burn injuries will not be able to speak has no substance.

46. In the case of **State of M.P. Vs. Dal Singh : (2013) 14 SCC 159** the Apex Court while discussing the issued whether 100% burnt person can make a dying

declaration or put a thumb impression has held as follows:

"14. In Mafabhai Nagarbhai Raval v. State of Gujarat, AIR 1992 SC 2186, this Court dealt with a case wherein a question arose with respect to whether a person suffering from 99 per cent burn injuries could be deemed capable enough for the purpose of making a dying declaration. The learned trial Judge thought that the same was not at all possible, as the victim had gone into shock after receiving such high degree burns. He had consequently opined, that the moment the deceased had seen the flame, she was likely to have sustained mental shock. Development of such shock from the very beginning, was the ground on which the Trial Court had disbelieved the medical evidence available. This Court then held, that the doctor who had conducted her post-mortem was a competent person, and had deposed in this respect. Therefore, unless there existed some inherent and apparent defect, the court could not have substitute its opinion for that of the doctor's. Hence, in light of the facts of the case, the dying declarations made, were found by this Court to be worthy of reliance, as the same had been made truthfully and voluntarily. There was no evidence on record to suggest that the victim had provided a tutored version, and the argument of the defence stating that the condition of the deceased was so serious that she could not have made such a statement was not accepted, and the dying declarations were relied upon.

A similar view has been re-iterated by this Court in ***Rambai v. State of Chhatisgarh, (2002) 8 SCC 83."***

47. In cases of dying declaration the legal maxim *"Nemo Moriturus Praesumitur Mentire"* i.e. the man will not meet his maker with a lie in his mouth comes in operation.

48. In the case of **Paniben (Smt) Vs. State of Gujarat : (1992) 2 SCC 474,** the principles governing the dying declaration are enumerated as under:

"18. .....It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring-corroboration is merely a rule of prudence. The Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. ***(Munnu Raja v. State of U.P., (1976) 3 SCC 104.***

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. ***(State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 522; Ramawati Devi v. State of Bihar, (1983) 1 SCC 211).***

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. ***(K. Ramchandra Reddy v. Public Prosecutor, (1976) 3 SCC 618).***

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. ***(Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264).***

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. ***(Kake Singh v. State of M. P., 1981 Supp SCC 25).***

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. ***(Ram Manorath v. State of U.P., (1981) 2 SCC 654).***

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. ***(State of Maharashtra v. Krishnamurthi Laxmipati Naidu, 1980 Supp SCC 455).***

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. ***(Surajdeo Oza v. State of Bihar, 1980 Supp SCC 769)***

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. ***(Nanahau Ram and another v. State of M.P., 1988 Supp SCC 152).***

(x) Where the prosecution version difers from the version as given in the dying declaration, the said declaration cannot be acted upon. ***(State of U.P. v. Madan Mohan, (1989) 3 SCC 390)."***

49. It has been next argued by the learned counsel for the appellants that the trial Court has failed to consider that from the evidence led by the defence with respect to the two appellants, namely, Noori and Sultan, they were not present at the time of occurrence as they were busy in distributing the results of the students of the school in which appellant Noori was the teacher and appellant Sultan was the Manager. The defence witness DW1 Paigam Rasool and DW2-Ayesha who have given evidence that the appellant Noori and and Sultan were present on the date and time of the incident in the school and were busy in distributing the results to the students, have failed to prove any cogent documentary evidence regarding the plea of *alibi* as has been pleaded by the said two appellants. The trial court after going through the evidence found that the documentary evidence i.e., register (Ext. Kha-1) which was produced by DW1, he in his cross-examination has admitted that from the first page to last page the same did not bear any date and prior to the said register there was no other register wherein the attendance of the teachers was maintained, hence, the trial Court disbelieved the defence evidence led on behalf of said two appellants and further it found that the school in which the appellants Noori and Sultan were the teacher and Manager respectively, was not a great distance that they could not reach the place of occurrence and after committing the crime they would return back to the school where they are stated to be working and also living.

50. The appellant Ruksana has claimed that she had left the house of the deceased and was living at the house of one of her relatives, namely, Nafisa in Noor Basti, also could not be believed by the trial Court as no evidence either oral or documentary was produced before the trial Court regarding the said fact.

51. So far as the argument of learned counsel for the appellants that the evidence of PW2 Mirza Hussain and PW4 Liyaqat Ali, who are stated to be the cousin brothers of the deceased and the nephews of PW1 Yusuf Ali alias Sher Ali are concerned that they reached the District Hospital at 6:45 p.m. in the evening after receiving an information from PW1 through phone that the deceased has been

burnt by her in-laws and has been admitted in District Hospital Saharanpur, they reached there and the deceased told them that her mother-in-law Ruksana and Nand Noori and Nandoi Sultan had poured kerosene oil on her and set her ablaze, the said disclosure by the deceased to the said two witnesses is also not reliable as the deceased who had received 100% deep burn injuries on her person could not have survived for a long time and can give such a statement to them. In this regard, it is to be noted that the trial Court has not given much relevance to the testimony of the said two witnesses regarding the disclosure of the incident by the deceased to them when they reached at the District Hospital on receiving the information from PW1 about the incident as it has taken note of the dying declaration of the deceased which was recorded by the Naib Tehsildar Sadar (PW5) in the presence of the doctor who was posted as Emergency Medical Officer on 28.5.2011 between 6:20 p.m. to 6:40 p.m. wherein the deceased narrated the manner in which the incident had taken place and she was set ablaze by the three appellants. There appears to be no ambiguity or legal lacuna in relying upon the dying declaration of the deceased i.e., Ext. Ka.2 on the basis of which the appellants have been convicted and sentenced by the trial Court.

52. So far as the last contention of the learned counsel for the appellants that the accused have categorically pleaded in their statements under Section 313 Cr.P.C. that the deceased died an accidental death while cooking food in the house as the stove had burst, has also no substance as the Investigating Officer during the spot inspection did not find any burnt stove at the place of occurrence, on the other hand he found the burnt clothes of the deceased which were also stick on the floor of the room where she was set ablaze along with a cane of 5 Liters of vital brand from which smell of kerosene oil was also coming.

53. Thus, the trial Court has rightly come to the conclusion that the deceased was burnt to death by the three appellants in the room where she was living and her medical evidence fully corroborates the version given by the deceased in her dying declaration and has rightly convicted the appellants for the offence in question.

54. Therefore, in view of the foregoing discussions, we are of the opinion that the trial Court has rightly convicted and sentenced the accused appellants. Thus, we upheld the conviction and sentence awarded by the trial Court to the appellants for the offence who have been charged with, does not call for any interference by this Court. The appeal lacks merit. It is, accordingly, **dismissed**.

55. The accused appellants are stated to be in jail. They shall remain in jail to serve out the sentence awarded by the trial Court.

56. Let a copy of this judgment be transmitted to the trial Court concerned forthwith along with the lower court record for necessary information and follow-up action.

57. The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person (s) (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked, before the concerned Court /Authority /Official.

58. The concerned Court /Authority /Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)01ILR A1231
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 5101 of 2006

Sohan Pal ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Dinesh Kumar(A.C.), Sri Apul Misra, Sri Dinesh Chandra Mishra, Sri K.K. Mishra, Sri Noor Mohammad, Sri S.K. Srivastava

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

Criminal Law-Indian Penal Code, 1860- Section 376, Section 307- From the evidence led by the prosecution which includes the testimony of prosecutrix/victim 'A' P.W.3 along with her medical examination report and the evidence of P.W.1 and P.W.2 goes to show that the appellant had committed rape on the victim, who is a minor girl and when she stated to complain about the incident to her mother, the accused with an intention to kill her, assaulted on neck with a scissor, causing grievous injuries to her, for which she was operated at Medical College, Meerut and remained in hospital for about a month and also admitted in AIIMS, New Delhi, after her surgery in the medical college, Meerut- The appellant who was taken on police remand got the bloodstained scissor recovered from the place where he has concealed the same of the incident.

The testimony of the victim, who is a child, is corroborated by the medical evidence and the testimony of the witnesses of fact as well as the recovery of the incriminating weapon with which the appellant had attempted to murder her, fully establish the case of the prosecution.

Quantum of sentence- The prosecutrix/victim because of the injury inflicted by the appellant on her neck, lost her power to speak after the incident which goes to show that the appellant has committed a heinous crime of rape and also made an attempt to murder the prosecutrix/victim after committing rape on her, hence the incarceration of the appellant for 17 years in jail, as has been argued by learned counsel for the appellant cannot be sympathetically weighed in comparison to the barbaric act of the appellant on the prosecutrix/victim, who is also an injured witness in the present case against the appellant- In cases of rape while considering the question of sentence, the Court has to strike balance between reformative theory and principle of proportionality- The sentence awarded to the appellant by the trial Court for the offences under section 376 IPC and under section 307 IPC for life imprisonment, respectively is perfectly justified in the instant case, as it shocks the conscience of the society and the Courts must hear the loud cry for justice by the society in cases of rape of innocent helpless girls of ten years and respond by imposition of sentence. To show mercy in the case of such heinous crime, could be travesty of justice and the plea of leniency is wholly misplaced.

It is settled law that a duty is cast upon the courts to strike a balance between the reformative theory and the principle of proportionality. Where the offence is heinous and barbaric and shocks the collective conscience of the society, then there is no need for the Court to interfere with the quantum of punishment awarded by the trial court.

Criminal Appeal rejected. (E-2) (Para 23, 25, 26, 28)

Judgements/ Case law relied upon: -

1. AIR 2013 SC 2209 Shyam Narain Vs St. of NCT of Delhi

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

1. The present appeal has been filed by the appellant against the judgment and order dated 27.7.2006 passed by Additional District and Sessions Judge, Court No.5, Meerut in S.T. No.175 of 2004 (State Vs. Sohanpal) convicting the appellant under sections 452 IPC and sentencing him to 01 year rigorous imprisonment and a fine of Rs.1000/- and in default of payment of fine to further undergo 01 month rigorous imprisonment, under section 376 IPC imprisonment for life and a fine of Rs.25,000/- and in default of payment of fine to further undergo 01 year rigorous imprisonment, under section 307 IPC imprisonment for life and under section 380 IPC 01 year rigorous imprisonment and fine of Rs.500/- only and in default of payment of fine to further undergo 01 month rigorous imprisonment, respectively and all the sentences were directed to run concurrently.

2. In view of the legislative mandate as contained in Section 228-A of the Indian Penal Code and the observation made by the Apex Court in it's catena of judgments, the identity of the prosecutrix/victim is not being disclosed and she is referred to as 'A' hereinafter.

3. The prosecution case as set out in the F.I.R. by the informant Kashi Ram, who submitted a written report which was written by Tota Ram on 27.11.2003 addressed to Station House Officer of Police Station Transport Nagar, Meerut stating that the informant Kashi Ram resident of near Hapur Line, Mohalla Chandralok, Police Station Transport Nagar in the morning of 27.11.2003 he went to Rohta Road for selling vegetables on a Cart. His wife Sonwati had gone to purchase vegetables from Mandi. His two younger children had gone to school and his daughter was alone in the house at about 8:30 a.m. Sohan Pal son of Megh Raj resident of Kunwa Wali Gali, Lalapura Nai Basti, Police Station Transport Nagar, Meerut in morning in his absence had come to his house and after bolting the house from inside committed rape with his daughter namely 'A' and in order to kill her, cut her neck. After the incident he was seen coming out of the house by Bhartu Khat Wala and Ram Chandra son of Deewan Chandra, who were resident of Mohalla Chandralok and his daughter 'A' in a pool of blood came out of the house, who was taken to police station by the said two persons and the incident was seen by many other. On receiving the information, the informant reached the police station.

4. On the basis of the written report submitted to the Police Station Transport Nagar on 27.11.2003, a First Information Report was registered on the same day at 9:45 a.m. at the said police station against the appellant Sohan Pal. The investigation of the case was entrusted to Sub Inspector Subhash Chandra Tyagi, who recorded the statements of witnesses under section 161 Cr.P.C. and prepared site-plan of the place of occurrence and also recovered the scissor, the weapon of assault and also prepared the site-plan of the place from where the scissor was recovered. A fard recovery of a paper, which was written by the victim/prosecutrix was also taken into custody by the Investigating Officer on 27.11.2003. The Investigating Officer also took into custody the bloodstained clothes of the victim along with bloodstained earth and plain earth, for which a recovery memo was also prepared by the Investigating Officer. The victim/prosecutrix was medically examined at Medical College, Meerut and other relevant papers were prepared by the

Investigating Officer, who submitted charge-sheet against the appellant Sohan Pal under sections 376, 307, 452 and 380 IPC. The case was committed to the Court of Sessions by the Magistrate and the trial Court framed charges against the accused Sohan Pal under sections 452, 376, 307 and 380 IPC, which was denied by the appellant, who claimed trial.

5. The prosecution in support of it's case has examined P.W.1 Kashi Ram, P.W. Ram Chandra, P.W.3 prosecutrix/victim namely 'A', P.W.4 Dr. Kirti Dubey, P.W.5 S.I. Subhash Chandra Tyagi, P.W.6 Dr. Sudhir Rathi, P.W.7 Dr. Subodh Tyagi.

6. The written statement filed by the prosecution such as written report Exhbit Ka-1, the recovery memo with respect to paper written by the victim/prosecutrix taken into custody by the police Exhibit Ka-2, recovery memo of bloodstained clothes of the victim and plain and bloodstained earth Exhibit Ka-3, recovery memo of the weapon of assault bloodstained scissor, which is used for cutting clothes Exhibit Ka-2. The medical examination report of the prosecutrix/victim prepared by Dr. Kirti Dubey Exhibit Ka-4 and Ka-5. Site-plan Exhibit Ka-6 and written statement of prosecutrix/victim 'A' Exhbit Ka-4A, Chik F.I.R. Exhibit Ka-9, carbon copy of G.D. Exhibit Ka-10, charge sheet Exhibit Ka-7 and medical examination report of the prosecutrix/victim Exhibit Ka-11.

7. The statement of appellant Sohan Pal was recorded by the trial Court under section 313 Cr.P.C. in which he has stated that the prosecution case against him is a false one, which has been registered against him in collusion with the informant and a false and concocted report has been prepared against him. The witnesses have falsely and wrongly deposed against him and all the proceedings which have been initiated against him is a fabricated and concocted one and no scissor was recovered at his pointing out and the witnesses because of inimical relationship had deposed against him and have falsely implicated. The victim had taken some money from him and the same was outstanding on the victim of the appellant and when he demanded the same, he was falsely implicated. The accused in his defence did not led any evidence.

8. P.W.1 Kashi Ram who is the informant and father of the victim/prosecutrix has deposed before the trial Court reiterating the prosecution case, as has been narrated in the F.I.R. and stated that on 27.11.2003 in the morning he had gone to Rohata Road for selling vegetables on a Cart and his wife Sonwati had gone to Mandi to purchase vegetables and in his house two younger children had gone to school and the victim/prosecutrix 'A' was alone in the house, who was aged about 15 years and his elder son Manoj had also gone to work on the same day. At about 9:00 a.m. Bhartu Khat Wala had come to him and informed him that his daughter's namely 'A' neck has been cut by Sohan Pal and committed rape on her. Sohan Pal was seen coming out of the house by Bhartu Khat Wala and Ram Chandra. The informant went to police station on the Vicky (vehicle) of Bhartu Khat Wala to police station where he found outside the police station his daughter 'A' and other persons of his Mohalla. He got the report written by his brother Tota Ram outside the police station and what was dictated by the informant, the scribe wrote the same and the said report was read over to him and he had put his signature on the written report after hearing the same and has proved the

written report as Exhibit Ka-1, which was dictated by him and proved his signature on the same. He further deposed before the trial Court that Sohan Pal was a distant relative of the witness and he used to often come to his house. On the day of the incident, appellant Sohan Pal had come to his house and the door was found to be broken, which got it opened and came inside and committed rape on his daughter and with an intention to kill her, cut her neck. Appellant after 15 days of the incident surrendered and got the scissor, the weapon of assault recovered and after 15 days, the witness was called at the police station, on which he along with Swaraj went to the police station and Sohan Pal in the presence of them had told that he had concealed the scissor near the railway track in bushes and he can get the same recovered. He along with Swaraj and Sohan Pal were taken in police jeep by the police to Hapur Railway Line where Sohan Pal had got the scissor recovered, which was bloodstained and Sohan Pal Stated that he had cut the neck of the victim/prosecutrix 'A' with the same. The Investigating Officer at about 3:00 p.m. on the same day prepared the recovery memo of the scissor, which was signed by him and other witnesses and he proved the signature on the same.

9. In the cross examination, the witness has stated that he had four children out of which three were daughters and one son and the elder child was his son. He has stated that his elder son is aged about 18 years and his daughter, the prosecutrix/victim 'A' was aged about 16 years, the third daughter Manju was aged about 14 years and the youngest one Monika was aged about 11 years. He used to sell vegetables at Rohta Road on a cart, on which he used to sit alone. He used to leave his house at 7:00 a.m. and his wife used to go to Mandi to purchase the items. He did not go to Mandi, as his wife used to go alone. The time on which the incident had taken place, he was on his vegetable cart and his wife was also along with him. His wife used to go to the house at about 10:10 a.m. after settling the vegetables on his cart and his wife used to leave the house at about 7:00 a.m. in the morning for Mandi. Vegetables Cart is at a distance of 01 Km. away from his house. His house is near Hapur Wali Line at Chandralok from the place where he used to sell vegetables on vegetable cart. The information about the incident was firstly given to him by Bhartu, who used to live opposite to his house near Railway Line. Bhartu did not frequently visit his house and only he was known to the witness. When Bhartu had informed about the incident then his wife was also present at his vegetable cart. Bhartu had told that that Sohan Pal had cut the neck of his daughter 'A', the victim/prosecutrix and also committed rape on her. On receiving the said information he went to the police station along with Bhartu on his Vicky (two seater vehicle), he reached the police station at 9:00 a.m. where he found his daughter victim 'A' at outside alongwith other persons of his mohalla and brother Tota Ram outside the police station. He only knew Driver Prem and Ram Chandra and did not know the names of other persons there of his mohalla. He had talked to his daughter 'A', who was not able to speak. His wife had reached the police station afterwards. They remained outside the police station for about 45 minutes and that time his daughter 'A' was unconscious and she did not tell anything to him and on the information given by Bhartu and Ram Chandra he had lodged the report against Sohan Pal, who had seen Sohan Pal coming out of his

house. He had got the report written from his brother Tota Ram. He had dictated the report to Tota Ram, who had written the same and he had put his signature on the same. In the written report, he had written that Sohan Pal had cut his daughter's neck and committed rape on her and some other things also he had got it written, but he did not remember. He has further stated that house of Sohan Pal was at great distance from his house. Sohan Pal used to frequently come to his house. He used to visit his house since when the informant/witness was married in the year 1984. He neither carried on any business with Sohan Pal nor had taken any money from him on loan. He had gone to the police station only once and thereafter had gone to the police station after 15 days of the lodging of the report. The Investigating Officer had recorded his statement under section 161 Cr.P.C. after 10 days of the incident and after 15 days of the lodging of the report. He went to the police station when the appellant had surrendered. He had proved the recovery of bloodstained scissor at the pointing out of the appellant from the bushes near Hapur Railway Line and he was accompanied with witness Swaraj and Sohan Pal in police jeep along with police personnel at the place of recovery of scissor. He further stated in his cross examination that he had kept Rs.300/- at his house, which was taken away by the appellant Sohan Pal on the day of the incident. He further deposed in his cross examination that his daughter victim 'A' was first admitted to Medical College thereafter she was referred to All Indian Institute of Medical Science, Delhi where in January, 2005 she was operated, she remained admitted in AIIMS for about one month. He further deposed that the place from where scissor was recovered there was no plot or field but it was recovered from the bushes near the Railway Line, which was standing. The appellant had got recovered the bloodstained scissor from the bushes where he had concealed. He had proved his written report Exhibit Ka-1 on the basis of which F.I.R. was lodged against appellant.

10. P.W.2 Ram Chandra in his deposition before the trial Court has stated that on 27.11.2003 at 8:30 or 9:00 a.m. in the morning he was going to purchase milk and on the way he met Bhartu Khat Wala, who were going together and when they reached the house of Kashi Ram then they saw Sohan Pal coming out of the house of Kashi Ram under fear. The witness went to the house of Kashi Ram and saw from the door of the house, which was opened, by peeping and saw that the victim 'A' was lying in pool of blood and there was no clothes on her body, the witness raised alarm on which people of the nearby area gathered at the house of Kashi Ram, at that time there was no one present at the house of Kashi Ram, nor Kashi Ram or the brother and sister of the victim 'A' were present. The witness further stated that he took the victim to police station. The report of the incident was lodged by Kashi Ram at the police Station, who was called and brought by Bhartu at the police station. The witness further stated that on 27.11.2003 the Investigating Officer had taken into custody a paper written by the victim 'A', for which a recovery memo was prepared and he had put his thumb impression on the same and the witness in his cross examination has stated that his wife Sona is the real Mausi of the victim 'A' and he is Mausa of the victim. He has denied his criminal antecedents and has further denied that he used to change his residence frequently. The witness has further deposed that when he was going to take milk then

he met Bhartu who met him 02 furlongs from his house. The witness has further stated that Bhartu did not accompany him for taking milk. Bhartu was going to Chandralok. He stated that on the alarm raised he saw from the door of the house of Kashi Ram, the victim 'A', who was in pool of blood and naked. He further stated that prosecutrix/victim 'A' in a pool of blood had came out of the house and gone straight to railway line crossing went away towards Shiv Hari Mandir Colony. He further stated that he saw the victim in a naked condition wearing Kurta and seen her running. He stated that he did not give the said statement to the Investigating Officer, who recorded his statement under section 161 Cr.P.C., for which he cannot tell any reason. He further stated that he did not depose to the Investigating Officer that the victim has told him that Sohan Pal had bolted the room from inside and committed rape on her. The said statement which has been recorded by the Investigating Officer of the witness, he cannot tell the reason for recording of the same. The witness further stated that when he for the first time peeped in the house of the prosecutrix/victim 'A' except her, he did not see any other person there. Parents of the victim on receiving the information rushed to the police station. He further stated that in his cross examination that he had once put his thumb impression and did not put his thumb impression on any other paper.

11. P.W.3 prosecutrix/victim 'A', who is also an injured witness in the incident in examination-in-chief, which was recorded in question-answer form by the trial Court has deposed that she knew the accused-appellant Sohan Pal. Kashi Ram is her father and Sonwati is her mother. She stated that her father used to keep vegetables on a cart at Rohta Road and she has one brother and they are three sisters. At the time of the incident, she was at her house, she has studied upto Class V and after Class V she had left her studies. She used to live at her house. She has stated that at the time of the incident she was aged about 16 years and the incident had taken place on 27.11.2003 at 8:30 a.m. in the day. At the time of the incident, she was at her house, her mother had gone at 6:30 a.m. to Mandi for taking vegetables and her sisters had gone to school and her brother had gone on work. Sohan Pal had come to her house twice on the death of her grand maternal mother (Nani). Two days prior to the incident, he had come enquirying about Palli, at that time her sister was with her, hence he had returned from outside. Prior to the incident she could speak. The prosecutrix/victim stated that on 27.11.2003 at 8:30 a.m. Sohan Pal had come to her house and she had gone for some work in her room and then Sohan Pal followed her and closed her mouth and thereafter he bolted the door from inside, on which she raised alarm but as the volume of the 'Deck' was raised full by him, due to which person from outside could not hear her and the appellant committed rape on her. Victim knew the meaning of rape. The accused caught string of her Salwar pulled it off and rape was committed by him on the floor of the house and when she stated that she would complain to her mother about the incident then accused-appellant Sohan Pal had cut her neck with the scissor, which is used for cutting clothes. She was assaulted by the accused with an intention to kill. At the place of occurrence blood oozed out. The accused Sohan Pal also taken Rs.300/- which was lying on her Cot and realizing that the victim has died he went away leaving the door closed. When the victim gained conscious she found herself in a

naked condition and reached near the Hapur Railway Line and people took her to police station where she could not speak, she wrote on a paper, which was taken from a Register i.e. Paper No.1-A/2 and proved the same, which was under her hand writing and signature marked as Exhibit Ka-4. She stated that after the incident, as she was not able to speak, her father had got a report written and her medical examination was conducted. The victim in her cross examination has stated that Sohan Pal was his Mausa, her mother had three sisters out of which none of them was married to Sohan Pal. She stated that the village from where her mother belong, in the same village one Tausi used to live. Tausi is not the sister of her mother. Sohan Pal is not her real Mausa and is distantly related to her as Mausa. The appellant is not the resident of her mohalla and nor she had gone to the house of Sohan Pal. Sohan Pal used to live in Nai Basti, Lallapura and she does not know how far is his house. The witness further stated in her cross examination that her parents had gone to the house of Sohan Pal once or twice and he used to sell Foot-mat (Paudan) and her father had no partnership with him nor had any money transaction with him nor he had any quarrel with him. The witness stated that on the day of the incident she was wearing Salwar and suit and stated that on her clothes bloodstained were found and where are her clothes she does not know, as she had become unconscious, blood was also fallen on the ground. The railway line is at a short distance. She stated that after the incident she saw the appellant at the time of recording of evidence before the Court and before the same, she saw two days before. The railway line is opposite to her house. She reached near the railway line as inside the door was opened. In the incident about 1/2 an hour took place. When she raised alarm Sohan Pal had caught hold of her mouth. At the time of incident there was only one person. The accused-appellant had caught hold of her hair by one hand and by the other he caught hold of her mouth. Her salwar was not on her body and the accused after committing rape had worn his clothes, as the volume of the Deck was raised, hence her alarm could not reach outside the house. The accused had first left. The victim was shown Exhibit Ka-5 her statement, seeing the same she stated that she has written the same, which was dictated by the Sub Inspector in the Hospital after 20-25 days of the incident. It took 10 minutes for the accused to commit rape. Firstly the medical treatment of the victim was conducted at Meerut Medical College and thereafter she was referred to AIIMS, Delhi. Prior to the incident she has not washed her clothes. She had written about the person committing rape on her and gave same to the police inspector and in the same she has not written the parentage of Sohan Pal and his residence. She has specifically denied that some unknown boys of the mohalla had committed rape on her and further denied that on account of inimical enmity, the name of Sohan Pal has been implicated. She further stated that there was no money transaction between her father and Sohan Pal. The case has been rightly lodged against Sohan Pal.

12. P.W.4 Dr. Kirti Dubey has been examined before the trial Court and she has stated that she had medically examined the victim and her hymen was found torned and admitting one finger with difficulty, vaginal swab was taken and sent for the presence of spermatozoa. On the basis of radiologist report, the age of victim 'A' was found to be above 16 years and less than 19 years. She has proved the medical

examination report Exhibit 4A dated 28.11.2003. She opined that no definite opinion regarding rape can be made at the time of incident. She stated that the victim could be aged about 16 years.

13. P.W. 6 Dr. Sudhir Rathi stated that he had examined the victim at Medical College Meerut and he conducted her operation of neck on 27.11.2003. An injury was found on her neck, which was found to be cut, which was on the front side and the same was bleeding. She was having difficulty in breathing. She was given local anesthesia and another way was made in order to continue the breathing. She was completely made unconscious and her lairings was repaired and veins were bleeding, which were tied and other injuries were stitched and repaired. He proved the supplementary report of the victim and his hand writing and signature and proved the same as Exhibit Ka-4.

14. P.W.7 Dr. Subodh Tyagi who has examined the victim, has found the following injuries on her person (Exhibit Ka-11):-

"1. Lacerated wound 7 cm x 3 cm x depth not probed 2.5 cm below from chin. Fresh blood present.

2. Lacerated wound 3 cm x 1.25 cm x trachea exposed with abrasion in an area of 5 cm x 3 cm around it on midline of neck 4 cm below from injury no.1. Sucking of air present from wound. Fresh blood present.

3. Multiple linear incised wound x depth not probed placed transversely on front of lower neck varying in size from 3 cm to 9 cm. Fresh blood present.

Detailed examination of the patient could not be done due to serious condition and patient was shifted to G.O.T. immediately for management in the interest of her life."

15. In the opinion of the said doctor, injury nos.1 and 2 were caused by hard and blunt object, whereas injury no.3 by sharp edged object and duration was found to be fresh. The witness further stated that the said injuries were dangerous to life, if the medical treatment could not be given to the victim and injury no.3 could be caused by scissor.

16. P.W.5 S.I. Subhash Chandra Tyagi, who is the Investigating Officer of the case in his statement before the trial Court has stated that the victim 'A' had come at the police station and on her neck there was injury and she was not able to speak and she had not worn a Salwar and she was given a trouser pant to wear the same in order to save her from embarrassment from public at large. He stated that the victim with her bloodstained hand had written on a register the name of the accused Sohan Pal, who had committed rape on her, on which she had signed the same, which is marked as Exhibit Ka-4. The said paper of the Register was taken into custody by the witness, which was signed by two witnesses and he has proved the same as Exhibit Ka-2. The witness has stated that as the condition of the victim 'A' was very serious, hence she was first sent to Pyare Lal Hospital. He prepared the site-plan of the place of occurrence and proved the same as Exhibit Ka-6 in his hand writing and signature. He also on the same day, had recorded the statement of the scribe of the F.I.R. Prior to it, he he had taken the bloodstained clothes and bloodstained earth and plain earth and also bloodstained cement floor, for which he prepared a recovery memo in his hand

writing and signature and proved the same as Exhbit Ka 3. He further stated that he got a bloodstained scissor, which is used for cutting clothes at the pointing out of accused-appellant Sohan Pal recovered on the information given by him. For getting the same recovered, he took the appellant on remand and recovered the same in presence of of the informant and one Swaraj Singh and he has prepared the recovery memo of the scissor in his hand writing and marked as Exhibit Ka-2. He has also stated that prosecutrix/victim had given a written statement in his presence, which he has incorporated in the case diary and the written statement of the victim has been proved by him as Exhibit Ka-5.

17. After considering the prosecution evidence and the statement of accused recorded under section 313 Cr.P.C., the trial Court came to the conclusion that the prosecution has proved it's case beyond reasonable doubt against the appellant Sohan Pal and, thus, convicted and sentenced him for the offences in question by the impugned judgment and order. Aggrieved by the same, the appellant has preferred the instant appeal.

18. Heard Sri Dinesh Kumar, learned Amicus-Curiae for the appellant, Kumari Meena, learned AGA for the State and perused the record.

19. It has been argued by learned counsel for the appellant that P.W.1 Kashi Ram, who is the informant of the case is not an eye witness of the occurrence and he came to know about the incident from Bhartu Khat Wala when he was selling vegetables on his Cart and, thereafter, he went to the police station along with Bhartu and inquired about the incident from his daughter and lodged the first information report against the appellant, but the witness Bhartu Khat Wala has not been produced by the prosecution before the trial Court and his evidence was not recorded. He further submitted that the other witness P.W.2 Ram Chandra, who saw the appellant coming out of the house of the informant after committing crime, but from his evidence it is apparent that his testimony is not trustworthy. He submitted that Bhartu the eye witness, who had also seen the appellant coming out of the house of the informant after committing crime in his cross examination P.W.2 has stated that Bhartu had not gone with him to take milk and Bhartu was going to Chandralok. He in his cross examination when was confronted with his statement under section 161 Cr.P.C. which was given to the Investigating Officer it was stated by him that the prosecutrix/victim 'A' had told him that Sohan Pal has committed rape on her after bolting the room. He stated that he cannot tell the reason as to how such a statement was recorded by the Investigating Officer under section 161 Cr.P.C. He next submitted that the accused in his statement under section 313 Cr.P.C. has stated before the trial Court that on account of enmity he was falsely implicated in the present case as he owed some money to the prosecutrix/victim and when he demanded the same, he was falsely implicated in the present case. He next argued that the appellant is already a married person, hence it was not possible for him to commit such a heinous crime. It was further argued that from the evidence of P.W.5, the victim was taken from police station to Pyare Lal Hospital for treatment, and thereafter referred to medical college, but there is no medical report of Pyare Lal Hospital. As per radiologist report, the victim is above 16 years and below 19 years of age. It appears that the incident has taken place in

some other manner and not stated by the prosecution. P.W.2 Ram Chandra, who happens to be Mausa of the victim, his evidence is highly interested and partisan one, therefore no credibility should be given to it. It was lastly submitted that the appellant has surrendered and is in jail for last 17 years i.e. since 2.12.2003 and the time of incident he was aged about 50 years and as on date he is 61 years of age. The recovery, which has been made of Scissor, the weapon of assault at the pointing out of the appellant is after 15 days of the incident, which is a false recovery, in fact no recovery was made of Scissor at the pointing of the appellant.

20. Learned AGA on the other hand has vehemently opposed the argument of learned counsel for the appellant and submitted that as per the prosecution case, the prosecutrix/victim is a minor girl aged about 15 years on the date of incident and as per her medical report she is stated to be above 16 and below 19 years of age. She was subjected to rape by the appellant in the absence of her parents, brother and sisters when she was alone in the house and when she told the appellant that she would complain about the incident to her parents then she was further assaulted by scissor on her neck by the appellant due to which she received serious injuries on her neck and was operated at Medical College, Meerut thereafter admitted in AIIMS, New Delhi and after the incident she was not able to speak and she gave a written statement to the police soon after the incident when she reached the police station on a paper taken out from a Register, which has been marked as Exhibit 4A, in which she has stated that it was the appellant who had committed rape on her. Moreover, she has also deposed against the appellant before the trial Court categorically for subjecting her to rape and further inflicting her serious injuries on her neck. The eye witness P.W.2 Ram Chandra and other eye witness Bhartu Khat Wala had seen the appellant coming out of the house in a disturbed mental state and P.W.2 took the victim and rushed to the police station along with other persons of the mohalla whereas Bhartu Khat Wala had gone to inform P.W.1 about the incident, who thereafter reached the police station and inquired about the incident and lodged the F.I.R. against the appellant on the same day and the trial Court after assessing the evidence led by the prosecution, has rightly convicted the appellant for the offence in question. The argument of learned counsel for the appellant that the appellant is in jail for 17 years is of no significant keeping in view the gravity of the crime committed by appellant and the appeal deserves to be dismissed by this Court.

21. After considering the rival submissions advanced by learned counsel for the parties, we have gone through the impugned judgment as well as record of the case thoroughly. The appellant Sohan Pal is named in the F.I.R., which has been lodged by P.W.1 Kashi Ram promptly on 27.11.2003 at 9:45 a.m. at Police Station T.P. Nagar, Meerut, which was at a distance of half kilometer away from the place of occurrence for a incident, which has taken place on 27.11.2003 at 8:30 a.m., on the information given by Bhartu Khat Wala, where he was selling vegetables on a Cart. At the time when the information was given to him, his wife was also present. P.W.1 on receiving the information about the incident by Bhartu Khat Wala immediately rushed to the police station on his Vicky (two seater vehicle) to the police station, where he found his daughter along with P.W.2 Ram Chandra and other

persons of his mohalla outside the police station. He talked to his daughter the prosecutrix/victim 'A', who was unable to speak and had given a written statement on a paper, which was taken out from a Register to the police, disclosing the fact that her rape was committed by the appellant Sohan Pal. The victim was in a pool of blood and her clothes were also bloodstained. The F.I.R. was written by his brother Tota Ram at the police station and submitted the same for lodging of the F.I.R. against the appellant Sohan Pal, which was registered on the basis of the written report submitted by P.W.1, who proved the same as Exhibit 1 before the trial Court.

22. When the accused surrendered on 2.12.2003, the Investigating Officer applied for remand of the appellant from the Court of A.C.J.M.,II, Meerut on 3.12.2003 and recorded his statement and the appellant further stated that he would get the weapon of assault i.e. Scissor recovered. Thereafter on 11.12.2003 the accused/appellant was taken on a police remand for two days and got recovered the Scissor, which was bloodstained near Hapur Railway Line from the bushes, wrapped in a polythene and given to the Investigating Officer and further confessed that he had inflicted injuries with an intention to cut the neck of the prosecutrix/victim and the incident had taken place on 21.11.2003 at 9:00 a.m. The recovery memo of bloodstained scissor was prepared by the Investigating Officer and marked as Exhibit Ka-2 and the said recovery was also made in the presence of informant Kashi Ram and Swaraj Singh, who have signed the recovery memo. The bloodstained clothes of the prosecutrix/victim 'A', plain earth and bloodstained earth along with piece of broken floor, which was also bloodstained, was taken by him and a recovery memo was prepared, as Exhbit Ka-3 on 27.11.2003.

23. From the evidence of P.W.3, the prosecutrix/victim 'A', whose statement was recorded in question-answer form by the trial Court reveals that she in her evidence has categorically stated that on 27.11.2003 at 8:30 a.m. it was the appellant, who has committed rape on her, while she was in her house and her parents had gone out and her two younger sisters had gone to school and the brother had gone for his work and when she tried to raise alarm, the volume of the 'Deck' was raised full by the appellant due to which person from outside could not hear her alarm for rescue. The accused Sohan Pal committed rape on her, when she stated that she would complain to her mother about the incident, the accused-appellant Sohan Pal had cut her neck by Scissor, which is used for cutting clothes with an intention to kill her, which started bleeding, on account of which blood was found on her clothes and also fallen on the floor. After the incident when she gained conscious, she reached near the Hapur Railway Line in a naked condition, which was just in front of her house. People took her to the police station and she wrote on a paper, which was taken from a Register i.e. paper no.1-A/2 and proved the same, which was under her hand writing and signature and marked as Exhbit Ka-4, in which she disclosed that it was the appellant, who committed rape on her. She stated that after the incident she was not able to speak and further her father had got a report written and her medical examination was conducted. From the medical examination report which was conducted, it is apparent that she suffered three injuries on her neck, which in the opinion of the doctor was found to be serious and patient was shifted to G.O.T. immediately for management in the interest of her life. Her surgery was conducted by P.W.6 Dr. Sudhir Rathi on 27.11.2003, who has stated that injury was found on her neck, which was found to be cut, which was on the

front side and the same was bleeding. She was having difficulty in breathing, she was given local anesthesia and another way was made in order to continue the breathing. She was completely unconscious and lairings was repaired and veins were bleeding, which was tied and other injuries were stitched and repaired. The supplementary report of the victim was proved by P.W.6, to be prepared by in his hand writing and signature and marked as Exhibit Ka.4. The bloodstained clothes of the prosecutrix/victim was sent to forensic lab Vidhi Vigyan Prayogsala, Agra and as per the report of the said lab dated 1.3.2004, on item nos.1 and 2 i.e. Salwar spermatozoa was found and further on item nos.3 & 7 i.e. Angocha and Scissor bloodstained were found, which goes to show that rape was committed on the victim by the appellant and further she was assaulted by him with scissor, which started bleeding profusely. P.W.1 in his evidence before the trial Court has categorically supported the prosecution case against the appellant and proved the F.I.R. lodged by him as Exhibit Ka-9 on the basis of written report as Exhibit Ka-1. P.W.2 Ram Chandra, who is a Mausa of the victim girl had seen the appellant coming out of the house of the informant in a disturbed state of mind and has also rushed the victim along with other persons of mohalla, who came out of the house in a naked condition, there was no clothes, as she was not wearing Salwar and as it has come in the evidence of P.W.5 that she was provided Pant to wear in order to save her from embarrassment. P.W.2 is also a witness of the recovery of memo of the paper in which the victim has written about the crime being committed by the appellant to the police Inspector, which has been marked as Exhibit Ka-4A, which was taken out from a Register. Therefore the argument of learned counsel for the appellant that the testimony of P.W.2 is highly a partisan and interested one and should not be believed, is not at all acceptable. The minor infirmities which has been pointed out by learned counsel for the appellant from the statement of P.W.2 do not go to the grass root to demolish the prosecution case, as has been stated by P.W.2 and his evidence before the trial Court. P.W.6 Dr. Kirti Dubey who has conducted the medical examination of the victim has stated that her hymen was not intact and it admitted only one finger with difficulty. Thus, from the evidence led by the prosecution which includes the testimony of prosecutrix/victim 'A' P.W.3 along with her medical examination report and the evidence of P.W.1 and P.W.2 goes to show that the appellant had committed rape on the victim, who is a minor girl and when she stated to complain about the incident to her mother, the accused with an intention to kill her, assaulted on neck with a scissor, causing grievous injuries to her, for which she was operated at Medical College, Meerut and remained in hospital for about a month and also admitted in AIIMS, New Delhi, after her surgery in the medical college, Meerut.

24. The appellant who was taken on police remand got the bloodstained scissor recovered from the place where he has concealed the same of the incident from the bushes near Hapur Railway Line in presence of the informant and a witness Swaraj Singh. As per the report of Vidhi Vigyan Prayogsala dated 1.3.2004 human spermatozoa was found on the Salwar of prosecutrix/victim. Further on the clothes of the prosecutrix/victim 'A' and cemented floor of the house where the incident took place, human blood was also found. Thus, the involvement of the appellant is proved beyond reasonable doubt by the prosecution.

25. The Court cannot loose sight that the prosecutrix/victim 'A' who was subjected

to rape by the appellant Sohan Pal was further assaulted by Scissor on her neck when she told him that she would complain to her mother about the incident of rape. The proseuctrix/victim because of the injury inflicted by the appellant on her neck, lost her power to speak after the incident which goes to show that the appellant has committed a heinous crime of rape and also made an attempt to murder the prosecutrix/victim after committing rape on her, hence the incarceration of the appellant for 17 years in jail, as has been argued by learned counsel for the appellant cannot be sympathetically weighed in comparison to the barbaric act of the appellant on the prosecutrix/victim, who is also an injured witness in the present case against the appellant. Her testimony fully supports the prosecution case, which is corroborated by her medical report against the appellant. The case of the appellant that he was falsely implicated in the present case by the prosecutrix/victim 'A' because he owed some money to her, has no substance, as he had failed to produce any oral or documentary evidence in this regard.

26. It would not be out of place to mention here that in cases of rape while considering the question of sentence, the Court has to strike balance between reformative theory and principle of proportionality.

27. We would like to refer here the judgment of the Apex Court reported in ***AIR 2013 SC 2209 Shyam Narain Vs. State of NCT of Delhi*** which while considering the question of sentence has observed in para 11, 12 and 22, which is reproduced here as under :-

"11. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed, regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

12. In this context, we may refer with profit to the pronouncement in Jameel V. State of Uttar Pradesh, wherein this Court, speaking about the concept of sentence, has laid down that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

22. Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the rampant uninhibited exposure of the bestial

nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniousity. In essence, leniency is sought on the base of aforesaid mitigating factors. It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended upto life. The legislature, in its wisdom, has left it to the discretion of the Court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society. The age old wise saying "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court. The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to

magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgment of conviction and the order of sentence passed by the High Court."

28. Thus in view of the above proposition of law, the sentence awarded to the appellant by the trial Court for the offences under section 376 IPC and under section 307 IPC for life imprisonment, respectively is perfectly justified in the instant case, as it shocks the conscience of the society and the Courts must hear the loud cry for justice by the society in cases of rape of innocent helpless girls of tend years and respond by imposition of sentence. To show mercy in the case of such heinous crime, could be travesty of justice and the plea of leniency is wholly misplaced.

29. The trial Court, thus, on the basis of prosecution evidence, has rightly recorded the findings of conviction and sentenced the appellant for the offences in question, which does not require any interference by this Court as the appellant has been found guilty for committing such a heinous crime against a minor girl.

30. In view of the discussions made above, the impugned judgment and order passed by the trial Court and conviction and sentence of the appellant for offences in question is hereby upheld.

31. The appeal lacks merit and is accordingly **dismissed**.

32. The appellant is in jail, he shall serve out the sentence awarded by the trial Court.

33. Let the lower court record along with a copy of this order be transmitted to the trial Court concerned for necessary information and follow up action, if any.

34. The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked, before the concerned Court/Authority/Official.

35. The concerned Court /Authority /Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)01ILR A1245
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2020

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Appeal No. 6864 of 2010

Mahendra Singh Baghel & Anr.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri V.K. Tripathi, Sri Arvind Agrawal, Sri Kalika Prasad Pal, Sri Kamlesh Kumar Tripathi, Sri R.B. Pal, Sri Rajiv Gupta

Counsel for the Opposite Party:
A.G.A., Sri Brij Raj Singh

A. Criminal Law - Code of Criminal Procedure,1973 - Section 374(2) - Indian Penal Code,1860 - Section 302/34- challenge to –conviction-deceased's close relatives turned hostile and that PW3 himself appeared to be inimical to the accused, as he and his sons were implicated in a case at the instance of the accused and had to go to jail- PW3 and others were there amongst the audience of the dance party of which the deceased was a part -The deceased however left the audience to urinate, When he was out urinating, he was shot at by someone. -on the basis of past enmity, the accused were named as is the narration by PW2 during his cross-examination by the defence- Though PW1 and PW2 were declared hostile but no specific question was put to them to demonstrate that they turned hostile for any specific reason-prosecution examined no independent witness despite the fact that the incident occurred at a time when a dance programme was on- no recovery from the accused of any incriminating material to lend corroboration to the prosecution story-no convincing evidence to indicate that accused had shared common intention with other accused to whom the role of firing at the deceased was attributed- prosecution failed to establish the guilt of the accused-appellants beyond reasonable doubt and, therefore, the accused-appellants are entitled to the benefit of doubt.(Para 1 to 36)

The appeal is allowed. (E-5)

List of Cases cited:-

1. Raghav Prapanna Tripathi Vs St. of U.P. (1963) AIR SC 74

2. Sunil Kundu & anr. Vs St. of Jharkhand (2013) 4 SCC 422

3. Bipin Kumar Mondal Vs St. of W.B. (2010) 12 SCC 91

4. Paramjeet Singh @ Pamma Vs St. of U.K. (2010) 10 SCC 439

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

1. Instant appeal is against the judgment and order dated 30.09.2010 passed by the Additional Session Judge, Court No. 2, Firozabad in Sessions Trial No. 502 of 2003 by which the appellants Mahendra Singh Baghel (A1) and Geetam Singh Baghel (A2) have been convicted under section 302 read with section 34 I.P.C. and sentenced to undergo imprisonment for life with fine of Rs. 10,000/- each and in default of payment of fine to undergo imprisonment of two years.

INTRODUCTORY FACTS AND PROSECUTION CASE

2. The prosecution case as per the first information report (for short 'FIR') (Ex. Ka-1), which was lodged on 25.05.2002, at 3:05 am, at P.S. Pachokhra, District Firozabad, by Mohan Lal Baghel (not examined), elder brother of the deceased (Bhagwan Singh Baghel), is that there was a marriage party of the daughter of Prem Singh in which a dance programme was going on. The informant, his younger brother (the deceased) and several others were witnessing the dance programme. While watching the programme, at about 1.30 am in the night of 25.05.2002, the deceased left the programme to attend to nature's call, there Mahendra Singh Baghel (A1) stopped him and Geetam Singh Baghel (A2), the brother of A-1, fired at the deceased from a country made pistol thereby causing injury to the deceased. In the first information report it was alleged that the incident was witnessed by Munshi Lal Baghel (PW.3) and informant's nephew Ranveer Singh (PW.1) and various other persons, who tried to get hold of the accused but they escaped. The alleged motive for the crime was land dispute.

3. The FIR was scribed by Ram Swaroop Baghel (PW.2). The Chik FIR (Ex. Ka4) was made by Pooran Mal (PW6). Initially it was registered for an offence punishable under Section 307 I.P.C. as by that time the deceased was alive. After lodging the FIR the deceased was rushed to the hospital but died on way at about 5 am. On report of his death, vide GD Entry No.11 (Ex. Ka 6), at about 10.30 am, on 25.05.2002, the case was converted to Section 302 I.P.C. Thereafter, the inquest was conducted in the mortuary of District Hospital, Firozabad at about 1.00 pm on 25.05.2002. Inquest report (Ex. Ka-2) was prepared and witnessed by Nihal Singh (PW.4) amongst others who have not been examined.

4. The post-mortem of the body of the deceased was conducted at about 4:30 pm on 25.5.2002 by Dr. A.K. Anand (PW.7). The post-mortem report (Ex. Ka-7), which was proved by PW.7, estimated the time of death around half a day before. Rigor mortis was found present in both extremities. External ante-mortem injuries found were: (i) one gun shot wound of entry size 3.0 cm x 0.5 cm cavity deep on the right lateral side of chest 18 cm above iliac crest at post axillary line level, margins inverted, lacerated with blackening and tattooing present; and (ii) gun shot wound of exit size 4.0 cm x 1.5 cm on the abdomen, 5 cm upward and right lateral to umbilicus, margins everted. Amongst the internal injuries, eighth rib was found fractured; right lung was found ruptured; peritoneum, liver and gall bladder was found ruptured; and 8 ounce of blood was found in the cavity. Small intestine was found lacerated with presence of 10 ounce of semi-digested food. In the large intestine faecal matter was present. According to the doctor, the cause of death was due to shock and haemorrhage as a result of ante-mortem firearm injury sustained.

5. Initial investigation was carried out by Sri Dharm Prakash Dwivedi (PW.8), who collected bloodstained and plain earth from the spot and prepared a fard thereof (Ex. Ka-3), recorded the statement of the deceased (Ex. Ka-8), prepared site plan (Ex. Ka-9) on the pointing out of informant and PW.3, prepared the inquest report, photo lash, challan lash and recorded statement of the eye-witness Munshi Lal Baghel (PW3) amongst others.

6. Nanha Ram Kureel (PW.9) carried out raid operations to arrest the accused but could not succeed. Though, later, the accused surrendered in Court on 01.07.2002. He completed the investigation and submitted charge-sheet (Ex. Ka-14). On submission of the charge-sheet, after taking cognisance, the case was committed to the Court of Session. The Court of Session framed charge against the appellants for offence punishable under Section 302 read with Section 34 I.P.C. The accused denied the charge and claimed trial.

PROSECUTION EVIDENCE

7. The prosecution examined as many as nine witnesses.

8. **PW.1 (nephew of the deceased-Ranveer Singh)** though was examined as an eye-witness of the incident but was declared hostile. He stated that at the time of the incident he was at his own house and had not witnessed the incident. He stated that when he received information that his maternal uncle (Mama), the deceased, was shot, he went to see him but by the time he could reach, his uncle was dead.

In his cross-examination by the State counsel, he stated that the investigating officer had not recorded his statement. Upon being confronted by the statement recorded under Section 161 Cr.P.C, he stated that he does not remember that he gave any such statement. He denied the suggestion that he was not stating the truth because of fear of the accused.

9. **PW.2 (Ram Swaroop)** : The scribe of the FIR. He stated that the report (Ex. Ka-1) was in his writing but it was not on the dictation of Mohan Lal Baghel (informant).

In his cross-examination by the State counsel, upon being confronted by his previous statement under section 161 CrPC, he stated that he was not aware as to how that statement was recorded. He denied the suggestion that he scribed the FIR on dictation of the informant. He stated that he wrote the FIR on dictation of the Inspector. He denied the suggestion that he was lying because he had colluded with the accused.

In his cross-examination by the counsel for the accused, he stated that at the time of the incident, he was with his maternal uncle Mohan Lal and Munshi Lal. At that point of time, it was 10 pm. They heard that Bhagwan Singh has been shot at. Upon which, he, his maternal uncle Mohan Lal, Munshi Lal and Ranveer Singh, all four went to the spot and found Bhagwan Singh lying in an injured condition in the field near the tubewell. The tubewell was of Dori Lal. He stated that at that point of time, his maternal uncle (Bhagwan Singh Baghel-deceased) was not in a position to speak. They took him to the police station. At the police station, his maternal uncle Mohan Lal had spoken to the police and the police had advised that the injured be immediately taken to the hospital. He stated that they had reached the police station at 11 pm. He stated that when Mohan Lal had gone to the hospital with the injured, he scribed the report on the dictation of the Station House Officer. He stated that the report does not bear the signature of Mohan Lal. He further stated that though Mohan Lal had informed the police that his brother Bhagwan Singh was shot at by some miscreant but had not named any person, But as the Station House Officer insisted that till such time the name of the accused is disclosed, report will not be written, Mohan Lal in consultation with Munshi Lal, had disclosed the name of Mahendra Singh and Geetam Singh. He stated that at that time, Bhagwan Singh was not in a position to speak rather he was unconscious.

10. **PW.3-Munshi Lal**- stated that he was there with Bhagwan Singh (the deceased), Ranveer Singh, Mohan Lal and various other fellow villagers at the dance programme held in connection with the marriage of Prem Singh's daughter, Manju. The incident occurred at 1:30 am in the night when dance programme was going on. He stated that during the dance programme Bhagwan Singh (the deceased) went to urinate. There he was stopped by Mahendra Singh (A1) and Geetam Singh (A2) fired a shot at the deceased from a country made pistol. Thereafter, the accused ran towards west and Bhagwan Singh, in an injured condition, ran towards east and, thereafter, fell in the field of Dori Lal. Whereafter, Mohan Lal and others arrived and took the injured Bhagwan Singh in a tractor. At that point of time, the deceased was alive and fully conscious. He stated that he saw the entire incident. He identified the two accused in front of the

court. He stated that at the time of the incident there was light with the aid of a generator. He stated that the incident was an outcome of enmity on account of land dispute as the field purchased by Mahendra Singh (A1) was purchased by Bhagwan Singh (the deceased).

PW3 was cross-examined by the defence counsel on multiple counts such as:

(a) That he was a witness related to the deceased. He and the deceased had common mother, inasmuch as, after PW3's father's death, his mother, Anaro Devi, had married deceased's father.

(b) That the land purchased by the accused was different from the one purchased by the deceased Bhagwan Singh because the accused had purchased the land from Har Devi. The balance land held by Har Devi was sold to her two sons Chote Lal and Khacheru Singh. Chote Lal, in turn, had sold it to Bhagwan Singh (the deceased). Therefore, there was no motive for the crime.

(c) That PW3 was not present on the spot and was somewhere else when the incident occurred; and that he did not witness the incident.

(d) That he was telling a lie because a report was lodged against his family at the instance of accused Mahendra Singh (A-1).

In addition to above, a suggestion was also given that the incident occurred in some other manner as one girl by the name Vineeta was teased by Bhagwan Singh (the deceased), who was a bachelor, and, in connection with that, some other person had fired at him.

In respect of his relationship with the deceased i.e. with regard to him and the deceased being born of the same mother, he denied the suggestion.

In respect of the land dispute, though he did not deny that Bhagwan Singh had obtained sale-deed from Chote Lal and that the accused had obtained sale-deed from Har Devi but stated that Har Devi had sold her entire land to Mahendra Singh (A-1) therefore, there was dispute and enmity. He also stated that in respect of this dispute, earlier, there had been an altercation between Bhagwan Singh and Geetam Singh. However, he could not disclose the date and time of such altercation though he stated that such altercation took place about a month and a quarter before the date of the incident.

In respect of the suggestion that he was not present on the spot and had not witnessed the incident, he denied the suggestion but admitted that on the date of the incident, he had gone to village Nagla Kharga to purchase Buffalo.

In respect of the suggestion that he was lying because his son had been sent to jail on the report by Mahendra Singh, though he did not deny the suggestion that report was lodged by Mahendra Singh implicating him and his sons but denied that he was lying on that account.

In respect of the suggestion that Bhagwan Singh had teased Vineeta and the incident occurred in some other manner, PW3 stated that Vineeta is a girl of good character and no such incident had occurred. He, however, did not deny the suggestion that Bhagwan Singh was a bachelor.

11. **PW.4- Nihal Singh-** proved the inquest proceeding and the inquest report (Ex. Ka-2).

In his cross-examination, he stated that Munshi Lal (PW-3) and the

deceased had common mother. He stated that Bhagwan Singh's mother's name is also Anaro Devi.

12. **PW-5- Bhuri Singh**- He is the son of Munshi Lal (PW3). He proved that he witnessed the lifting of blood-stained and plain earth from the spot of which fard (Ex Ka-3) was prepared.

In his cross-examination, Bhuri Singh stated that the deceased Bhagwan Singh, in relationship, was his uncle. He, however, feigned ignorance whether PW3 and the deceased had common mother.

13. **PW-6- Head Constable Pooranmal**- proved the GD entry of the FIR and proved that it was lodged on 25.05.2002 at 3.05 am. He also proved that at 10:30 am on 25.05.2002 upon information that Bhagwan Singh had died, section 307 I.P.C. was altered to section 302 I.P.C. vide GD report no. 11.

In his cross-examination, he stated that informant along with Bhagwan Singh, Bhuri Singh, Yadram, Nepal Singh, Munshi Lal, Ranveer Singh and others had come to the police station to lodge report. He stated that he saw the injured Bhagwan Singh. He was not in a position to speak. At that time, he was lying on the tractor. As the condition of the injured was serious, *Chitthi Majroobi* was prepared immediately and he was sent to the hospital. He stated that the injured stayed at the police station for as long as it took to prepare *Chitthi Majroobi* which was prepared in just 2-4 minutes. He stated that the death information was received from Gulab Singh who had accompanied the deceased to the hospital. He stated that the investigation was assigned to SI Dharm Prakash Dwivedi (PW-8) and Nanha Ram Kuril (PW-9). They both left the police station immediately upon registration of the first information report at 3.05 am.

14. **PW-7 Dr. A.K. Anand**- proved the post-mortem report and the injuries noticed therein and stated that the deceased could have died half a day before the examination.

In his cross-examination, he stated that 8th rib, right lung, liver, small intestine were found ruptured. The injuries were very serious which would bring the injured in a state of shock and unconsciousness and, most likely, he would not be in a condition to speak. He also stated that after receiving such injury, injured would not be in a position to walk or climb. He stated that the angle with which the gun shot travelled across the body suggested that the deceased and the person who fired the shot at the deceased were not at the same level. He acknowledged the possibility of the deceased dying earlier, say in the night of previous day between 10-11 pm. He stated that from the amount of blood found in the cavity it could be said that the deceased died within one half to one hour of receiving injury.

15. **PW-8 Dharm Prakash Dwivedi**- proved various stages of the investigation and stated that he recorded the statement of the injured Bhagwan Singh Baghel i.e. **Ex. Ka-8.** He stated that the injured was sent to the hospital with constable Gulab Singh but died en route to the hospital. He stated that he recorded the statement of the constable who prepared the Chik FIR and thereafter he recorded the statement of Mohan Lal (informant) and the scribe of the FIR. Thereafter, he went to the spot and recorded the statement of Munshi Lal Baghel and on the pointing out of the

informant and Munshi Lal Baghel he prepared the site plan (Ex. Ka-9). He also collected blood-stained and plain soil and prepared fard thereof (Ex. Ka-3). He proved the inquest proceeding and other stages of the investigation.

In his cross-examination, he stated that 6-7 people had come to the police station. The informant had not met him at the police station because PW-8, at that time, was at his residential quarter. The informant had met the clerk at the police station. PW8 was informed by *Santri* that at village Raspur there had been firing and that the injured had come. Upon receipt of information from *Santri*, he reached near the tractor on which Bhagwan Singh was lying. He enquired about the incident from Bhagwan Singh and his brother Mohan Lal. At that time, the FIR was not registered but was in the process of being registered. He stated that he did not enquire from the tractor driver or the persons who were there along with the injured, because the condition of the injured was very serious and, therefore, he sent the injured to the hospital. He stated that when he visited the spot, he received information from Gulab Singh about the death of the injured. He stated that though the injured was sent with constable Gulab Singh but he did not record the statement of Gulab Singh.

In his cross-examination, he also stated that while recording the statement of the injured Bhagwan Singh, he did not follow the procedure provided under the U.P. Police Regulation and did not obtain the signature of the deceased on the statement so recorded nor did he get signature of any witness in whose presence his statement was recorded. He admitted that in the case diary he had not entered the date and time of recording the statement of Bhagwan Singh though the time of recording the statement of other witnesses is mentioned in the case diary. He also stated that it is mentioned in the case diary that Bhagwan Singh died on way at 5 am.

On a question whether he was informed with regard to any previous incident between the deceased and the accused, he stated that Munshi Lal had not given any information to him with regard to any previous incident. He also stated that he did not take possession of the generator or other equipments that were there at the place of the incident.

16. **PW-9- Nanharam Kuril-** proved that he took over the investigation from PW8 and, after completing the investigation, submitted charge-sheet and tried to effect arrest of the accused persons though, ultimately, they surrendered in court.

In his cross-examination, he stated that at the time of inspection of the spot, he did not notice abandoned footwear such as slippers, sandals, shoes. He could not discover any pellet, cartridge/ empties, *lathi* or *danda*. He stated that he did not move any application for taking custody of the accused to recover the murder weapon. He stated that he was not aware of the statement made by Munshi Lal to the previous investigating officer. He stated that Munshi Lal is brother of the deceased. He also admitted that during the course of investigation he did not enquire from any of the artists in the dance party as to the manner in which the incident occurred.

In his cross-examination, he stated that though the deceased was unmarried but he could not get any information with regard to his involvement with any women or girl nor could gather any information that in the night of the incident the deceased had teased a girl by the name Vineeta. He stated that by the time statement of Munshi Lal was

recorded, information with regard to the death of Bhagwan Singh had not been received therefore, in the statement of Munshi Lal there is no mention of his death.

17. The incriminating circumstances borne out from the prosecution evidence were put to the accused while recording statement under Section 313 Cr.P.C. The accused though admitted that on the night of the incident there was a function in connection with the marriage of the daughter of Prem Singh, namely, Manju, but denied their presence in the marriage function. They claimed that the prosecution case is false; the FIR is ante-timed; and that they have been falsely implicated. It was also claimed by them that the witnesses are all related to the deceased.

DEFENCE EVIDENCE

18. Defence examined three witnesses to demonstrate that deceased had cases against him and that PW3 on the date of the incident had gone to purchase a buffalo and in that connection had stayed overnight at a place and, therefore, could not have witnessed the incident. These three witnesses are:

DW-1-Satya Prakash- He stated that he was posted at police station Pachokhara, Firozabad between 1988 to 2000. On 18.11.1999, Teekam Singh son of Tilak Singh had lodged NCR No. 47 of 1999 against Ramveer Singh, Bhagwan Singh, Nek Ram son of Nathi Lal. On the basis of the said report, proceedings under Section 107/116 Cr.P.C. were also initiated.

DW-2 Waish Ahmed- He stated that he was posted at P.S. Pachokhara. He brought the NCR register and proved NCR No. 37 of 2003 which was marked as Exhibit Kha-2. He also proved NCR No. 47 of 1999 and Chik FIR of Case Crime No. 55 of 1999. They were exhibited as Exb. Kha-3 and Kha-4.

DW-3-Mahavir Singh- On 25.3.2009, he stated that about 6-7 years back Munshi Lal had come to Champaram's house, who happens to be his cousin, for purchase of buffalo. He had arrived late and had stayed overnight at Nagla Kharga.

In his cross-examination, he could not tell the date and time of the visit of Munshi Lal.

TRIAL COURT FINDINGS

19. The trial court, found the prosecution evidence, in particular, the testimony of PW-3, wholly reliable and unshakeable even though he might have been related to the deceased. The trial court observed that, according to the prosecution, the informant could not appear as a witness because he was abducted in respect of which a case was lodged by wife of the informant against Mahendra Singh (A-1) and others in which charge-sheet was submitted. Under the circumstances, it was quite natural that no resident of the village could come and give evidence. It also observed that even if no strong motive could be proved for the crime but, as there was ocular evidence, absence of motive was inconsequential. It found that the place and time of occurrence was duly proved and the FIR was promptly lodged, therefore, as the ocular account found support from medical evidence, the accused were liable to be convicted for the charge framed against them. While holding as above, the trial court also noticed the conduct of the accused appellant in trying to evade arrest for few days to infer existence of guilty mind.

20. We have heard Sri Kamlesh Kumar Tripathi for the appellants; Sri Virendra Singh Rajbhar, the learned A.G.A., for the State; and Sri Brij Raj Singh from the victim's side.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

21. The contention of the learned counsel for the appellants is as follows:-

(a) The informant of the case was not examined as a witness. P.W.2, the scribe of the FIR, specifically stated that the same was not written on the dictation of the informant; that the informant was not able to name the accused; and that the FIR was not being registered, without names, therefore, names were given. This seriously dents the credibility of the prosecution case.

(b) According to the FIR, the incident was witnessed not only by Munshi Lal (PW-3) but by Mohan Lal (not examined) and Ranveer Singh (PW-1), amongst others. Ranveer Singh (PW1), who happens to be the own nephew of the deceased, stated on oath that he had not witnessed the incident but was at home when he received information that the deceased had received injuries. This also seriously dents the credibility of the prosecution case.

(c) PW-2, during his cross-examination by the counsel for the accused, had stated that at the time of the incident, that is at about 10 pm, he was sitting with his maternal uncle Mohan Lal (informant) and Munshi Lal (PW-3) when they were informed that somebody had shot Bhagwan Singh. On receiving this information, PW-2 along with Mohan Lal (informant) and Munshi Lal (PW-3) and Ranveer Singh (PW-1) had gone together to find out Bhagwan Singh lying injured in the field. He also stated that they had reached the police station at around 11 pm but as condition of Bhagwan Singh was serious the Station Officer had directed that the deceased be taken to the hospital and when Mohan Lal had taken the deceased to the hospital, the first information report was written on the instruction of the police station incharge. He also stated that the FIR does not bear signature of Mohan Lal. This testimony of PW2 shakes the foundation of the prosecution case and renders the testimony of PW3 unreliable as, according to PW2, when the deceased was shot at, PW3 was with PW2.

(d) The testimony of PW-3 is not reliable because not only his presence at the spot is belied by the statement of PW-2 but also because he has deliberately tried to hide his identity that he is the step-brother of the deceased, born out of common mother. Apart from that PW-3 is an interested witness as he had admitted in his cross-examination that after the incident, he and his sons had gone to jail at the instance of Mahendra Singh (A-1). It has also been submitted that from the statement of PW-3, during his cross-examination on 08.04.2004, it appears, within 2 minutes of Bhagwan Singh having gone to attend nature's call gun shot was heard by him which suggests that upon hearing the gun shot he visited the spot but was not there from before to notice the actual firing. This statement was, however, immediately, improved by PW3 by adding that he was also attending nature's call and was there at the spot. Whereas, no such statement was made earlier. It has also been submitted that the ocular version that after receipt of gun shot injury the deceased ran a few paces towards east is not probable and is neither supported by medical evidence nor by presence of blood at any other place

except where he, the deceased, was lying injured. Therefore, it appears, PW-3 did not witness the incident but was set up or it might be that he reached the spot on hearing the gun shot.

(e) The statement of the deceased alleged to have been recorded by the investigating officer before his death appears to be totally fabricated as the deceased had suffered very serious injury and was not in a condition where he could speak. PW-6, who made GD entry of the FIR, clearly stated that the deceased was in a precarious condition and was just lying on the tractor and not speaking. He also stated that as soon as the FIR was registered, after preparation of Chithi Majroobi, the deceased, who was then lying injured, was sent to the hospital. Thus, there was no opportunity for PW8 to record the statement of the deceased. Moreover, the statement of the deceased was not recorded as a dying declaration and as per the procedure for recording such statement, mandated by U.P. Police Regulations. Further, signature of the deceased was not obtained on the alleged dying declaration. Even the time of recording the dying declaration was not mentioned. Thus, the alleged dying declaration is nothing but a waste paper.

In a nutshell, the submission on behalf of the appellants is that the prosecution story is not supported by any reliable testimony; and the trial court has not properly examined, considered and appreciated the evidence. Hence, the judgment of the trial court is liable to be set aside and the appellants are entitled to be acquitted. In the alternative, it was submitted that in so far as Mahendra Singh (A-1) is concerned the only evidence against him is of stopping the deceased and not of exhortation or catching hold the deceased whereas the role of firing at the deceased is attributed to Geetam Singh, therefore, Mahendra Singh could not have been convicted under section 302 IPC with the aid of section 34 IPC, particularly, when no pre-meditated plan to kill the deceased was proved.

SUBMISSIONS ON BEHALF OF THE PROSECUTION

22. Per contra, the learned A.G.A. as well as learned counsel for the victim submitted that there was serious threat to the life of the witnesses and therefore PW-1 and PW-2 turned hostile. PW-3, who is an aged person, considering his responsibility to stand by the truth stood up bravely to depose with regard to the involvement of the accused-appellants and his testimony stood the test of cross-examination and is also corroborated by medical evidence and the circumstances such as prompt lodging of the FIR, proving of the place of occurrence, existence of light, etc. Therefore, as it is well settled that conviction can be recorded on the testimony of a solitary witness, it is a fit case where the appeal be dismissed and conviction of the accused-appellants be upheld.

ANALYSIS OF THE PROSECUTION EVIDENCE

23. We have considered the rival submissions and have perused the record carefully.

24. Before we proceed to analyse the evidence, at the outset, we would like to observe that the trial court while analysing the evidence and returning its finding on the guilt of the accused has, inter alia, observed (a) that the informant Mohan Lal was abducted of which report was made by

his wife against several persons including Mahendra Singh (A-1) and, therefore, there would not be many willing villagers to depose against the accused; and (b) that from the testimony of PW9 it appears that despite efforts/ raids the accused could not be promptly arrested which is suggestive of a guilty mind. To test whether those observations had foundation on the evidence on record and had a legal basis, we have carefully perused the record. Upon a close scrutiny of the record, we find that neither the police witnesses nor the alleged eye-witnesses have deposed about the criminal antecedents of the two accused. PW1 and PW2, who were declared hostile, were not specifically questioned in respect of their fear to tell the truth on account of abduction of Mohan Lal (informant). Further, PW3 also did not make any such statement which may indicate that any threat was extended to him though he stated that he and his sons amongst others were implicated in a case in which they had to go to jail. Under the circumstances, the trial court appears to have taken note of that aspect on the basis of oral submissions which, in our considered view, is not appropriate. In respect of conduct of the accused in evading arrest, we may observe that it has not come in the testimony of PW9, who allegedly made efforts on several dates to arrest the accused, that any declaration under section 82 CrPC was obtained. Moreover, from his testimony it appears that the accused surrendered in court on 01.07.2002 and that no application was moved by PW9 to take them into police custody for recovery/ discovery of any incriminating material. Even otherwise, mere abscondence of an accused does not lead to a firm conclusion of his guilty mind. An innocent man may also abscond in order to evade arrest, as in light of such a situation, such an action may be part of the natural conduct of the accused. Otherwise also, abscondence by itself is not sufficient to prove the guilt. At best, it may lend weight to other evidence establishing the guilt (vide **Raghav Prapanna Tripathi vs State of Uttar Pradesh, AIR 1963 SC 74; Sunil Kundu and another Vs State of Jharkhand, (2013) 4 SCC 422; Bipin Kumar Mondal vs State of West Bengal, (2010) 12 SCC 91; and Paramjeet Singh @ Pamma vs State of Uttarakhand, (2010) 10 SCC 439**). Under the circumstances, keeping in mind the nature of the testimony of PW9, we do not consider that mere delay in the arrest of the accused-appellants, without there being any declaration under section 82 CrPC, is an indica of their abscondence suggestive of their guilty mind and, therefore, the observation to the contrary made by the court below is uncalled for. More so, when such circumstance has not been put to the two accused while recording their statement under section 313 CrPC.

25. Now we shall proceed to analyse the evidence led by the prosecution. Apart from the testimony of formal witnesses, there are essentially two types of evidence to support the prosecution case. One is the alleged dying declaration (Ex. Ka-8), recorded by PW8, and the other is the ocular account rendered by PW3.

26. We shall deal with the dying declaration first. The dying declaration (Ex. Ka-8) recites that the deceased with great difficulty could speak that in the previous night in connection with the marriage of Manju, the daughter of Prem Singh, Baraat had come and a dance programme was on. He (the deceased) along with fellow villagers was part of the audience. Sitting near him were Munshi Lal (PW3); and his nephew Ranveer (PW1). At about 1.30 am,

in the night, he left to urinate. As soon as he got up after urinating, Mahendra Singh (A-1) and his brother Geetam Singh (A-2), who had also come to witness the dance programme, arrived. Mahendra Singh stopped him and Geetam Singh fired at him with country made pistol. The shot hit him on the right side of his rib cage. Upon being hit, he cried /shouted. Hearing his cries and the sound of gun shot, Munshi Lal (PW3), his nephew Ranveer Singh and others came running and tried to arrest the two accused but they ran away towards the west. In his narration, the deceased proceeded to disclose his enmity with Mahendra Singh (A-1) on account of land dispute. He also added that after hearing gunshot complete panic had set in and the dance programme had stopped.

27. The alleged recording of the statement of the deceased prior to his death by PW8 does not appear to be probable for two reasons. Firstly, from the testimony of PW-6, it appears that the injured stayed at the police station only for 2 - 4 minutes till the first information report was registered and *Chitthi Majroobi* was prepared and no sooner the *Chitthi Majroobi* was prepared, the deceased was rushed to the hospital. Thus, there was not sufficient time for PW8 to record the statement of the deceased. Secondly, the condition of the deceased was extremely serious. Whether he was in a condition to speak is anybody's guess, because, according to PW6, the deceased was just lying on the tractor and was not speaking. Admittedly, his right lung and liver was ruptured, rib was fractured and blood was there in his abdomen. According to the doctor (PW7), in such a state, it would be very difficult to expect that he would be in a position to speak.

28. Apart from the above, the dying declaration was not recorded after lodging the FIR and in the form in which it ought to be recorded as per the U.P. Police Regulations. According to PW8 he was called from his quarters and while the FIR was being lodged he spoke to the injured i.e. the deceased Bhagwan Singh. Neither the time nor the date of recording of the dying declaration is entered. The dying declaration is also not witnessed. Further, no signature of the injured was obtained. Taking a conspectus of all the facts i.e. the manner in which the alleged dying declaration was recorded, the statement of PW6 that the injured was just lying on the tractor and not speaking, the short duration of time during which the injured was at the police station and the medical evidence negating the probability of the injured being in a position to speak, leads us to the conclusion that the so-called dying declaration is wholly unreliable and has to be discarded.

29. Coming to the ocular account, no doubt, the prosecution examined three eye-witnesses but, out of the alleged three eye-witnesses, two were declared hostile. However, from the testimony of those two hostile witnesses it is proved that the deceased had gone to witness dance party in a marriage and that the FIR (Ex. Ka-1) was scribed by PW2. Further, from the statement of PW2, made during his cross examination by the defence counsel, it appears that PW1, PW2, and PW3 were all there, as, according to PW2, upon receipt of information that some one had shot Bhagwan Singh, he, his maternal uncle Mohan Lal (the informant), Munshi Lal (PW3), Ranveer (PW1), all four had gone to the spot to find Bhagwan Singh lying injured in the field near the tube-well of

Dori Lal. Although, during his cross-examination by the defence counsel, PW2 gives the time of the incident as about 10 pm of the previous day i.e. 24.05.2002 but he admits that the deceased was brought to the police station by the informant Mohan Lal, amongst others, and from there he was taken to the hospital. The registration of the FIR at about 3.05 am is proved by PW6. He also proved that the deceased was alive at the time when he was brought to the police station. According to the doctor (PW7), the deceased, with the kind of injury he had, could have survived just for one-half to one hour, therefore, by rough estimation the incident did occur on or about the time put by the prosecution, that is to say at about 1.30 am. The place of occurrence was proved by the testimony of the prosecution witnesses which was corroborated by the blood-stained earth lifted from the spot by PW8. Thus, from the evidence led by the prosecution, it is duly proved that the incident occurred on or about the time put by it and at the place where there was music and dance in connection with the marriage of Prem Singh's daughter Manju.

30. The prosecution case, both in the first information report as well as in the ocular account rendered by PW-3, is to the effect that the deceased Bhagwan Singh was part of the audience to the dance programme and that, during the course of that programme, he went to urinate. According to PW3, he was stopped by Mahendra Singh (A1) and was shot by Geetam Singh (A2). Now, the issue which arises for our consideration is whether PW3 witnessed the actual firing or he was part of the audience of the dance programme at the time when the shot was fired and arrived with others upon hearing gun shot or the cries of the deceased.

31. Before we dwell into that issue we may notice that an effort has been made by the defence to demonstrate that PW3 had gone to purchase Buffalo on that day to another place and stayed there over night and, therefore, could not have witnessed the incident. However, this effort of the defence could not succeed as the witness who was produced from the defence side could not give the date. Moreover, from the other bits and pieces of evidence it was satisfactorily proved that PW3 was part of the audience of that dance.

32. Reverting to the issue whether PW3 actually witnessed firing of the shot at the deceased or arrived as others on hearing the shot, we find that from the sequence of events as they emerge from the prosecution evidence, one thing is clear that the deceased though was part of the audience but had left them to urinate. Ordinarily, when a person goes to urinate, he would try to find a place where he may not be noticed because it is not expected that a person would urinate in the gaze of others, more so, when there is a marriage gathering. The site plan of the place of occurrence (Ex. Ka-9), which has been prepared by PW8 on the pointing out of PW3 would suggest that the dance party was on a stage north of point B where the audience was seated. Point A is the place where the deceased was urinating and where he was shot at. The distance between point B and point A is 30 paces. Point C is the place where the deceased ran to and fell after being hit. The distance between point A and point C is 35 paces. Notably blood-stained soil was lifted from point C only. Direction wise, point A is south of point B, whereas, point C is north east of point A. The accused appellants are stated to have escaped towards west of point A, which would be

south-west of point B, that is the place where audience was seated. Interestingly, the site plan which was prepared by PW8 on the pointing out of PW3, as admitted by PW3, does not specifically disclose the point from where PW3 and other witnesses witnessed the shooting though in entry no.2 of the index to the site plan it is stated that from point B the witnesses, upon seeing the occurrence, came rushing and gave a chase to the assailants. During his cross-examination on 08.04.2004, PW-3 stated that the stage was open towards *Jamunai* side (which, according to the counsel for both sides, would be south as river Jamuna flows south of that area) and was covered from the remaining sides. He stated that he was sitting outside the canopy (*Pandal*) towards south whereas Ranveer Singh (PW1), Mohan Lal (informant) and the deceased Bhagwan Singh were sitting in front of him. When he had reached the marriage party, Ranveer, Mohan Lal and the deceased were already seated. The statement of PW-2, who is the scribe of the FIR, but whose presence is not acknowledged by PW3, during his cross-examination by defence counsel, would reveal that at the time of the incident, he was sitting with his maternal uncle Mohan Lal and Munshi Lal (PW3). There they learnt that someone had shot Bhagwan Singh, upon which, he, his maternal uncle and Munshi Lal, Ranveer Singh went to the spot and found Bhagwan Singh in an injured condition. We may not rely on statement of PW2 because he has not been consistent and has been declared hostile but his testimony is relevant as a corroborative circumstance that PW3, Mohan Lal, Bhagwan Singh and Ranveer Singh were all together and part of the audience. Considering that Bhagwan Singh left the audience to urinate, a strong probability arises that he may have been alone at that point in time. Thus, whether the witnesses came on hearing gun shot or were there while he was urinating is a crucial question. To solve this riddle, PW-3, during his cross-examination, dated 08.04.2004, stated as follows:-

'' घटना स्थल पर मैने जब फायर की आवाज सुनी तो उसके ज्यादा से ज्यादा 2 मिनट पहले भगवान सिंह उठकर पेशाब करने को गया था। डांस पार्टी के स्थान पर मैने मुल्जिमान को बैठे नहीं देखा था।

मैने मुल्जिमान के आने की दिशा नहीं देखी केवल यह देखा था कि वह राम किशन के खेत में खड़े थे। जब मैने उन्हे राम किशन के खेत में खड़े देखा उसके 1 मिनट के अन्दर ही मैने फायर की आवाज सुनी। मैं पेशाब के लिए उठा था जब मैंने मुल्जिमान को अपनी आंखों से गोली मारते देखा। घटना के समय मै पेशाब के लिए उठकर बाहर गया की बात मुझसे किसी ने नहीं पूछी थी इसलिए यह बात आज तक मैंने किसी को नहीं बताई। भगवान सिंह पेशाब करके जब खड़ा ही हुआ था कि उसी समय इसके गोली मार दी। ''

33. The above statement of PW-3 appears to be a deliberate attempt to explain his presence at the spot where Bhagwan Singh was shot at. But this statement of his does not inspire our confidence because it was made immediately after he was caught on the wrong foot, that is when he stated that he heard gun shot just 2 minutes after Bhagwan Singh had left to urinate. This slip of tongue coupled with the circumstance that in the site plan, prepared on the pointing out of PW3 himself, PW3's location as a person who separately witnessed the incident, standing close by, was not shown and instead the place from where witnesses in general watched and arrived, which was point B, 30 paces away from point A, that is the place where shot was fired, was disclosed, suggests that PW3 had arrived on the spot with others after hearing gun shot as is also the case of PW2. Once that is the position, keeping in

mind that it is a case of solitary gun shot, with no scuffle, and could be a case of hit and run, the circumstances exclude the opportunity for the witnesses to spot and identify the assailant. There is another circumstance which makes us wonder whether PW3 actually witnessed the shooting because, according to him, after being hit from a close range, Bhagwan Singh ran from point A to point C, that is 35 paces, which does not appear probable, inasmuch as, according to the doctor (PW7), he would not be in a position to walk with lung, liver and small intestine ruptured and rib fractured. Though no doctor with certainty can predict the immediate reaction of a person who has received an injury but it does throw a possibility that the deceased was actually shot at point C and not at point A. More so, when he was picked up from point C and blood was also noticed at point C only. If he was shot at point C then the narration of PW3 about the incident falls to the ground. When we notice the site plan (Ex. Ka 9) we find that point C is towards east of point B where the audience was seated for the dance programme whereas point A was south of point B. The statement of PW3 indicates that the stage was covered with a canopy from three sides and was open towards *Jamunai* side, which would be south, as already noticed above. Thus, if the incident occurred at point C there would be complete blockage of vision due to canopy coverage on three sides. Hence, it appears to us that deliberately location of shooting was disclosed at point A even though the injured was found lying at point C and blood was also found at point C, which probabilizes that the incident occurred at point C and not at point A. More so, because if one goes to urinate he would like to be at a place where he would not be spotted urinating.

CONCLUSION

34. Keeping in mind all that has been discussed above and the fact that deceased's close relatives have turned hostile and that PW3 himself appeared to be inimical to the accused, as he and his sons were implicated in a case at the instance of the accused and had to go to jail, the testimony of PW3 that he actually witnessed the shot being fired at the deceased does not inspire our confidence. We are rather of the view that PW3 and others were there amongst the audience of the dance party of which the deceased Bhagwan Singh was also a part. The deceased however left the audience to urinate. When he was out urinating, he was shot at by some one. Hearing the shot, the witnesses arrived and took the deceased to the police station and the hospital. At the police station, may be on strong suspicion or by guess-work, on the basis of past enmity, the accused were named as is the narration by PW2 during his cross-examination by the defence. Though PW1 and PW2 were declared hostile but no specific question was put to them to demonstrate that they turned hostile for any specific reason. PW3 tried to ensure that the accused who had implicated him and his son in another case be punished. To succeed in that errand, he tried his level best to pose as an independent witness even though it appeared, both from the testimony of formal witnesses as well of his own son, namely, Bhuri Singh (PW5), who stated that the deceased was uncle in relation to him, that he was closely related to the deceased. All of this coupled with the fact that the prosecution examined no independent witness despite the fact that the incident occurred at a time when a dance programme was on, keeping in mind the statement of PW9 that he took no pains to enquire from the members of the dance

party as to how the incident unfolded as also that there was no recovery from the accused of any incriminating material to lend corroboration to the prosecution story, leaves us with no option but to extend the benefit of doubt to the two accused.

35. At this stage, though it is not required as we have already taken a decision to extend the benefit of doubt to the two accused, we may observe that there was no convincing evidence to indicate that Mahendra Singh had shared common intention with Geetam Singh to whom the role of firing at the deceased was attributed. Mahendra Singh was attributed only the role of stopping the deceased without disclosing whether he exhorted the main shooter to finish off the deceased or that he caught hold of the deceased with a view to immobilise him so as to enable the shooter to finish off the deceased. Further, the alleged weapon of assault is a country made pistol which can easily be concealed. It is not shown that when Mahendra Singh stopped the deceased, Geetam Singh had already taken out his gun. Under the circumstances, in absence of any evidence of a premeditated plan, fastening liability on accused Mahendra Singh by invoking the provisions of Section 34 IPC was not justified. However, surprisingly, both the accused were tried for the charge of murder read with Section 34 I.P.C. when, in the facts of the prosecution case, the main shooter should have been tried with the charge of murder simpliciter, punishable under Section 302 I.P.C., and the other with the aid of Section 34 I.P.C.

36. In view of the foregoing discussion, we are of the considered view that prosecution has not been able to establish the guilt of the accused-appellants beyond reasonable doubt and, therefore, the accused-appellants are entitled to the benefit of doubt. Consequently, the appeal is **allowed**. Both the appellants are acquitted of the charge for which they have been tried. The appellant No. 1 (Mahendra Singh Baghel) is reported to be on bail, he need not surrender subject to compliance of the provisions of Section 437 A CrPC before the trial court below. In so far as appellant no. 2 (Geetam Singh Baghel) is concerned, he is reported to be in jail. He shall be released forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437 A CrPC before the trial court below.

37. Let a certified copy of this order and the record of the trial court be sent to the trial court forthwith for information and compliance.

(2021)01ILR A1260
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2020

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Appeal No. 8378 of 2008
With
Criminal Appeal No. 7424 of 2008 & 7517 of 2008

Keshav Singh @ Kesho...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Birendra Kaushik, Sri Chandra Kumar Rai, Sri Noor Mohammad, Sri Vineet Kumar Singh, Sri Sukhvir Singh

Counsel for the Opposite Party:
A.G.A., Sri Pankaj Sharma

A. Criminal Law - Code of Criminal Procedure,1973 - Section 383 - Indian Penal Code,1860 - Section 302/120B - Arms Act,1959 - Section 25 - appellants with their common intention to kill the deceased is indicated by their conduct, the manner of assault, the weapon used, the situs of the injuries and their nature and there was preconcert as shown by the evidence of PWs' 1, 2 and 4-Their common intention is fully established by the circumstances and events that unfolded in the prosecution story, duly corroborated by PW-1, PW- 2 and PW- 4. –minute discrepancies in ocular version and medical evidence does not vitiate the proceeding and trustworthiness of witnesses-trial court rightly observed the matter- The trial court has wrongly appreciated the evidence on the point of the criminal conspiracy without giving any cogent reasoning as to how and in what manner the appellant hatched the criminal conspiracy along with the other 4 appellants-appellant gets benefit of doubt in hatching conspiracy and acquitted while other four appellants sentence is affirmed.(Para 1 to 71)

B. It is observed that undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of the prosecution witnesses. A witness cannot be expected to possess a photographic memory and to recall the details of an incident verbatim. Ordinarily, it so happens that a witness is overtaken by events. A witness could not have anticipated the occurrence which very often has an element of surprise. The mental faculties cannot, therefore, be expected to be attuned to absorb all the details. Thus, minor discrepancies were bound to occur in the statement of witnesses. The evidence of relative cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. (Para 34)

The appeal is partly allowed. (E-5)

List of Cases cited:-

1. Prithu @ Prithi Chand & anr. Vs St. of H.P. (2009) 11 SCC 588

2. St. of U.P. Vs M. K. Anthony (1985) 1 SCC 505

3. Mangu Khan & ors. Vs St. of Raj. (2005) AIR SC 1912

4. Madan Gopal Kakkad Vs Naval Dubey & anr. (1992) 3 SCC 204

5. Dilip Singh & ors.Vs St. of Punj. (1953) AIR SC 364

6. Stalin Vs State reptd. by Inspr of Police CRLA No. 577 of 2020

7. R. Shaji Vs St. of Ker. (2013) 14 SCC 266

8. Yogesh Singh Vs Mahabeer Singh & ors. (2017) 11 SCC 195

(Delivered by Hon'ble Sanjay Kumar Pachori, J.)

1. The present appeals are filed against the judgment and order passed by Additional Sessions Judge, Court No. 2 Mathura, on 22.10.2008 in Sessions Trial No. 637 of 2005 by which the appellants Keshav Singh @ Kesho, Bhuri Singh @ Bhura, Surendra Singh and Jagdish Singh have been convicted for the offences punishable under section 302 Indian Penal Code ("I.P.C.") and the appellant

Ghanshyam for the offence punishable under section 302 read with section 120-B I.P.C. In addition thereto, the appellants Keshav Singh @ Kesho and Bhuri Singh @ Bhura have also been convicted for the offence punishable under section 25 Arms Act. The punishment awarded to the appellants for their conviction noticed above is as follows; imprisonment for life with a fine of Rs.5,000/- each and default sentence of six months additional imprisonment under section 302 I.P.C., and section 302 read with section 120-B I.P.C.; one year's rigorous imprisonment with fine of Rs. 500/- each and default sentence one-month additional imprisonment for section 25 Arms Act. The sentences were directed to run concurrently.

PROSECUTION CASE

2. Prosecution case in brief, as could be elicited from the FIR lodged by Balveer (PW- 1), is that the appellants Ghanshyam, Keshav Singh @ Kesho, Bhuri Singh @ Bhura, Surendra Singh and Jagdish Singh had enmity with informant's brother Ranveer Singh (deceased) as they suspected that Ranveer Singh had informed the police about Ghanshyam's illegal arms factory, which was seized by the police on 10.6.2005. Due to this enmity, on 19.7.2005, at about 6.30 a.m., while Ranveer Singh was going to his *Nauhara* along with his wife Smt. Guddi Devi (PW- 2) and daughter Asha (not examined), when he reached in front of the house of Ghanshyam, the appellants Keshav Singh, Bhuri Singh, Surendra Singh, and Jagdish Singh, ambushed him and fired shots at Ranveer Singh by rifle and unlicensed pistols. On receiving gunshot injuries, Ranveer Singh died at the spot. Hearing the gunshots, Hakim Singh (not examined) and Devendra Singh (PW- 4) arrived at the spot. The appellants threatened them and fled away from the spot. According to the prosecution, Ghanshyam Singh had hatched the conspiracy to murder Ranveer Singh and, before the incident, he and other accused-appellants had threatened the informant.

3. The First Information Report1 dated 19.7.2005 (Ex. Ka-3) had been registered under section 302, 506, 120-B I.P.C. against the appellants at Police Station- Baldev, District Mathura at 7.15 a.m. by Balveer Singh (PW- 1). The distance between the place of occurrence and Police Station is 14 KM. The special report (SR Report) of the present case had been sent to the Magistrate on the same day at 8.30 a.m. PW-6 Sub-Inspector2 B.R. Zaidi, after receiving a telephonic information reached the place of occurrence at around 7.00 a.m., during the investigation, he recovered two used cartridges (which were .315 & .12 bore) and blood-stained earth and plain earth from the place of the incident, the proceeding of the inquest had been completed at 10.30 a.m. The body of the deceased was sent for autopsy with other police papers (Ex. Ka-11 to Ex. Ka-14).

4. PW-3 Dr. B. D. Bhaskar conducted the post-mortem examination of the body of the deceased on 20.7.2005 at 1.30 p.m. and opined that the cause of death was 'shock and haemorrhage due to ante-mortem injuries'. The post-mortem (Ex. Ka-2) disclosed presence of 6 ante-mortem injuries on the corpse of Ranveer Singh. These are as under:

1. Wound of entry of firearm size 0.5 cm x 0.5 cm x cavity deep present on the left side outer aspects lower chest, 17 cm below of left nipple at 5 'O' clock position.

2. Wound of exit of firearm size 2 cm x 3 cm x cavity deep present on back of

right side chest lower part 3 cm away from mid line connected with injury no. 1.

3. Wound of entry of firearm size 01 cm x 01 cm x cavity deep present on the right side forearm just below the elbow joint (Right) anterior aspect.

4. Wound of exit of firearm size 02 cm x 1.5 cm x bone deep present on the posterior aspect of left elbow just connected with injury no. 3 wounding bone.

5. Wound of entry of firearm size 01 cm x 01 cm x cavity deep present on the right side chest lower part 15 cm below right nipple at 7 'O' clock position.

6. Abrasion size 02 cm x 01 cm on the right side of neck middle part.

5. During the investigation, on 29.7.2005 at 5.30 a.m., PW-6 S.I. B. R. Zaidi arrested the appellants Bhuri Singh and Surendra Singh. He reached the recovery place as told by the appellant Bhuri Singh. At 6.45 a.m., he recovered an unlicensed pistol .315 bore on the disclosure statement and pointing out of the appellant Bhuri Singh from the bushes near Kashimpur mod, Madora canal at Barauli Road. On 4.8.2005 at 8.30 a.m. he also arrested the appellants Keshav Singh and Jagdish Singh near Khanpur crossing at 9.30 a.m., on the disclosure statement and pointing out of Keshav Singh, he recovered another unlicensed pistol .12 bore from a closed Dal Mill near Hathkoli Road, seizure memo of the two recovered pistols (Ex. Ka-17, Ex. Ka-19) have also been prepared. Two F.I.R.'s of case crime nos. 124 of 2005 and 129 of 2005 (Ex. Ka- 28, Ex. Ka- 5) were also lodged. All the articles recovered during the investigation were sent for forensic examination.

6. S.I. Prahlad Singh (PW- 7) after receiving the investigation of case crime no. 129 of 2005, under Section 25 Arms Act, on 4.8.2005, prepared a site map (Ex. Ka-22) of the recovery place of unlicensed pistol and after completion of the investigation and after obtaining requisite permission from the District Magistrate, submitted a charge sheet (Ex. Ka-23) against the appellant Keshav Singh. PW- 8 S.I. Raudas Singh also after receiving the investigation of case crime no. 124 of 2005, under Section 25 Arms Act, on 29.7.2005, prepared a site map (Ex. Ka-25) of the recovery place of unlicensed pistol and after completion of the investigation and after obtaining requisite permission from the District Magistrate, submitted a charge sheet (Ex. Ka-26) against the appellant Bhuri Singh.

7. After completion of the investigation, a charge sheet (Ex. Ka-21) was submitted against the appellants, under sections 302, 506, 120-B I.P.C by PW- 6 S.I. B. R. Zaidi. On committal, the trial court framed charges against the appellants Keshav Singh, Bhuri Singh, Surendera Singh and Jagdish Singh under Sections 302, 506 I.P.C. and also framed charges against the appellant Ghanshyam under Sections 302 read with section 120-B I.P.C. The trial court also charged the appellants Keshav Singh and Bhuri Singh, under Section 25 Arms Act. The appellants denied the charges and claimed trial.

8. To prove the charges against the appellants, the prosecution examined as many as 8 witnesses, namely PW- 1 Balveer Singh (informant/younger brother of the deceased), PW- 2 Smt. Guddi Devi (wife of the deceased) and PW- 4 Devendra Singh (cousin brother of the deceased) as eye-witnesses and also produced formal witnesses, namely PW-3 Dr. B.D. Bhaskar, PW- 5 Head Moharrir Awan Kumar Dixit

(Scribe of the F.I.R.), PW- 6 S.I. B.R. Zaidi (Investigating Officer), PW- 7 S.I. Prahlad Singh and PW- 8 S.I. Raudas Singh, to prove the exhibited documents and also produced material objects. A Forensic Scientific Laboratory report (paper no. 28 Ka/6 to 28 Ka/8) has also been submitted by the prosecution. The prosecution proved certain material exhibits, namely, an unlicensed pistol .315 bore as material Ex. No.-1, an unlicensed pistol .12 bore as material Ex. No.-2, used cartridge .315 bore as material Ex. No.-3, used cartridge .12 bore as material Ex. No.-4, blood stained earth as material Ex. Ka-5, plain earth as material Ex. No.-6. The prosecution proved F.I.R. dated 4.8.2005 and its G.D. report no. 16 as secondary evidence by PW-8 S.I. Raudas Singh as Ex. Ka-28 and Ex. Ka-29.

9. The appellants were examined under section 313 Cr.P.C., wherein they denied the questions put to them and stated that they have been falsely implicated on account of village partibandi, enmity of election, the F.I.R. has been lodged ante-timed, the deceased was a history-sheeter, he was killed at outskirts of the village by his companions in the intervening night and his dead body was brought by his family members. The appellant Bhuri Singh stated that his left leg and left arm were fractured and he was unable to move. The appellants filed certain certified copies as documentary evidence for showing the criminal history of the deceased etc. The appellants, however, did not lead any oral evidence in support of their defence.

FINDINGS OF THE TRIAL COURT

10. The trial court on the basis of the evidence held that the testimony of PW- 1 Balveer Singh, PW- 2 Smt. Guddi Devi, and PW- 4 Devendra Singh is cogent, credible, and trustworthy with regard to the guilt of the accused-appellants; the evidence of relative cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. The trial court further held that it is trite law that a mere information about an incident on phone would not be treated as a first information report. F.I.R. is not an encyclopedia of the case, PW- 1 Balveer Singh lodged a prompt F.I.R. and narrated all the incriminating facts of the case without any delay; he had seen the incident; the defense side had not impeached his evidence. On the basis of evidence that an illegal arms factory had been seized by PW- 6 on 10.6.2005; due to this enmity the appellants had threatened the deceased prior to the incident and the incident had taken place in front of the house of Ghanshyam; other appellants Keshav Singh, Bhuri Singh, Surendra Singh, and Jagdish Singh hid themselves in the house of Ghanshyam, therefore, Ghanshyam is also liable for conspiracy.

11. The trial court also held that PW-2 Smt. Guddi Devi and PW- 4 Devendra Singh were eye-witnesses of the incident; their names were disclosed in the F.I.R. as eye-witnesses of the incident with regard to the evidence of PW- 4 the trial court held that there is sufficient explanation regarding the delay in recording of the statement by the Investigating Officer. The trial court also considered the close distance from where the witnesses saw the incident and held that even if there is some discrepancies but it would not affect the otherwise credible evidence of the witnesses; the trial court also held that according to the Medical Jurisprudence time of death as suggested by the PW- 6

Dr. B. D. Bhaskar can vary 6 hours plus/minus and PW- 6 in his examination-in-chief admitted that the death is possible at 6.30 a.m. on 19.7.2005. The trial court further held that the used cartridges recovered from the place of the incident were shot from the unlicensed pistols which had been recovered at the instance of Keshav Singh and Bhuri Singh. The FSL report corroborated the above fact.

12. The trial court also dealt with the inconsistency in the evidence of PW- 1 Balveer Singh and PW-6 S.I. B.R. Zaidi by pointing out that PW- 1 Balveer Singh stated that the police recovered the blood in polythene from the place of occurrence by PW- 6 whereas PW- 6 S.I. B.R. Zaidi denied this fact. It held that this inconsistency in ocular evidence is minor, a witness cannot be expected to possess a photographic memory so as to recall the details of an incident and it does not shake the basic version of the prosecution case. The trial court also recorded its finding that opportunity was provided to accused-appellants to explain the incriminating facts of the prosecution evidence, but they had not given any explanation.

13. On the basis of the evidence, the trial court did not accept the submission urged on behalf of the appellants and after appreciating the oral and documentary evidence, the trial court held that it is proved beyond all reasonable doubt that the appellants Keshav Singh, Bhuri Singh, Surendra Singh and Jagdish Singh had caused injuries to Ranveer Singh, which resulted in his death, under conspiracy hatched by Ghanshyam. The trial court convicted and sentenced the appellants as indicated herein above. Though, however, the trial court acquitted the appellants Keshav Singh, Bhuri Singh, Surendra Singh, and Jagdish Singh of the charge of offence punishable under section 506 I.P.C.

14. Being aggrieved by the judgment and order dated 22.10.2008, the appellants have preferred these appeals.

SUBMISSIONS BEFORE THIS COURT

15. We have heard Sri Sukhvir Singh, learned counsel for the appellants; Sri Patanjali Mishra, learned A.G.A. for the State; and have perused the record.

16. Learned counsel for the appellants assailing the judgment of the trial court argued that death of the deceased occurred in the night hours of 18/19.7.2005 at about 1.30 a.m., as is established by the post-mortem report which suggests that the death of the deceased occurred 36 hours prior to the post-mortem. The deceased had criminal history and, therefore, had several enemies and might have been killed by some other persons at another place, as is reflected by the circumstance that inquest of the body of the deceased was not at the place of occurrence. Admittedly, the police had arrived at the spot before lodging of the F.I.R. which suggests that the incident had occurred much earlier than alleged and in some other manner and only later a false prosecution story was developed. It was urged that the trial court has not properly appreciated and considered the entire evidence on record. The prosecution has failed to prove the case against the appellants beyond all reasonable doubts and the impugned judgment is liable to be set aside.

17. **Per Contra;** learned A.G.A. refuted the arguments on behalf of the appellants and submitted that this is a case

of broad daylight murder with direct evidence to prove the guilt. The exact time of death of the deceased Ranveer has neither been nor could be estimated by PW-3 Dr. B.D. Bhaskar. The incident took place on 19.7.2005 at 6.30 a.m. in front of the house of Ghanshyam and there was sufficient evidence that he had hatched conspiracy of the murder and had a role in it. The F.I.R. was registered against all the appellants on the same day at 7.15 a.m. promptly (i.e. within 45 minutes of the incident); it is not expected that wrong persons would be implicated and the real culprits would be spared. The prosecution has successfully proved prompt lodging of the F.I.R. as well as the date, time, place and manner of the occurrence and the assault as well as injuries caused to the deceased. The trial court has properly appreciated the evidence and rightly held the appellants guilty. The findings recorded by the trial court are based on proper appreciation of the evidence. The judgment of the trial court is liable to be affirmed.

DISCUSSION

18. Before us, the appellants arguments are:*firstly*, no strong motive for the crime proved because it is proved that no illegal arms factory of Ghanshyam was unearthed/seized, *secondly*, the incident occurred in the night, nobody witnessed the incident, which is borne out from following circumstances: (a) medical evidence ruled out the time of death, (b) police had arrived at the spot even before lodging the F.I.R., (c) inquest was conducted at the *Nauhara* and not at the spot; and thirdly, the eye-witnesses are not reliable because:

(i) There is discrepancy in the statement of PW-1 on one hand and PW- 2 & PW- 4 on the other with regard to the place from where the shots were fired. One set states that shots were fired from the door/chabutara of Ghanshyam's house and the other stated that they were fired from the Khadanja.

(ii) The prosecution witness though relatives received no fire-arm injury.

(iii) There is also discrepancy in respect of the role of Ghanshyam. As there is an improvement from the version taken in the F.I.R. inasmuch as role of exhortation has been attributed for Ghanshyam in the testimony whereas in the F.I.R. no presence of Ghanshyam was shown though suspicion was expressed with regard to his hand being behind the murder.

19. We have examined the contentions of the appellants and have gone through the entire evidence on record with care and caution.

20. Now, we shall proceed to examine the argument on behalf of the appellants, that is the incident was of night and was already reported to the police and that, later, story was developed by lodging F.I.R.

21. As per prosecution case, the incident took place on 19.7.2005 at 6.30 a.m. and its F.I.R. (Ex. Ka-3) was registered by PW-5 H.M. Awan Kumar Dixit on the basis of written complaint (Ex. Ka-1) against the appellants on the same day at 7.15 a.m. promptly (i.e. within 45 minutes of the incident), and he sent the special report (SR Report) of the case at 8.30 a.m. on the same day. The carbon copy of G.D. entry of written report (Ex. Ka-4) was duly proved by PW-5. This fact gets supported by statement of PW-1 Balveer Singh, who stated that he reached the police station at around 7.00 a.m. and

had lodged the F.I.R. within 15 minutes. It is proved on record that PW-6 S.I. B.R. Zaidi, investigating officer of the case had reached the place of the incident at around 7.00 a.m. vide Ravangee G.D. Report No. 10 on receipt of telephonic information of the incident from Hakim Singh, but the name of accused, time of murder had not been disclosed in the telephonic information.

22. Section 154 of the Code, requires an officer in charge of a police station to reduce to writing every information relating to the commission of a cognizable offence, if given orally to such officer. It further requires that such information, which has been reduced to writing, shall be read over to the informant and the information reduced to writing or given in writing by the person concerned shall be signed by the person giving it.

23. On a close scrutiny of the evidence, we observe that the appellants did not dispute the time of lodging of the F.I.R., time of dispatch of Special Report of the case to the Magistrate and the time of commencement of the inquest proceeding in as much as no suggestion was put to the witnesses on the above aspects.

24. It is trite law that a mere information about an incident on phone would not be treated as a first information report. The object and purpose of giving such telephonic message is not to lodge the first information report, but to request the officer in charge of the police station to reach the place of occurrence. Every telephonic information about commission of a cognizable offence irrespective of nature and details of such information cannot be treated as F.I.R. (Vide: **Ramesh Baburao Devaskar and Others v. State of Maharashtra, Ramsinh Bavaji Jadeja v. State of Gujarat, Dhananjoy Chatterjee @ Dhana v. State of W.B., Soma Bhai v. State of Gujarat, Tapinder Singh v. State of Punjab and Another**).

25. It is equally well-settled that first information report is not a substantive piece of evidence and it need not be an encyclopedia containing all the minute details of the prosecution case. We are thus of the view that the telephonic information of Hakim Singh received by the police cannot be treated as the first information report of the incident/case.

26. We shall now examine the evidence pertaining to the incident. There are three eye-witnesses, namely, PW- 1 Balveer Singh, PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh. All of them have consistently stated that on the date of incident, Ranveer Singh (deceased) was going to his *Nauhara* along with his wife Smt. Guddi Devi and daughter Asha, as soon as he reached in front of the house of Ghanshyam, the appellants Keshav Singh, Bhuri Singh, Surender Singh and Jagdish Singh fired shots at the deceased which resulted in his death on the spot. The incident took place over the Khadanja, the width of which was around 4 steps. At the time of the incident PW- 2 Smt. Guddi Devi was 20-25 steps behind her husband. She reached the scene of occurrence first, after her, PW- 1 Balveer Singh, PW- 4 Devendra Singh and Hakim Singh reached there. Hakim Singh had informed the police by telephone at around 6.30 a.m. This fact is corroborated by PW- 5 H.M. Awan Kumar Dixit, who stated that the telephonic information of the incident was received at 6.30 a.m. which was passed on to the Station Officer, it is proved on record that the then Station Officer PW-6 B.R. Zaidi

had reached the place of the incident at around 7.00 a.m. vide Ravangee G.D. Report no. 10.

27. PW- 6 S.I. B.R. Zaidi, after inspecting the place of the incident as pointed out by the informant, prepared a site map (Ex. Ka-7). He recovered two used cartridges (which were .315 & .12 bore) from the place of occurrence and prepared a seizure memo (Ex. Ka.-8). He also recovered blood-stained earth and plain earth from the place of the incident, sealed them separately and prepared another seizure memo (Ex. Ka-9). He also completed the inquest proceedings at the *Nauhara* on 19.7.2005 at 10.30 a.m. and prepared the inquest report (Ex. Ka- 10). PW- 6 proved all those steps of the investigation.

28. On behalf of the appellants, it is pointed out that there is a material contradiction in the statements of PW- 1 Balveer Singh, on the one hand and PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh on the other. PW- 1 Balveer Singh stated in his cross-examination that the appellants Keshav Singh, Bhuri Singh, Surendra Singh and Jagdish Singh fired from the door and chabutara of the house of Ghanshyam, whereas PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh stated that the appellants Keshav Singh, Bhuri Singh, Surendra Singh and Jagdish Singh fired from Khadanja in front of the house of Ghanshyam.

29. PW- 1 Balveer Singh categorically stated in his cross-examination that Ranveer Singh, Smt. Guddi Devi and Asha used to go to the *Nauhara* every day for feeding his cattle at around 6-6.30 a.m., he witnessed the incident within minutes of his leaving the house at around 6.30 a.m. The appellants fired several shots upon the deceased though three gunshots hit his brother. Smt. Guddi Devi and Asha who were about 15 steps behind Ranveer saw the incident and ran towards their house. Ghanshyam's house has a chabutara 4 steps from the place of the incident, the deceased was shot from 4 steps away from chabutara. The incident took place over the Khadanja. After the incident, he saw two used cartridges lying near the body of the deceased. He and his family members brought Ranveer's corpse inside the *Nauhara* and kept the dead body there. Thereafter, he went to the police station for lodging the report after about 15 minutes of the incident.

30. PW- 1 Balbeer Singh lodged the F.I.R. with utmost promptitude within 45 minutes of the occurrence. The prompt lodging of F.I.R. by him, in which all necessary details of the incident have been given, lends enough assurance to the presence of PW- 1 at the spot. A promptly lodged F.I.R. reflects the first-hand account of what has actually happened, and who was responsible for the offence in question. PW- 6 S.I. B.R. Zaidi recovered two used cartridges from the place of the incident and the site map (Ex. Ka-7) has been prepared by the investigating officer with the assistance of PW- 1 Balveer Singh which also supports the presence of the PW- 1 at the place of occurrence at the time of the incident. No suggestion was put to this witness that he did not see the incident. Thus, the testimony of PW- 1 Balveer Singh is to be treated as that of an eye-witness.

31. PW- 2 Smt. Guddi Devi consistently stated in her cross-examination that she used to go to the

Nauhara with her husband every day at 6 a.m. Ghanshyam's two houses were situated on the way between her house and *Nauhara*. The incident took place in front of the second house of Ghanshyam, which is near to her *Nauhara* and the house of Hakim Singh is adjacent to her *Nauhara*. The width of Khadanja in front of the house of Ghanshyam is equal to 3 steps, at the time of the incident her husband was 20 - 25 steps away from her and her brother-in-law PW- 1 Balveer Singh was 20-25 steps behind her. Keshav Singh, Bhuri Singh, Surendra Singh, and Jagdish Singh shot fire from the Khadanja, she ran back and hid behind the wall of Guddu's house. Her husband was shot when he was standing and some shots were fired even when he fell down. Ghanshyam did not fire at Ranveer Singh, when she reached the spot her husband was dead, PW- 1 Balveer Singh, PW- 4 Devendra Singh, and Hakim Singh also reached there.

32. PW- 4 Devendra Singh supported the prosecution version and stated in his cross-examination that he was sitting on the chabutara of Hakim Singh, distance of the chabutara from the place of the incident will be about 20 steps. All shots were fired from Khadanja. At the time of the incident, PW- 2 Smt. Guddi Devi was 20 steps behind her husband, PW- 1 Balveer Singh was also behind 20-25 steps behind from PW- 2 Smt. Guddi Devi.

33. As to what would be the consequence of such discrepancy in the testimony of the eye-witnesses, it would be useful to notice few decisions of the Apex Court. In **Prithu @ Prithi Chand & Another v. State of Himanchal Pradesh (2009) 11 SCC 588,** the Apex Court has observed as under: (SCC p. 591, para 14)

"14. In Bharwada Bhoginbhai Hirjibhai v. State of Gujarat8, it was observed that undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of the prosecution witnesses. A witness can not be expected to possess a photographic memory and to recall the details of an incident verbatim. Ordinarily, it so happens that a witness is overtaken by events. A witness could not have anticipated the occurrence which very often has an element of surprise. The mental faculties cannot, therefore, be expected to be attuned to absorb all the details. Thus, minor discrepancies were bound to occur in the statement of witnesses."

34. In **State of U.P. v. M. K. Anthony (1985) 1 SCC 505,** the Apex Court has observed as under: (SCC pp. 514-15, para 10)

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of

the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals..."

35. In **Yogesh Singh v. Mahabeer Singh and Others, (2017) 11 SCC 195,** the Apex Court observed as under: (SCC p. 212, para 29)

"29. It is well settled in law that the minor discrepancies 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 material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments 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 contradiction and 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)

36. Upon close scrutiny of the evidence, we observe that the appellants did not put any questions or suggestions to the eye witnesses PW-1 Balveer Singh, PW-2 Smt. Guddi Devi and PW- 4 Devendra Singh on material facts such as: (i) On 19.7.2005, Ranveer Singh, along with his wife PW- 2 Smt. Guddi Devi and his daughter Km. Asha, was going to his *Nauhara* from his house; (ii) the occurrence had taken place on 19.7.2005 at around 6.30 a.m. in front of the house of appellant Ghanshyam, at Khadanja; and (iii) the appellants Keshav Singh @ Kesho, Bhuri Singh @ Bhura, Surendra Singh, and Jagdish had shot fired at the deceased with unlicensed pistols.

37. Keeping the body of the deceased at *Nauhara* is quite natural because why would family members let the body lie on Khadanja street. Minimum respect to the dead is quite natural. Moreover, the place of occurrence has been established by the prosecution witnesses of fact as well as formal witnesses by recovery of blood-stained earth/plain earth; cartridges; site plan, etc. No question or suggestion was put to the I.O. as to why they would falsely implicate.

38. Discrepancy amongst the witness with regard to the place from where shots were fired does not demolish the substratum of the prosecution case as the

Khadanja is quite narrow and if one shooter stands on one end of the Khadanja, a witness may perceive that he is firing from the house adjoining the Khadanja. No question or suggestion was put to the witnesses as to why they would falsely implicate the accused/main shooters. Further, no question was put that the main shooters were not known to the witnesses. In view of the above discussion, we are of the considered opinion, that the above contradictions do not affect the core of the prosecution case.

39. Evidence of PW- 1 Balveer Singh, PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh is assailed on the ground that, according to the post-mortem report, death occurred 36 hours before the post-mortem, therefore, the incident did not occur at 6.30 a.m. on 19.7.2005. Hence, none of them have seen the incident.

40. Dr. B.D. Bhaskar (PW- 3), who conducted the post-mortem (Ex. Ka.-2) of the body of the deceased on 20.7.2005 at 1.30 p.m., during his cross-examination, stated that the death could have occurred 36 hours before the post-mortem examination. Taking advantage of the above statement, the learned counsel for the appellants vehemently argued that the deceased, who had criminal-history, was killed by other persons at a different place in the night hours of 18/19.7.2005, say at about 1.30 a.m., therefore, the incident did not take place at 6.30 a.m. on 19.7.2005 as alleged by the prosecution.

41. PW- 3 Dr. B.D. Bhaskar, had formed his opinion on the basis of *rigor mortis* found at the time of the post-mortem. In his examination-in-chief, he stated that it is possible that the death of the deceased occurred at 6.30 a.m. on 19.7.2005. The post-mortem report (Ex. Ka-2) discloses that the deceased sustained three entry wounds and two exit wounds. The post-mortem report also indicates that all firearm wounds were caused from a close-range.

42. In this regard it be observed that it is well settled position of law that doctor can never with precision determine the exact time of death or the duration of injuries. In **Mangu Khan and Others v. State of Rajasthan, AIR 2005 SC 1912,** the Apex Court has observed as under: (AIR p. 1916, para 9)

"9...In the first place, neither post-mortem report suggests that the death had taken place exactly 24 hours before the post-mortem was conducted. All that the post-mortem reports say is that the death had occurred "within 24 hours prior to PM Examination." Undoubtedly, the post-mortem examination was carried out at 11.00 a.m./12 noon on 11.7.1997. In other words, the post-mortem reports suggest that the death might have occurred any time after 11.00/12.00 noon of 10.7.1997. The contention urged by reference to text books on Forensic Medicine to show the time within which regor mortis develops all over the body also has no factual basis. It depends on various factors such as constitution of the deceased, season of the year, the temperature in the region and the conditions under which the body has been preserved. The record indicates that the body was taken from the mortuary. We notice that there is no cross-examination, whatsoever, of the doctor so as to elicit any of the material facts on which a possible argument could have been based. If these are the circumstances, then the presence of rigor mortis all over the body by itself cannot warrant the argument of the learned

counsel that the death must have occurred during the previous night. Acceptable ocular evidence cannot be dislodged on such hypothetical basis for which no proper grounds were laid."

43. In **Madan Gopal Kakkad v. Naval Dubey and Another (1992) 3 SCC 204,** the Apex Court has observed: (SCC p. 221, para 34)

"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court."

44. In the instant case, as per the prosecution, the death of the deceased had occurred about 36 hours before the post-mortem. As we have already observed that PW-3 Dr. B.D. Bhaskar had formed his opinion on the basis of *rigor mortis* found at the time of the post-mortem on 20.7.2005 at 1.30 p.m. he estimated that the death of deceased could have been caused 36 hours before the post-mortem. The post-mortem report (Ex. Ka.-2) is just an estimate of the time and does not give the exact time of the death. In fact, PW- 3 in his examination-in-chief did state that it is possible that the death could have taken place at 6.30 a.m. on 19.7.2005.

45. Learned counsel for the appellants relied upon **Moti v. State of U.P.** wherein Hon'ble Supreme Court, dealing with a case where stomach of the deceased was found empty and the prosecution evidence was that the murder took place shortly after the deceased had his last meal, observed "in our opinion, a serious doubt as to the time of incident and the presence of the eye-witnesses at the time of incident and their narration of the incident also becomes doubtful." But in the instant case, there is no such doubt, as, according to the post-mortem report (Ex. Ka-2), stomach of the deceased was found empty and there is no evidence led by the prosecution that the deceased had taken food shortly before the incident. Further, PW- 2 Smt. Guddi Devi stated that the deceased had not left the house after having breakfast nor he had gone to answer the call of nature before the incident.

46. It has been observed in various cases by Hon'ble Supreme Court that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not to be used to rule out reliable ocular account.

47. In **Yogesh Singh v. Mahabeer Singh and Others, (2017) 11 SCC 195,** the Apex Court observed as under: (SCC p. 217, para 43)

"43. ....In any event, it has been consistently held by this Court that evidentiary value of medical evidence is only corroborative and not conclusive and, hence, in case of a conflict between oral evidence and medical evidence, the former

is to be preferred unless the medical evidence completely rules out the oral evidence. [See: Solanki Chimanbhai Ukabhai v. State of Gujarat, Mani Ram v. State of Rajasthan, State of U.P. v. Krshna Gopal, State of Haryana v. Bhagirath, Dhirajbhai Gorakhbhai Nayak v. State of Gujarat, Thaman Kumar v. State (UT of Chandigarh), Krishnan v. State, Khambam Raja Reddy v. Public Prosecutor, State of U. P. v. Dinesh, State of U.P. v. Hari Chand, Abdul Sayeed v. State of M.P. and Bhajan Singh v. State of Haryana]

48. In the instant case, the medical evidence is not in absolute conflict with ocular evidence neither with regard to the time of the incident as also with regard to the injuries found on the body of the deceased and it cannot be said that the medical evidence is in complete conflict with the prosecution story that the deceased died of gunshot wounds early morning at about 6.30 a.m. on 19.7.2005. The medical evidence is in conformity with the ocular testimony of all the eye-witnesses. We are thus of the firm view that there is no inconsistency between the ocular evidence and medical evidence and on the basis of mere estimation of the time of death, ocular evidence of PW- 1 Balveer Singh, PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh can not be discarded.

49. Evidence of PW- 1 Balveer Singh, PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh has been assailed on the ground that they are close relatives of the deceased, hence their testimony is not reliable.

50. In this regard it be observed that it is settled position of law that the testimony of a relative is not to be treated as inherently tainted, the court only needs to ascertain whether the evidence is inherently probable, cogent and consistent. In **Dilip Singh and Others v. The State of Punjab, AIR 1953 SC 364, (3 Judge)** the Apex Court has observed as under: (AIR p. 366, para 26)

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high & there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

51. In **Yogesh Singh v. Mahabeer Singh and Others, (2017) 11 SCC 195,** the Apex Court observed as under: (SCC p. 212, para 28)

"28. A survey of judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witness is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the

convict/accused in a given case. Thus, the evidence can not be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly, should be relied upon. (See Anil Rai v. State of Bihar, State of U. P. v. Jagdeo, Bhagaloo Lodh v. State of U. P., Dahari v. State of U.P., Raju v. State of T.N., Gangabhavani v. Rayapati Venkat Reddy and Jodhan v. State of M.P.)

52. Keeping in mind, the settled position of law, we are of the considered view that merely because of PW- 1 Balveer Singh, PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh are family members of the deceased their evidence cannot per se be discarded. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused-appellants cannot be a ground to discard the evidence which is otherwise cogent and credible.

53. Testimony of PW- 4 Devendra Singh has been challenged by the appellants by contending that his statement under section 161 Cr.PC. has been recorded by the investigating officer after about one-month of the incident and the delay has not been explained by the prosecution, but from the record, we observe that on the issue of delay in recording statement of PW- 4 Devendra Singh, no question was put to PW-6 S.I. B.R. Zaidi, investigating officer, as to why there was delay in recording the statement. PW- 4 Devendra Singh, on the other hand, explained the delay by stating that on the second day of the incident he had gone for 10-15 days to his relatives. Thus, the plea of the appellants that on account of delay in recording statement of PW- 4 his testimony is not credit worthy has no substance.

54. Credibility of the testimony of PW- 1 Balveer Singh, PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh has also been attacked by the appellants on the ground that they have not received any firearm injury on their body. In this regard, we may observe that PW- 2 Smt. Guddi Devi was 20-25 steps behind the deceased, at the time of the incident. She categorically stated in her cross-examination that the appellants did not fire at her. Moreover, she ran back and had hidden herself behind the wall of Guddu's house. PW- 4 Devendra Singh at the time of incident was sitting on the chabutara of Hakim Singh along with Hakim Singh. The distance between the chabutara of Hakim Singh and the place of incident is about 20 steps. The evidence of these eye-witnesses can not be doubted merely because they did not receive injury. Moreover, it is not the case that they had planned the murder of the entire family of the deceased.

55. At this stage, it is pertinent to deal with the motive behind the incident, according to the prosecution the accused suspected that on the information provided by the deceased, the police seized an illegal arms factory of the appellant Ghanshyam on 10.6.2005. As per the prosecution case, on 18.7.2005, a day before the incident, the appellants threatened the deceased, but with regard to extension of threat the evidence of PW- 1, PW-2 and PW- 4 is contradictory. It is an admitted fact that no F.I.R. prior to the incident in respect of extension of threat was registered against the appellants and the F.I.R. dated 10.6.2005 had not been registered against the appellants. It is also an admitted case of the prosecution that the appellants did not threaten the deceased till the evening of 18.7.2005.

56. Some other evidence with regard to the enmity between the deceased and the appellants has appeared in the cross-examination of PW- 1 Balveer Singh and PW- 4 Devendra Singh, which is that there was a dispute between Ranveer Singh and Ghanshyam regarding putting the cable in the house of Pangeevi Singh (cousin brother of the deceased); Ranveer had not beaten Ghanshyam and not put the cable by force; appellant Surendra's father Harishchandra had molested Vinod's wife (cousin sister-in-law of the deceased) before the incident and admitted his mistake; Ranveer was not a police informer; there was no enmity between Ranveer and appellants Keshav and Bhura; Ranveer had not wanted to kill Keshav and Bhura; and informant's father sold any land to Ghanshyam or Harishchand, informant wanted to take that land back from Ghanshyam.

57. In **Stalin v. State represented by the Inspector of Police criminal appeal No. 577 of 2020, (3 Judge),** decided on 9.9.2020, the Apex Court has observed as under: (para no. 8.1)

"8.1 As observed and held by this Court in the case of Jafel Biswas v. State of West Bengal (2019) 12 SCC 560, the absence of motive does not disperse a prosecution case if the prosecution succeed in proving the same. The motive is always in the mind of person authoring the incident. Motive not being apparent or not being proved only requires deeper scrutiny of the evidence by the courts while coming to a conclusion. When there are definite evidence proving an incident and eye-witness account prove the role of accused, absence in proving of the motive by prosecution does not affect the prosecution case."

58. The instant case based on direct evidence of the eye-witnesses, it is settled position of law that the motive is always in the mind of person authoring the incident. In case there is direct trustworthy evidence of the witnesses as to commission of an offence, motive loses its significance.

59. The prosecution duly proved the seizure memo of unlicensed pistol .315 bore (Ex. Ka-17) which has been recovered on the instance of the appellant Bhuri Singh and another seizure memo of unlicensed pistol .12 bore (Ex. Ka-19) which has also been recovered on pointing out of the appellant Keshav Singh. On this fact, the appellants have not asked any suggestion to the PW- 6 S.I. B.R. Zaidi on this aspect. The report of FSL (paper no. 28Ka/6 to 8) also proves the fact that the used cartridges recovered from the place of the incident were fired from the recovered pistols.

60. It was argued that the finding of conspiracy against the appellant Ghanshyam recorded by the trial court is untenable because the prosecution has improved the case against Ghanshyam. As per the prosecution case, in the F.I.R. the appellant Ghanshyam had hatched the criminal conspiracy along with other appellants to commit the murder of Ranveer Singh and in furtherance thereof appellants Keshav Singh, Bhuri Singh, Surendra Singh and Jagdish Singh hid themselves in Ghanshyam's house and came out from the house to fire at the deceased. Whereas, PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh have improved the prosecution case against Ghanshyam by stating that he was present at the place of occurrence and had exhorted other appellants to kill Ranveer Singh.

61. On persual of the entire evidence, we find that PW- 1 Balveer Singh, PW- 2

Smt. Guddi Devi and PW- 4 Devendra Singh have not stated a single word in their chief-examination in respect of criminal conspiracy or that the appellant Ghanshyam was the principal conspirator of the incident. On the other hand, PW- 2 and PW- 4 stated that Ghanshyam exhorted the other 4 appellants to kill Ranveer Singh, which is contradictory to the prosecution version taken in the FIR.

62. According to PW- 1 Balveer Singh, the assailants stayed 2 or 3 minutes at the place of the incident and he did not see them entering the house of Ghanshyam. PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh have developed the prosecution case and stated that Ghanshyam was present at the place of occurrence and he exhorted Keshav Singh, Bhuri Singh, Surendra Singh and Jagdish Singh to kill Ranveer Singh. It is a settled position of law that exhortation to other accused would amount the participation, the court has to evaluate the evidence very carefully for deciding whether that person had really done any such act. In the instant case, the case of exhortation against Ghanshyam is improved by PW- 2 and PW- 4 which is completely against the prosecution case taken in the F.I.R. It is an admitted case that no other role has been attributed to Ghanshyam by the prosecution.

63. It is the well-settled position of law that a conspiracy is rarely hatched in the open. There need not be any direct evidence to establish the same. Thus, it can be proved by way of inference on the basis of circumstantial evidence or by way of necessary implication.

64. In **R. Shaji v. State of Kerala (2013) 14 SCC 266,** the Apex Court has observed: (SCC p. 286, para 54)

"54. A criminal conspiracy is generally hatched in secrecy, owing to which, direct evidence is difficult to obtain. The offence can therefore be proved either by adducing circumstantial evidence, or by way of necessary implication. However, in the event that the circumstantial evidence is incomplete or vague, it becomes necessary for the prosecution to provide adequate proof regarding the meeting of minds, which is essential in order to hatch a criminal conspiracy, by adducing substantive evidence in the court. Furthermore, in order to constitute the offence of conspiracy, it is not necessary that the person involved has knowledge of all the stages of action. In fact, mere knowledge of the main object/purpose of conspiracy, would warrant the attraction of relevant penal provisions. Thus, an agreement between two persons to do, or to cause an illegal act, is the basic requirement of the offence of conspiracy under the penal statute. (vide: Mir Nagvi Askari v. CBI, Baldev Singh v. State of Punjab, State of M.P. v. Sheetla Sahai, R. Venkatkrishnan v. CBI, S. Arul Raja v. State of T.N., Monica Bedi v. State of A.P. and Sushil Suri v. CBI)

65. There is no reliable and cogent evidence brought on record to suggest that the appellant Ghanshyam had conspired with the other accused except four circumstances, namely, *firstly*, the appellant Ghanshyam suspected that the deceased had informed the police about his illegal arms factory which was seized by the police on 10.6.2005, *secondly*, Ghanshyam with other appellants had threatened the deceased of dire consequences, *thirdly*, the other four accused had come out and were hiding in the house of Ghanshyam, *fourthly*, the incident took place at the Khadanja, just in front of the house of Ghanshyam. So far as the first three circumstances are concerned they are not

proved in as much as it is not proved that Ghanshyam ever had an illegal arms factory or that any case in connection therewith was registered. In respect of hiding of the other accused-appellant in the house of Ghanshyam is concerned that does not appear convincing because as per PW-2 Smt. Guddi Devi and PW- 4 Devendra Singh shots were fired from the Khadanja and there appear improvement in the prosecution case to implicate Ghanshyam by attributing the role of exhortation when initially it was only of conspiracy.

66. In **Yogesh Singh v. Mahabeer Singh and Others, (2017) 11 SCC 195,** the Apex Court has observed as under: (SCC p. 208, para 15)

"15.It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubts. However, the burden on the prosecution is only to establish its case beyond all reasonable doubt and not all doubts. Here, it is worthwhile to reproduce the observations made by Venkatachaliah, J., in State of U.P. v. Krishna Gopal43: (SCC pp. 313-14 paras 25, 26)

"25. ...Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

26. The concept of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice." (See: Krishnan v. State, Valson v. State of Kerala, and Bhaskar Ramappa Madar v. State of Karnataka)

67. Thus, after considering the entire evidence, as regards the charge of conspiracy against Ghanshyam, we do not find any worthwhile evidence against Ghanshyam to convict him for the offence of criminal conspiracy to murder the deceased. The trial court has wrongly appreciated the evidence on the point of the criminal conspiracy without giving any cogent reasoning as to how and in what manner the appellant Ghanshyam hatched the criminal conspiracy along with the other 4 appellants to kill Ranveer Singh. We are therefore of the considered view that the prosecution has failed to prove the charge of offence punishable under section 302 read with section 120-B I.P.C. against the appellant Ghanshyam beyond all reasonable doubt. As the evidence on record is not sufficient to bring home the guilt of the appellant Ghanshyam, the appellant Ghanshyam is entitled to benefit of the doubt, consequently, the appellant Ghanshyam is entitled to be acquitted of

the charge under section 302 read with 120-B IPC.

68. In so far as the other appellants, namely, Keshav Singh, Bhuri Singh, Surendra Singh and Jagdish Singh are concerned their common intention to kill the deceased is indicated by their conduct, the manner of assault, the weapon used, the situs of the injuries and their nature and there was preconcert as shown by the evidence of PWs' 1, 2 and 4. Their common intention is fully established by the circumstances and events that unfolded in the prosecution story, duly corroborated by PW-1 Balveer Singh, PW- 2 Smt. Guddi Devi and PW- 4 Devendra Singh. All the incriminating circumstances showing concert and participation in the joint criminal action were duly put to them in their examination, under section 313 Cr.P.C., and the said appellants were fully aware of the gravamen of the charge against them. Thus, even though the charge under section 302 read with section 34 I.P.C. had not been specifically framed against the appellants Keshav Singh, Bhuri Singh, Surendra Singh and Jagdish Singh but since section 34 I.P.C. is only a rule of evidence and does not create a substantive offence, no prejudice has been caused to them.

CONCLUSION

69. In view of the above discussion, we are of the considered opinion that the trial court rightly found the evidence of the eye-witnesses PW- 1 Balveer Singh, PW- 2 Smt. Guddi Devi and PW-4 Devendra Singh, worthy of acceptance so as to hold that the prosecution successfully proved that on 19.7.2005 at 6.30 a.m., the appellants Keshav Singh @ Kesho, Bhuri Singh @ Bhura, Surendra Singh and Jagdish Singh fired gunshots at Ranveer Singh, from their firearms at the Khadanja, in front of the house of Ghanshyam, which resulted in his death on the spot. The finding of the trial court to that extant is based on proper appreciation of the evidence. Therefore, we affirm the conviction and sentence awarded to the appellants Keshav Singh @ Kesho, Bhuri Singh @ Bhura, Surendra Singh, and Jagdish Singh and hold them guilty for offence punishable under section 302 read with section 34 I.P.C. However, as already discussed above the appellant Ghanshyam is entitled to be acquitted and is hereby acquitted of the charge of criminal conspiracy to commit murder.

70. The appellants Ghanshyam, Surendra Singh, and Jagdish Singh are on bail, therefore, their personal bonds and sureties are hereby cancelled. The appellants Surendra Singh, and Jagdish Singh are hereby directed to surrender before the trial court forthwith, failing which the learned Sessions Judge concerned shall take prompt steps to put the appellants Surendra Singh, and Jagdish Singh back in jail to undergo the sentence awarded to them by the trial court as affirmed above. The appellant Ghanshyam need not surrender but shall fulfill the requirement of section 437-A Cr.P.C. to the satisfaction of the trial Court at the earliest.

71. The criminal appeal no. 7517 of 2008 is **partly allowed** to the extent it relates to the appellant Ghanshyam, and is dismissed to the extent it relates to appellants Surendra Singh and Jagdish Singh. Whereas criminal appeals nos. 8378 of 2008 and 7424 of 2008 are **dismissed**.

72. The trial court record be returned forthwith together with a certified copy of

this judgment for compliance. The office is directed to provide the copy of the judgment separately to all the appellants promptly. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

(2021)01ILR A1279
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.01.2021

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1330 of 2004
Connected with
Criminal Appeal No. 1324 of 2004

Shakir Ali ...Appellant
Versus
The State of U.P. ...Respondent

Counsel for the Appellant:
Rishad Murtaza, Nadeem Murtaza

Counsel for the Respondents:
G.A.

A. Criminal Law - Code of Criminal Procedure,1973 - Section 374(2) - Indian Penal Code,1860 - Section 307/34 - Challenge to- due to previous enmity, appellants fired arms to PW-1 to settle the case- a criminal case was pending against PW-1- 18 hrs. delay in FIR-PW-2 (father) statement is self-contradictory-P.W.-2 is not an eye-witness whereas the statement of P.W.-1 is self -contradictory and unreliable as he, even after receiving such injury, had fled away from the place of occurrence and neither lodged any report at any police station situated on the way to hospital through which he passed or received any medical treatment to any nearest hospital. Prosecution did not examine other witnesses who were present at the time of occurrence- FIR based on false and fabricated story-the prosecution has miserably failed to prove its case beyond reasonable doubt against the appellants. The appellants are entitled for acquittal.(Para 16 to 27)

B. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.(Para 24)

The appeal is allowed. (E-5)

List of Cases cited:-

Thulia Kali Vs St. of T. N., (1972) 3 SCC 393

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

1. Both the aforesaid appeals have been preferred against the judgment and order dated 25.05.2004, passed by Additional District and Sessions Judge,

F.T.C. Court No.4, Hardoi, in Sessions Trial No.499 of 2002, arising out of Case Crime No.92 of 2001, P.S.-Pachdevra, District-Hardoi, whereby the appellants-Nabi Sher and Nabi Hasan of Criminal Appeal No.1324 of 2004 and appellant-Shakir Ali of Criminal Appeal No.1330 of 2004 have been convicted and sentenced for five years rigorous imprisonment with fine of Rs.5000/- each for offence under Section 307 read with 34 I.P.C.

2. Since both the above said criminal appeals have been preferred against the aforesaid judgment and order, both appeals have been heard jointly and are being decided by common judgment.

3. The prosecution case, in brief, is that Shakir Ali (P.W.-1), son of Shakkar Ali (P.W.-2), was resident of Village-Chandpur, P.S.-Pachdevra, District-Hardoi. The appellants-Nabi Sher and Nabi Hasan son of Sitaram were also resident of same village, but before two years of the occurrence, they had migrated to Village-Angwa, P.S.-Sahabad, District-Hardoi. The appellant-Shakir Ali is brother-in-law (Jija) of appellant-Nabi Sher. There was a previous enmity between Nabi Sher and Shakir Ali (P.W.-1) as criminal case was lodged by the appellant-Nabi Sher for causing grievous hurt against Shakir Ali (P.W.-1).

4. On 19.09.2001, Shakil Ali (P.W.-1) was sitting in his village near the house of one Rajendra, situated towards southern side of village and Deshraj son of Ramdin Kushwaha, Bhaiya Lal son of Buddhi Lal Pal and Ganga Singh son of Taule Kushwaha were also present there. Meanwhile, at about 12:00 p.m. at noon, the appellants-Nabi Sher, Nabi Hasan and the appellant-Shakir Ali (hereinafter referred to as appellants) along with two unknown persons came there with illegal arms, with intention to cause death and due to previous enmity, they fired fire around at Shakir Ali (P.W.-1). Shakir Ali (P.W.-1), to save his life, fled away from the place of occurrence and reached Village-Nagla Hussain from where Ram Kumar Telli, resident of Village-Nagla Hussain and one Chhote Bhaiya Singh, resident of Village-Pakda, took him (P.W.-1) via Kath (town) to District Headquarter-Sahanjahapur and therefrom to Primary Health Centre Sahabad, where he (P.W.-1) was given first aid treatment and thereafter he was carried to District Hospital, Hardoi for medical treatment. On hearing the noise and receiving the information, Shakkar Ali (P.W.-2) who was present at his house, reached at the place of occurrence and was told by people, present on the spot, that his son, Shakir Ali (P.W.-1) received fire arm injuries, shot by the appellants and had fled away from the place of occurrence. Shakkar Ali (P.W.-2) rushed to police station-Pachdevra and lodged a first information report (Ext.Ka-1) (in short F.I.R.) at 6:45 a.m. On 20.09.2001. The investigation of the case was entrusted to S.I. Shivpal (P.W.-4).

5. Dr. J. L. Gautam, Emergency Medical Officer, Civil Hospital, Hardoi, examined the injuries of Shakir Ali (P.W.-1), who was brought by Ram Kumar resident of Village-Nagla Husain, P.S.-Pachdevra, on 19.09.2001 at 11:30 p.m.. According to him, the following injuries were found on the body of the injured :

"(1) Firearm wound of entry size 2.0 cm x1.0 cm x depth not proved present on abdomen 6.0 cm above umblicus at 12"0 clock margin inverted lacerated.

(2) Firearm wound of exit size 5.0 cm x 3.0 cm x communicating with injury no.1 present on left side of abdomen, 6.5 cm away from umblicus at 3'0 clock margins everted, lacerated illegible.

(3) Black scabed depressed abraded wound 0.3 cm in diameter x depth not proved present on left arm middle part.

(4) Multiple Black scabed depressed abraded wounds size 0.3 cm in diameter x depth not probed to 2.00 cm x 0.3 cm x muscle deep gutter wound present on right leg from knee to ankle joint dried blood clots present. Soft scab over wound tissues present."

6. According to this witness (P.W.-3) the case was referred from Primary Health Centre, Sahabad and the aforesaid injuries were kept under observation as it would have been caused by fire arms like Tamancha and was half day old. According to him further, injuries nos.1 and 2 were from back to left side whereas rest injuries were from front to back side. He (P.W.-3) further stated that all injuries of P.W.-1 were noted by him in injury report (Ext.-Ka-2) and the said injury might be caused at 12"o clock on 19.09.2001.

7. S.I. Shivpal Singh (P.W.-4), during investigation, inspected the place of occurrence, prepared the site plan (Ext.-ka-5), recorded the statement of witnesses and after completion of investigation, filed charge sheet against the appellants, before the concerned Magistrate, who took the cognizance and since the offence was exclusively triable by the Court of Sessions, after providing the copy of relevant police papers as required under Section 207 of the Code, committed the case to the Court of Sessions, Hardoi for trial.

8. The learned trial Court, after hearing the counsel for both the parties, framed charges for the offence under Section 307 read with Section 34 I.P.C. against the appellants from which they denied and claimed for trial.

9. The prosecution, in order to prove its case, examined Shakir Ali (P.W.-1), Shakkar Ali (P.W.-2), Dr. Z. L. Gautam Devi (P.W.-3) and S.I. Shivpal Singh (P.W.-4). So far as documentary evidence is concerned, first information report (Ext.-Ka-1) was proved by Shakir Ali (P.W.-1), injury report (Ext.-Ka-2) was proved by Dr. Z. L. Gautam (P.W.-3), Chik-F.I.R. (Ext.-ka-3), G. D. Report (Ext.-Ka-4), site plan (Ext.-Ka5) and charge sheet (Ext.-Ka-6) were proved by S.I. Shivpal Singh (P.W.-4).

10. 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.

11. 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.

12. Heard Sri Nadeem Murtaza, learned counsel for the appellant and Sri Dhananjay Kumar Singh, learned A.G.A. for the State.

13. Learned counsel for the appellants has submitted that the appellants are innocent and have been falsely implicated due to previous enmity of criminal proceeding, lodged against Shakir Ali (P.W.-1) by the appellants, in order to create undue pressure to settle it. Learned counsel further submitted that independent witnesses, present on the spot including Ram Kumar who accompanied the injured from the place of occurrence to District Hospital, Hardoi were also not examined by the prosecution. Learned counsel further submitted that an F.I.R. was lodged by delay of 18 hrs. whereas concerned police

station is situated only six kms. away from the place of occurrence and the prosecution has not placed any explanation in this regard. Learned counsel further submitted that Shakkar Ali (P.W.-2) is not an eye-witness whereas the statement of Shakir Ali (P.W.-1) is self contradictory and unreliable as he, even after receiving such injury, had fled away from the place of occurrence and neither lodged any report at any police station situated on the way to hospital through which he passed or received any medical treatment to any nearest hospital. Learned counsel further submitted that the statements of P.W.-1 and P.W.-2 are self contradictory. Learned counsel further submitted that the trial Court, without considering the material on record, passed the impugned judgment in cursory manner, which is liable to be set aside. Learned counsel has placed reliance on the law laid down by Supreme Court in ***Thulia Kali vs. State of Tamil Nadu, 1972) 3 SCC 393.***

14. Per contra, learned A.G.A. vehemently opposed and submitted that the prosecution case is wholly reliable. Learned A.G.A. further submitted that Shakkar Ali (P.W.-2), father of Shakir Ali (P.W.-1), got information regarding the said occurrence, lodged the first information report without any delay. Learned A.G.A. further submitted that Shakkar Ali (P.W.-2) is illiterate person and due to geographical condition of the said police station, the F.I.R. was lodged at 6"o clock on next day. Learned A.G.A. further submitted that Shakir Ali (P.W.-1) is injured witness and his evidence cannot be brushed aside for want of independent witness. Learned A.G.A. further submitted that every effort was made to save the life of Shakir Ali (P.W.-1) as the appellants were chasing him, hence, failure to take any medical treatment at District Headquarter, Sahajahapur will not affect the credibility of prosecution story. 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 made by both the parties and perused the record.

16. Shakir Ali (P.W.-1), sole star witness, supporting the prosecution story, has stated that before two years of the said occurrence, an occurrence was happened between the appellants-Nabi Sher and Nabi Hasan with him and criminal case was lodged against him (P.W.-1) by the appellant-Nabi Sher, which was pending at the time of occurrence. He further stated that at the time of occurrence, at about 12:00 p.m. (noon), he was present, nearby trolly, situated in front of Rajendra's house ; Ganga Singh and Deshraj were sitting in the trolly and Bhaiya Lal was sitting at floor. He further stated that meanwhile all the appellants along with two unknown persons, carrying firearms, appeared there and exhorted to kill him (P.W.-1) whereupon all the appellants and two unknown persons fired at him. He further stated that fire made by the appellant-Nabi Sher hit his stomach whereas fire made by the appellants-Nabi Hasan and Shakir Ali hit his leg and hands. He further stated that he did not know whether fire made by unknown persons caused any injury to him (P.W.-1) or not. He further stated that he rushed to the house of Rajendra and thereafter via house of one Prithvi Pal, he reached at his house. He further stated that the appellants chased him upto crossing, situated in front of Govardhan's house. He further stated that thereafter he reached at

the house of one Ram Kumar Telli, resident of Nagla Husain and lay there wherefrom Ram Kumar and Bade Bhaiya, resident of Village-Pakda and Brij Lal carried him to a Kuriyan Kala via Ram Kheda and thereafter they reached at Kath. He further stated that he was carried to district-Sahajahapur by jeep and thereafter to Primary Health Centre, Sahabad where first aid was given to him. He further stated that he was referred to District Hospital, Hardoi where his injuries were examined and x-ray was also conducted. He further stated when his father (P.W.-2) reached at hospital, he came to know that first information report was lodged.

17. Shakkar Ali (P.W.-2), father of Shakir Ali (P.W.-1), narrating the prosecution story as stated by P.W.-1, has stated that at the time of occurrence, he was picking up "urad fali" at the door of his house. He further stated that Bhaiya Lal, Deshraj and Ganga Singh were present at the place of occurrence and had seen the occurrence. Stating that his son (P.W.-1) had fled away to his house, he also reached at his house. He further stated that he had lodged the first information report (Ext.-Ka-1).

18. The prosecution did not examine Ganga Singh, Deshraj and Bhaiya Lal, who were present at the time of occurrence with Shakir Ali (P.W.-1). It has not examined Rajendra in front of whose house, the occurrence was taken place and after the occurrence, P.W.-1 entered into his house to save his life. It has also not examined Ram Kumar, Bade Bhaiya and Brij Lal, who carried P.W.-1 to district hospital, Hardoi via Kuriyan Kala, Kath, Sahajahapur and Sahabad. The prosecution has also not examined the radiologist who conducted x-ray examination of Shakir Ali (P.W.-1). It has also not examined the Constable, who prepared Chik-F.I.R. (Ext.-Ka-3) and entered the information (Ext.-Ka-1) in G. D. Report (Ext.-Ka-6). The prosecution has not placed any explanation as to why the aforesaid important witnesses were withheld and only one witness of fact i.e. injured-Shakir Ali was produced. The record further shows that the cross-examination of Dr. Z. L. Gautam (P.W.-3) was closed by the trial Court without affording any opportunity to cross-examine him. From perusal of the record, it further transpires that the appellants' counsel, before trial Court, had filed an application to recall P.W.-3 for cross-examination on the ground that the cross-examination of P.W.-3 could not be conducted as advocates were abstaining from work due to condolence but the trial Court dismissed the said application on the ground that P.W.-3 was only formal witness.

19. Now the question arises whether the prosecution evidence, based on testimony of P.W.-1 and P.W.-2, is reliable or not.

20. P.W.-1 is injured witness. His first medical aid, according to him, was provided at Primary Health Centre, Sahabad but the prosecution has not placed any documentary evidence as to whether or not any treatment was given to P.W.-1 at Primary Health Centre, Sahabad. According to Dr. Z. L. Gautam (P.W.-3) he had examined P.W.-1 at 11:35 p.m. i.e. after twelve hours of the occurrence. P.W.-1 has stated that fire arm injury was caused at his stomach, leg and hands and after the occurrence, he fled away from the place of occurrence and entered into one Rajendra's house, reached at his own house via Prithvi Pal's house and also reached to Village-Nagla Hussain at Ram Kumar's house

where he lay down. According to him, he reached at District Hospital-Hardoi via Ram Kheda, Kuriyan Kala, Kath, Sahajahapur and Sahabad. In cross-examination, he admitted that during his journey, he neither gave any information nor took any treatment at any place. He further admitted that he was lying at the door of Raj Kumar's house for two hours. He further stated that Hardoi, Sahajahapur road is stituated 35-36 kms. away from his Village-Chandpur and Kath where police station is also situated, is situated 4-5 "kosh' (8-10 miles). He further stated that he reached at Sahabad at 6:30-7:00 p.m. ; Sahabad police station is situated at main road ; he had narrated the incident to police of police station Sahabad but had not given any written report. He further stated that he did not know whether or not his report was lodged at P.S.-Sahabad.

21. In addition to above, the conduct and statement of this witness are also doubtful because according to him even after receiving serious injuries in his leg and stomach, he ran from the place of occurrence and entered into the house of one person, thereafter gone to his house and therefrom reached another village and lay down there. Thus, according to him, after the occurrence, he had gone also to his own house but his father Shakkar Ali (P.W.-2) had stated that information of the occurrence was received by him from unknown person. In view of the said contradiction, the statement and conduct of P.W.-1 become doubtful.

22. The first information report was lodged by Shakkar Ali (P.W.-2) , father of Shakir Ali (P.W.-1). Admittedly, he is not eye-witness. In cross-examination, he has stated that he could not reach at the place of occurrence and when he was on the way to place of occurrence, the people told that his son had escaped from the place of occurrence. Stating that he could not see the place of occurrence, he further stated that he could not tell the name of persons who narrated to him the occurrence. He further stated that he could not meet the boy who had informed him regarding the occurrence. Stating that he had given the information at concerned police station at 1:00 a.m. (night), he further stated that the said occurrence took place in the evening.

23. The first information report, although is neither substantive piece of evidence nor encyclopedia of the occurrence, is important step of the prosecution to initiate the criminal machinery in order to collect the evidence. Although, there is no prescribed proforma for lodging the F.I.R. and also no time limit is provided to lodge the same but if it is lodged by the inordinate delay without any explanation, it creates doubt in the prosecution story.

24. In ***Thulia Kali vs. State of Tamil Nadu, 1972) 3 SCC 393*** where the first information report was lodged by delay of twenty two hours, Supreme Court has held as under :

"First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them

as well as the names of eyewitnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained."

25. Coming to the facts of this case, according to P.W.-2, he had received the information of the occurrence just at the time of occurrence. Admittedly, the first information report was lodged on 20.09.2001 at 6: 45 a.m. whereas occurrence was taken place at 12:00 p.m. on 19.09.2001. Thus, the F.I.R. was lodged by delay of 18 hours. In Ext.-Ka-3, the distance of place of occurrence from concerned police station is only six kms. P.W.-2, in his cross-examination, has not placed any plausible explanation as to why he had not lodged the first information report at any reasonable time just after the occurrence on 19.09.2001. His admission, in cross-examination, that the said occurrence took place in evening, further creates doubt in the prosecution story. Although, he has stated in cross-examination that he had given information at 1:00 a.m. in the night but this fact is not supported by any documentary evidence and even he had not explained as to why he had lodged first information report at 1:00 a.m. in the night i.e. by delay of 13 hrs.

26. Thus, in the light of above discussion, it is clear that there was enmity between P.W.-1 and the appellants due to enmity of criminal case, lodged against P.W.-1 by the appellants-Nabi Sher and Nabi Hasan. The prosecution has also failed to produce the independent witnesses, present at the spot, including the witness who carried the P.W.-1 to hospital and remained present with him for more than twelve hours since his departure from the place of occurrence till his arrival at District Hospital, Harodi. The conduct and evidence of P.W.-1 and P.W.-2, who were inimical to the appellants, are not trustworthy. Their statement regarding the time of occurrence as admitted by P.W.-2 that it was happened in the evening, is also contradictory with the statement of P.W.-1. Non filing of first information report at any police station i.e. Kath or Sahabad and failure to take medical aid for nearly 12 hrs by P.W.-1, further creates doubt in the prosecution story. In addition to above filing of first information report by delay of more than 18 hrs. without any reasonable explanation also has made the prosecution case doubtful. Learned trial Court, without considering the aforesaid fact of the prosecution story, passed the impugned judgment and order in cursory manner.

27. Thus, the prosecution has miserably failed to prove its case beyond reasonable doubt against the appellants. The appellants-Shakir Ali, Nabi Sher and Nabi Hasan are entitled for acquittal and both the appeals are liable to be allowed.

28. In view of the above, the impugned judgment and order passed by trial Court is set aside. Both the Criminal Appeal No.1330 of 2004 (Shakir Ali vs. State of U.P.) and Criminal Appeal No.1324 of 2004 (Nabi Sher and another vs. State of U.P.) are ***allowed.*** All the

appellants-Shakir Ali, Nabi Sher and Nabi Hasan are acquitted. They are on bail. Their bail bonds are cancelled and sureties are discharged.

29. Keeping in view the provision of Section 437-A of the Code, appellants-Shakir Ali, Nabi Sher and Nabi Hasan are 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, they, on receipt of notice thereof, shall appear before Hon'ble Supreme Court.

30. A copy of this judgment along with lower court record be sent to trial Court by FAX for immediate compliance.

(2021)01ILR A1286
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2020

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ-B No. 6567 of 2006

Ram Niwas ...Petitioner
Versus
D.D.C. Mahamaya Nagar & Anr. ...Respondents

Counsel for the Petitioner:
Sri Yogesh Chandra Yadav, Sri Ram Snehi Yadav, Rekha Singh, Sri Vijendra Singh

Counsel for the Respondents:
C.S.C., Sri Aditya Narayan, Sri Anil Kumar Aditya, Sri R.C. Tiwari

A. Civil Law – - U.P. Consolidation of Holdings Act, 1953 - Re-opening of proceedings of chak allotment - It was not open for a subsequent transferee to re-open proceedings of chak allotment which had attained finality against his predecessor in interest, the revision itself was not maintainable and for the same reason the impugned revisional order, which allows the revision cannot be sustained and must necessarily be set aside. (Para 6)

Writ Petition allowed. (E-3)

Present petition assails the order dated 27.12.2005, passed by Deputy Director of Consolidation.

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

1. Heard learned counsel for the parties and learned Standing Counsel.

2. The instant writ petition has been filed by the petitioner arises out of the proceedings for allotment of chaks and seeks a writ of certiorari for quashing the order dated 27.12.2005 passed by the Deputy Director of Consolidation on a revision filed by the respondents.

3. The contention of learned counsel for the petitioner is that the revision filed by the contesting respondents was not maintainable. It has been submitted that the order of the Settlement Consolidation Officer challenged before the revisional court was dated 05.09.2004. The revision itself has been filed after the contesting respondents obtained a sale deed of the entire chak of Shri Suresh Chandra on 08.11.2005. It is also contended that the order dated 05.09.2004 had attained finality against Suresh Chandra and, therefore, the contesting respondents, who was a transferee from Suresh Chandra, after the chak allotment in favour of Suresh Chand

attained finality, was clearly not maintainable.

4. The contesting respondent had purchased the entire chak of Suresh Chandra with open eyes and after the allotment of chaks in his favour has become final and, therefore, the transferee did not get any right to challenge the allotment made in favour of Suresh Chandra.

5. Learned counsel for the respondents has tried to support the impugned order but has not been able to show as to how his revision was maintainable, he being a subsequent transferee after the allotment made in favour of his predecessor in interest had attained finality.

6. In view of the above foregoing discussions and since in my considered opinion, it was not open for a subsequent transferee to re-open proceedings of chak allotment which had attained finality against his predecessor in interest, the revision itself was not maintainable and for the same reason the impugned revisional order, which allows the revision cannot be sustained and must necessarily be set aside.

7. Accordingly, I allow this writ petition and set aside the order dated 20.07.2005 passed by the Deputy Director of Consolidation.

8. No costs.
